ABC Wypadki
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Antitrust, Bankruptcy & Consumer Law
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General Principles

Economics Review – supply and demand curve (supply slopes up and demand slopes down)

- *income effect* = more people can afford something when the price is low
- 'price ceiling = *when gov says you cannot charge more than X for something*
- *price floor* = putting a min limit on the price of something (min wage in labor market)
- **2 basic assumptions:** (1) individuals make decisions based on self interest; (2) the aggregate of these maximize wealth in society

An Intro to Micro-Economics

Goods & Services Market

People or households – pay for the goods & services

Firms/Corporations – supply goods & services

Labor Market

People or households – give the labor/sweat/toil to the firms

Firm – pay the households w/ wages

Capital Market

Households – have $ that they invest in the firms

Firms – send back interest payments, dividends, etc.

Value in exchange

Value in use

Price of the good in a competitive market & the supply of the good in a competitive market –

What can cause supply to change?

Weather

New market entrants

Rational market theory

Assumes everyone behaves rationally

Price floors & price ceilings – imposed by gov't

- Price ceiling
  - Ex: rent control
  - Creates a shortage
- Price floor
  - Creates a surplus
  - Ex: lowest you can charge for a bushel of grain is X
  - Ex: minimum wage

Elasticity – how responsive something is to a change in something else

Numbers

- Percentage change – change in the slope of supply/price
- Elastic – the slope of supply/demand changes a lot
- Inelastic – the slope of supply/demand does not change a lot
  - When demand is relatively inelastic, cost increases can be passed on to consumers; when demand is elastic, cannot usually be passed on to consumers

Welfare Economics

- "welfare" – the overall wealth of society
  - welfare = value – cost of production
  - idea of welfare economics is to maximize surplus
- Consumer surplus = value – price
- Two ways society can get welfare
  - Consumer gains
  - Producer gains

Antitrust Overview

Intro. – Antitrust is a body of law to prevent businesses them from hurting free market

- the study of competition
- seeks to ensure competitive markets through the interaction of sellers & buyers in the dynamic process of exchange (ex – an agreement not to compete would mean each producer would be less concerned about responding to consumer's needs)

Horizontal Restraints

Contents

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Horizontal Restraints, Collaborating Competitors - Sherman Act 1

Sherman Act 1 - 15 USC Section 1

- 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
- Interpretation
  - Only unreasonable restraints outlawed
    - Per se illegality
      - Unreasonable as a matter of law
      - No justifications or defenses entertained
      - Examples: (1) Agreement between competitors to maintain fix minimum prices; (2) Agreement to divide up market into exclusive territories; (3) Agreement between competitors to fix output levels
    - Current trend is away from per se illegality
      - Example: Vertical price restraints no longer per-se illegal. Reversed 96 year precedent.
    - "Quick look" rule of reason analysis
      - Case-by-case, but detailed analysis not necessary, for inherently suspect restraints

                - Designed for restraints that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry. It allows the condemnation of a naked restraint on price or output without an elaborate industry analysis.
                - An observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets
                - Exchange of price information between competitors
        - Rule-of-reason analysis
            - Case-by-case interpretation
            - Look at pro-competitive justifications
            - Examples: (1) Joint-ventures between competitors; (2) Vertical price maintenance; (3) Exclusive distribution arrangements

Horizontal Restraints

- Refers to competitors at the same level (distinguish from vertical restraints, which refers to different parties involved in the supply chain for a product or industry)
- **Price fixing**
    - Competitors agree on the price for a certain product
    - In order for price fixing to succeed, output must be decreased - have to decrease the supply to increase the demand so people will pay whatever price is set for the product
- **Cartel**
    - Two or more firms (or any sellers of a product) that get together and have some kind of horizontal restraint between them
    - Markets that are ripe for cartelization
        - High barriers to entry - i.e., hard to get into that specific market. This makes it less likely for people to come into the market & disrupt the cartel
            - Example: getting into the nuclear fission reactor business
        - High market concentration of sellers/participants - there are relatively few players in the market - something that can be dominated by just a few players
        - High dispersion of customers
        - Commodification/product homogeneity - all of the product looks the same
        - Openness of the market - not openness among competitors, but openness of the market transactions
            - If it is open, it is harder to "cheat on the cartel" - members of the cartel can check up on each other & can make sure the rules of the cartel are being followed
        - Unnegotiated transactions
    - Participants ripe for cartelization
        - Uniformity of participant size
        - Together, the participants hold a large percentage of the market
        - Similarity in their costs
    - Business barriers to cartelization
        - Large customers with bargaining power
        - Idiosyncrasy of sales transactions
        - Many participants in the market of small sizes
        - The hidden nature of transactions in the market

        - Transactions with customers tend to be negotiated
- **Horizontal Restraints Other than Price Fixing**
    - Customer division
    - Territorial division
    - Output reduction
    - Market share fixing
        - I.e., "I agree that I will be happy with my 20% share of the market and you agree to be happy with your 20% share of the market" - they have to not compete to keep their percentages, which will keep prices high

Developments and Modern Applications

Chicago Board of Trade v. U.S.

- Dealing with the grain markets in Chicago
    - Standard forms of trading: (1) Spot sales -sales of grain already in Chicago railroads or elevators for immediate delivery by order on carrier; (2) Future sales - agreements for delivery later in the current or some future month; (3) Sales "to arrive"- agreements to deliver, on arrival, grain which is already in transit to Chicago or is to be shipped there within a time specified
    - The "Call" rule: bids for wheat, corn, etc. had to be fixed at the day's closing bid on the Call bid until the opening of the next session.
        - Government called the "Call" rule a naked restraint & sought to enjoin enforcement of the rule
        - U.S. Supreme Court reversed because the court did not consider anything included in the test of legality
            - Test of legality
                - Whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition
                - To determine the question, the court must consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, and the nature of the restraint and its effect, actual or probable

Palmer v. BRG of Georgia

- HBJ began offering a Georgia bar review course in direct competition with BRG, the only main provider of bar review courses in Georgia. In 1980, HBJ gave BRG an exclusive license to market HBJ's material in Georgia, and they agreed that HBJ would not compete with BRG in Georgia and that BRG would not compete with HBJ outside of Georgia. This agreement gave HBJ a share of BRG's revenues. Immediately after the agreement, the price of BRG's course rose from $150 to over $400.
- The Court held the arrangement was a per se illegal allocation of markets.
    - Example of dividing territory; monopoly rents

BMI v. CBS

- ASCAP & BMI - publisher of music signs up with one of these companies & ASCAP or BMI issue a blanket license to a radio station, restaurant, etc. for use for use of the music. Radio stations & restaurants then fill out a queue sheet to show that they placed & ASCAP & BMI look at the sheets and distributed the money from the blanket license to the artists according to those sheets
- CBS's complaint: didn't like paying a flat fee regardless of the amount of music it uses. It has a lot of programs that don't use the music & being forced to pay for a blanket license makes them overpay; CBS wants to negotiate music use on a show-by-show basis.
- Holding: Not an antitrust violation
    - The blanket license, as we see it, is not a naked restraint of trade with no purpose except stifling of competition, but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use.
        - Note: the blanket licenses are not exclusive

California Dental Association v. FTC

- CDA had prohibited the advertising of comfort, discounts, and reasonableness of fees. the CDA stated that false advertising was such a problem that it just banned that advertising outright.
- PH: FTC found the CDA's restrictions on advertising illegal per se. COA affirmed and used quick look analysis.
- Holding: SC remanded for further analysis.
    - SC: all the restriction on trade does is affect the demand, not the supply, it's restricting information, not the dental services
        - What the Court is missing: a free market needs the free flow of information in order to function properly - a supply a consumer does not know about is not really a supply at all
- Dissent: would break down the analysis for determining whether restraints are anticompetitive overall into 4 questions
    - (1) What is the specific restraint at issue?
    - (2) What are it's likely anticompetitive effects?
    - (3) Are there offsetting pro-competitive justifications?
    - (4) Do the parties have sufficient market power to make a difference?

Existence of Agreements

Copperweld v. Independence Tube Corp.

- Issue: Whether a parent and its wholly owned subsidiary are capable of conspiring in violation of Section 1 of the Sherman Act.
- Intra-enterprise conspiracy - Section 1 of the Sherman Act liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership.
    - *U.S. v. Yellow Cab Co.*
        - Court observed that an unreasonable restraint may result as readily among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent.
    - *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*
        - Court held that two wholly owned subsidiaries of a liquor distiller were guilty under Section 1 of the Sherman Act for jointly refusing to supply a wholesaler

who declined to abide by a maximum resale pricing scheme. Court noted its past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws and this rule was especially applicable when defendants hold themselves out as competitors.

- Section 1 of the Sherman Act
    - Reaches unreasonable restraints of trade effected by a contract, combination, or conspiracy between separate entities . It does not reach conduct that is wholly unilateral.
        - Contract, combination, or conspiracy - nothing in the literal meaning of these terms excludes coordinated conduct among officers or employees of the same company.
- Holding: Copperweld and its wholly owned subsidiary are incapable of conspiring with each other for purposes for Section of the Sherman Act
    - Section 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions.
    - The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of Section 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. If a parent and a wholly owned subsidiary do agree to a course of action, there is no sudden joining of economic resources that had perviously served different interests, and there is no justification for Section 1 scrutiny.

Concerted Refusals to Deal

Fashion Originators Guild of America v. FTC

- Case deals with "style piracy" - manufacturers design clothing - after the designs enter the channels of trade, other manufacturers make and sell copies of the designs and sell these copies at lower prices.
- The Guild is a group of designers & manufacturers of women's clothing. Upset about style piracy, so the Guild essentially created a private IP right - convinced many retailers to sign agreements that the stores would not purchase clothing from "style pirates." Guild members threatened not to sell to retailers if the retailers did not cooperate.
- FTC - the Guild restrained competition, conspired to prevent sales in interstate commerce, and tended to created in themselves a monopoly. The Guild violated the Clayton Act and the Sherman Act.
- Holding: affirmed the FTC's determination. The purpose and object of the Guild's plan, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts.
    - Violation of the Clayton Act
        - Paragraph 3 of the Clayton Act - It shall be unlawful for any person engaged in commerce . . . to . . . make a sale or contract for sale of goods . . . on the condition, agreement or understanding that the . . purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the seller, where the effect of such . . . sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.
            - The Guild's plan clearly conflicts with this language
    - Violation of the Sherman Act

- The Guild's plan narrowed the outlets to which garment and textile manufacturers could sell and the sources from which the retailers could buy
- The plan subjected all retailers and manufacturers who declined to comply with the Guild's program to an organized boycott
- The plan took away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs
- The plan had both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs
- Additionally, this combination in reality is an extra-governmental agency which prescribed rules for the regulation and restraint of interstate commerce and provided extra-judicial tribunals for determination and punishment of violations

Monopoly

- Monopolization entails something more than monopoly. Monopolization requires exclusionary conduct.

Sherman Act 2

- Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Monopolization

Mode of Analysis

- Monopolization claims proceed under a rule-of-reason sort of analysis, but courts tend not to use the label "rule of reason" for section 2 claims like they do for section 1 claims

Monopolization requires:

- (1) Monopoly power
    - See Monopoly Power Section.
- (2) Exclusionary conduct
    - Intent requirement: very weak. Some intent is required, but it can be inferred from actions. A purposeful act is required, but there is no need to show a specific intent to monopolize. The defendant may be "Moral wrong" is not required (United Show). But malicious intent can be evidence of the exclusionary nature of the conduct (Microsoft)
    - What counts as exclusionary conduct?
        - From Grinnell: 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.
        - Getting
        - Growing, or
        - Keeping the monopoly
        - Must look to economic realities of the situation
        - Must be injury to competition. Injury to competitors is not enough.
        - Note: charging monopoly prices is not exclusionary conduct, in fact, it is often the opposite.
        - Examples of exclusionary conduct:
            - Refusals to deal with competitors (Aspen Skiing)
            - Coercing competitor's suppliers/partners (Standard Oil, Microsoft)
            - Denial of access to an essential facility (Otter Tail)
            - Predatory pricing (Standard Oil)
            - Acquisitions of competitors (Standard Oil)

            - Acquisition and retirement of assets (American Tobacco, United Shoe)
            - Preventing formation of second-hand market (United Shoe)
            - Tying arrangements (United Shoe, Microsoft)
            - Setting and controlling standards (Microsoft)
            - Raising competitor's costs
    - Fallacious arguments asserted by defendants: (1) Illusory choice; (2) Evils of competition
    - Injunctive remedies
        - Courts have broad powers
            - Can refashion contracts and eliminate restrictions (United Shoe)
            - Can order break-up of the company (AT&T, American Tobacco, Standard Oil)
            - Can order defendant to deal (Otter Tail, Aspen Skiing)
            - And more . . .

Attempt and Conspiracy to Monopolize

- See Sherman Act 2
- Attempt to monopolize requires:
    - (1) that the defendant has engaged in predatory or anticompetitive conduct with
    - (2) a specific intent to monopolize *and*
    - (3) a dangerous probability of achieving monopoly power
- Conspiracy to monopolize requires:
    - (1) the existence of a combination or conspiracy to monopolize;
    - (2) an overt act in furtherance of the conspiracy;
    - (3) the specific intent to monopolize; *and*
    - (4) causal antitrust injury
    - Conspiracy to monopolize does not require a dangerous probability of success
- Specific intent
    - Specific intent to monopolize must be shown
    - Needed for both conspiracy and attempt liability
    - Compare the offense of monopolization, for which non-specfici intent need be shown
- Monopoly Power not required
    - Monopoly power is not required for either attempt or conspiracy liability
    - But, for attempt liability, there must be a dangerous probability of success
    - For conspiracy, no probability of success need be shown

Standard Oil

- Holding: the oil company was found to be an illegal monopoly.
    - Oil company achieved dominance of domestic oil production and distribution through numerous mergers, some of which were coerced, and oppressive tactics against competitors, including the coercion of competitors' suppliers and customers.
- Relief granted: Standard Oil was split into 33 geographically dispersed companies

American Tobacco

- Holding: court found the existence of a monopoly

- Classic predatory conduct - the company purchased plants not to use them, but to shut them down and render them useless for purposes of trade.
  - Note: this type of conduct is only going to be effective if the company has a dominant hold of that industry - demonstrates a monopoly

United Shoe

- United supplied 75% and probably closer to 85% of the current demand for shoe machinery. United had 3,915 patents - high # blocks potential competition. United was the only manufacturer that produced all the types of machines that were necessary to make shoes. United would never sell its machinery - it would only lease it.
  - Lease Requirements
    - 10 year lease term
    - Full capacity rule - lessee must use the machine at full capacity if the lessee had the work
    - Return charge was reduced if the lessee held on to the machine
    - More favorable terms on replacement machine
    - Free repairs
      - Why is this anticompetitive?
        - Discouraging the formation of a market of shoe machine repair services; chances are, if a manufacturer bought a non-United machine, no one else would know how to fix it
      - There was nothing in the United contracts that said a non-United workers could not work on the machine
        - This was an illusory choice - the manufacturer is going to choose the free repair rather than pay someone to fix the machine
  - 3 approaches to determine if business has violated Section 2 of the Sherman Act
    - (1) Section 2 Violation if: (a) Monopoly power; (b) Section 1 violation to retain that power
    - (2) Section 2 Violation if: (a) Power to exclude competition and (b) Either (i) exercised that power; or (ii) had a purpose to exercise it
    - (3) Section 2 Violation if: (a) Monopoly power; (b) Do business
- Holding: Facts show that United had & exercised such overwhelming strength in the show machinery market that it controlled the market; this strength excluded some potential and limited some actual competition; and the strength was not attributable solely to United's ability, economies of scale, research, natural advantages, and adaption to inevitable economic laws.
  - United created unnatural barriers to competition - i.e., its lease-only system, and the full capacity clause, unnecessarily restricted a free market
  - United intended to engage in the leasing practices and pricing policies which maintained its market power. That is all the intent which the law requires when both the complaint and the judgment rest on a charge of monopolizing, not merely attempting to monopolize.
- Remedy: reforming contracts - court allowed the manufacturers who had leases with United to get out of them and required United to offer to sell the machines.
  - Note the broad power the court has in determining a remedy

U.S. v. Microsoft

- Two elements of the offense of monopolization
    - (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.
- Two ways to demonstrate monopoly power
    - (1) that a firm has in fact profitably raised price substantially above competitive levels; or
    - (2) possession of a dominant share of a relevant market that is protected by entry barriers.
- Test to determine if a particular act of a monopolist is exclusionary
    - (1) First, to be condemned as exclusionary, a monopolist's act must have an anticompetitive effect. That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one's competitors will not suffice.
    - (2) Second, the plaintiff must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect
    - (3) Third, if a plaintiff successfully establishes a prima facie case under Section 2 by demonstrating anticompetitive effect, then the monopolist may proffer a procompetitive justification - a nonpretextual claim that its conduct is indeed a form of competition on the merts. Then the burden shifts back to the plaintiff to rebut that claim.
    - (4) Fourth, if the monopolist's procompetitive justification stands unrebutted, the the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.
    - (5) Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of Section 2, the court will focus upon the effect of that conduct, not upon the intent behind it.

Otter Tail Power Co.

- Otter Tail had refused to sell wholesale power to proposed municipal systems or to allow power produced by others to flow through its transmission system to reach such municipal systems. Otter Tail controlled the only transmission lines that would reach the municipalities.
- DC: Otter Tail had attempted to prevent communities in which its retail electric power distribution franchise had expired from replacing its franchise with a municipal distribution system.
- Holding: SC held this violated Sherman Act Section 2

Berkey Photo

- Kodak(D) developed new camera and film that only they could develop
    - First found for P, court of Appeals reversed
- Court found it to be an ordinary and acceptable business practice to keep one’s new developments a secret, so it was erroneous to instruct the jury that D had any duty to predisclose information regarding its new system

Aspen Skiing

- Issue: Whether the jury's finding that Aspen Skiing had monopolized the market for downhill skiing services in Aspen was erroneous because it rests on the assumption that a firm with monopoly power has a duty to cooperate with its smaller rivals in a marketing arrangement in order to avoid violating Section 2 of the Sherman Act.
- Aspen operated facilities on 3 mountains, Highlands had the 4th. Over the years, various arrangements existed wherein week-long passes usable at any of the 4 mountains were sold at a discount to the daily ticket price. Highlands share of the revenues varied between 18.5% - 13.2% over 4 years. For the 1977-78 season, Aspen offered to continue the "all-Aspen" tickets only if Highlands would accept a 13.2% fixed share of the revenues. Highlands eventually accepted a fixed percentage of 15% for the 77-78 season. The next season, Aspen offered Highlands 12.5%, which Highlands refused.
- Aspen also refused to sell Highlands any lift tickets and discontinued the 3-day, 3-area pass. Additionally, Aspen refused to accept Highlands vouchers that equalled the price of a daily lift ticket at Aspen. Highlands share of the downhill skiing services market declined steadily from that point.
- Jury returned a verdict finding Aspen had monopoly power and willfully acquired, maintained, or used that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes. the COA affirmed, holding the multi-day, multi-area ticket could be characterized as an essential facility that Aspen had a duty to market jointly with Highlands, and sufficient evidence existed to support a finding that Aspen's intent in refusing to market the 4-area ticket was to create or maintain a monopoly.
- Holding: affirmed the COA.
  - Evidence supported the inference that Aspen was not motivated by efficiency concerns & it was willing to sacrifice short-run benefits and consumer good will in exchange for a perceived long-run impact on its smaller rival.

AT&T

Monopoly Power

Narrative

- Three key battle points in determining whether monopoly power exists
  - Defendant wants to define the market as larger, plaintiff always wants the market to seem smaller
  - Defendant wants to show its share is smaller
  - Defendant wants to show a lack of barriers to entry
- Economist view: the power to elevate prices above (and to restrict output below) competitive level.
  - Sherman Act §2:
    - Defines monopoly power as the power to control price or to exclude competition.
    - Only Substantial market power will be deemed monopoly power.
      - 50% more than the competitive price is a show of market power.

- Ways of measuring market power:
  - Unexploited power-
    - Market power that has not been exercised fully
    - Unexercised power today may be exploited tomorrow.
  - Prospective power-
    - Anticipatory market power
      - i.e. potential merger or joint venture in the future.
  - Power to inferred from conduct-
    - Conduct itself might illuminate the existence or prospect of market power.
      - i.e. think the refusal to sell machines in United Shoes.
- Determinants of market power:
  - Buyer responsiveness determines seller's power
  - Suppliers of the very same product in the same vicinity (current direct competitors)
  - Suppliers of substitute products
  - Market power and its determinates are all matters of degrees:
    - Locational advantage
    - Brand power
- Market definition, the relevant market, and market share
  - The market definition concept –
    - The process to exclude non-relevant suppliers in the market. Includes only suppliers of the same or related product in the same or related geographic area
  - Market share and market power -
    - Courts will generally regard shares of 90% as sufficient for unilateral monopolistic exploitation.
  - Group power-
    - Joint venture or merger may enable the new firm the power to raise prices significantly above competitive levels.
- More about product market definition
  - Differentiated products, different brands (i.e. Advil and Ibuprofen)
    - Product differentiation like product substitution generally, is a matter of degree.
      - i.e. Coco-cola cannot raise its prices significantly above cost without losing too much business to Pepsi.
  - Physically different products: can be good substitute.
  - Elasticity versus cross-elasticity
    - Elasticity – a tool for measuring the responsiveness of a function to changes in parameters.
    - Cross elasticity - rate at which consumers change their consumption of one product in response to a price change for another. When cross-elasticity is high, the two products should be included in the same market.
- Competitors, supply substitution, and entry
  - Expansion by immediate competitors – Immediate competitors able to expand on their production.
  - Supply substitution- Buyers may be able to turn to alternative suppliers not now producing the product in question.

        - Entry – Entry by new firms. Barrier to entry. If the barriers to new entry are not great, potential competition can be a significant restraining force.

U.S. v. Microsoft

- Two ways to demonstrate monopoly power
    - (1) that a firm as in fact profitably raised price substantially above competitive levels; or
    - (2) possession of a dominant share of a relevant market that is protected by entry barriers
- Court found Microsoft had monopoly power
    - Microsoft had a dominant share of the relevant market & the market was protected by entry barriers
        - Relevant market: Intel-compatible PC operating systems
            - Microsoft had more than a 95% market share
            - Barriers to entry: Windows enjoyed a massive "applications barrier to entry" in the form of over 70,000 applications written for Windows (IBM's OS/2 at its peak had approximately 2,500 applications)
- Outcome: the D.C. Circuit remanded the case for consideration of a proper remedy under a more limited scope of liability.

IP & Antitrust

Intellectual Property & Antitrust

4 Types of Intellectual Property

- 1. Copyright
    - Protects a novel expression-in a tangible form (written down, picture, on a computer)
    - Prevents anyone from copying it without your permission
- 2. Trademark
    - Logos, symbols-get it for something that reliably identifies a product
    - Don’t talk about it in regard to antitrust
- 3. Patent
    - Awarded on inventions
    - Have to apply for it, they grant it to you
    - What we are usually talking about with antitrust
- 4. Trade secret
    - Contains information that is not generally know to the public, there is some sort of economic benefit to its holder, and there are reasonable efforts to maintain its secrecy

- IP
    - Legal monopolies
    - Patents
    - Copyrights

- When does antitrust limit IP monopolies?
  - Generally, trying to get more than the monopoly is supposed to grant
    - Allowed
      - Charging customers monopoly rents
        - Example: Charging ultra-high prices for drugs that cancer patients will die without
      - Exclusive licenses
      - Limiting output
      - Refusing to manufacture
    - Not allowed
      - Fixing prices of unpatented articles made by patented machine
      - Agreements for royalties that continue after the expiration of the patent
    - May violate Sherman Act
      - Grant-back clauses
      - Patent accumulations
      - Tying arrangements
      - Blockbooking
    - Generally okay
      - Patent pools

IP LIcensing and Settlements

- Owners of IP often license it. These licenses sometimes impose price or use restrictions that limit competition among licensees or with the licensor. Sometimes the restrictions are legitimate & sometimes they violate antitrust laws.
  - Restrictions are likely to violate antitrust laws if the restriction & not the license is the primary purpose of the transaction.
- Resolving the conflict between IP & Antitrust
  - Ask, does the challenged practice contribute more to inventive activity than it costs in terms of lost competition?

Patent Accumulation

- In order to get a patent, has to be:
  - New; Useful; Eligible subject matter; Non-obvious; Disclosed; Something you invented
- Government tries to encourage inventive activity; encourage its disclosure
- Good for 20 years from the date of your application-takes a lot of time to get a patent, so don't usually have the patent for 20 years really
- Patent pending-just notifies people that you have applied for one

Vertical Restraints; Discrimination

Restricted Distribution

Leegin Creative Leather v. PSKS

- Kay's Kloset – wanted to sell Brighton merchandise at discounted rates & were doing that; Brighton wanted to set the prices for the merchandise
- Kay's Kloset brought suit
- Two Possible Tests
  - Rule of reason: "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on trade
  - Per se illegality – treating categories of restraints as necessarily illegal, no review for reasonableness
- Dr. Miles case – precedent
  - Manufacturer sold medicines only to distributors who agreed to sell at set prices
  - US SC holding: analogous to unlawful combination among competing distributors. Per se review
- Pro-Competitive Effect of Resale Price Maintenance
  - Stimulates inter-brand competition
    - Not competing among different places that sell the same purse, but choosing b/t a purse that costs $100 of the brand and a purse that costs $40 of the same brand
  - Eliminates free-riding on services
    - Mom & pop stores do a lot of special services in order to get people to come in to their stores; if the purse you want is available at a mom & pop store, but is 40% off at another store, consumers will reap the benefits of the services (i.e., fashion show at mom & pop store) and will then just go buy the cheaper purse at the other store
- Anti-competitive effects of Resale Price Maintenance
  - Facilitates manufacturer cartel
  - Facilitates retail cartel
- In this case, court believed pro-competitive effects outweighed the anti-competitive effects
- What about Stare Decisis?
  - Sherman Act = Common Law Statute
  - Doctrinal underpinnings of Dr. Miles challenged comparative
- Behavior that has been OK'd
  - Unilateral pricing policy (PING)
  - Integrating Downstream
  - Territorial Restrictions
- Unilateral price maintenance
  - Ex: Ping had a set price for its product; if any retailer undersold them, that retailer was never allowed to sell Ping clubs again. Ping also made it a terminable offense if any Ping seller (at the Ping level) discussed prices with the retailers. The Ping employee had to talk to a specific group of lawyers hired by Ping to deal w/ Dr. Miles.

Tying Arrangements

- What is tying?
    - Conditioning the sale of a good or service on the buyer also buying a second good.
    - Also applies to leases.
    - Must be two separate products.
- Sherman Act Section 1
    - 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. ...
- Clayton Act Section 3
    - It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of ... commodities ... on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect ... may be to substantially lessen competition or tend to create a monopoly in any line of commerce.
- Under Clayton Act Section 3
    - Subject to rule-of-reason scrutiny if:
        - (1) Seller has market power in the tying product, *or*
        - (2) A substantial amount of commerce is affected
- Under Sherman Act Section 1
    - Subject to per-se illegality if:
        - (1) Seller has market power in tying product, *and*
        - (2) A substantial amount of commerce is affected
- Affirmative defenses for "per se" offenses:
    - (1) Business justification
    - (2) Fledgling industry
        - We're just getting our business of the ground so give us a break

U.S. v. Microsoft

- Holding: rule of reason analysis is appropriate for platform software products. Court will not apply per se because it is software & the court should only classify business relationships as per se after it has considerable experiences with them, and the court does not have a lot of experience with software.
- 4 elements of a per se tying violation
    - (1) the tying and the tied goods are two separate products
    - (2) the defendant has market power in the tying product market
    - (3) the defendant affords consumers no choice but to purchase the tied product from it; and
    - (4) the tying arrangement forecloses a substantial volume of commerce
- Examples of tying arrangements given by the court
    - defendant newspaper conditioned the purchase of ads in its evening edition on the purchase of ads in its morning edition
    - defendant railroad leased land only on the condition that products manufactured on the land be shipped on its railway
    - defendant distributor of copyrighted feature films conditioned the sale of desired films on the purchase of undesired films

Discrimination - Robinson-Patman Act

Robinson-Patman Act

- §13a. Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties
  - It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor. Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.
- §13b. Cooperative association; return of net earnings or surplus
  - Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.
- §13c. Exemption of non-profit institutions from price discrimination provisions
  - Nothing in the Act approved June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.
- §21a. Actions and proceedings pending prior to June 19, 1936; additional and continuing violations
  - Nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 13 of this title, prior to June 19, 1936: Provided, That where, prior to June 19, 1936, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 13 of this title, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since June 19, 1936, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 13 of this title, it may reopen such original proceedings and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon the same proceedings shall be had upon such supplementary complaint as provided in section 21 of this title. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since June 19, 1936, or is being committed, used or carried on, in violation of said section 13 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to

include any additional violations of law so found. Thereafter the provisions of section 21 of this title, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 21 of this title the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken.

Great A&P Tea Co. v. FTC

Discrimination Under the Robinson-Patman

- See Section 13a
- Two kinds of violations
  - (1) Primary-line: A form of predatory pricing
  - (2) Secondary-line: Competition is hurt among buyers
  - Primary-line violation:
    - Primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under 2 of the Sherman Act. ...With whatever additional flexibility the Robinson-Patman Act standard may imply ... two prerequisites to recovery remain the same. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs ... Second, the plaintiff must demonstrate that the competitor had a reasonable prospect, or, under2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.
- Requirements for violation:
  - (1) Strong interstate commerce requirement (generally, one sale must cross a state line)
  - (2) Sales of commodities (not leases, not services)
  - (3) Like grade and quality
  - (4) Competitive injury (for secondary-line, differentially treated buyers must compete)
- Affirmative defenses
  - (1) Cost-justification
  - (2)Good-faith in meeting competition *A&P v. FTC*

Mergers

Introduction to Merger Law

- a permanent union of previously separate enterprises
- generally governed by Clayton and Sherman Acts
- can dramatically increase concentrations in relevant markets

Mergers are classified according to the market relationship of the merging parties:

HORIZONTAL MERGERS – involve parties that are competitors

VERTICAL MERGERS – parties that are or could become buyer/seller

CONGLOMERATE MERGERS – every other case

Motives for Merger:

- anticompetitive reasons
- easier expansion or entry
- operating efficiencies and scale economies
- financial gains without new efficiencies
- financial gains with new efficiencies
- management goals; substituting better management
- defensive mergers
- net reckoning

Narrative

Northern Securities Co. v U.S.

- SC held the unification of the Great Northern Railroad and the Northern Pacific Railroad, two parallel railroads across the northern tier of the western US, was a combination in restraint of trade forbidden by Section 1 of the Sherman Act.
    - Note: before passage of the Clayton Act, merger cases had to be brought under the Sherman Act.

U.S. v. Union Pacific Railroad Co.

- Court held the merger of Central Pacific and Southern Pacific was an unlawful restraint of trade. "The consolidation of two great competing systems is an unlawful restraint of trade in destroying or greatly abridging the competition theretofore existing."
    - Central Pacific & Southern Pacific were not parallel & although they were competing transcontinental systems, there were several other transcontinental systems.
    - The railroad cases were not typical - thousands of mergers were never attacked

U.S. v. U.S. Steel Corp.

- US Steel Corp was the product of mergers of previously independent steel companies that had an 80-95% market share of some products. Its overall share of iron & steel products had declined to 40% at the time of the suit.
- HOlding: court absolved steel company of Sections 1 & 2 violations because, although the mergers were undertaken with the intent of gaining monopoly control over the industry, the company had not achieved its purposes & had abandoned it.

U.S. v. Columbia Steel Co.

- This case deals with horizontal and vertical merger.
- U.S. Steel acquired Consolidated. Consolidated was the largest producer of steel ingot & rolled steel in the country.
    - Merger was horizontal because U.S. Steel also fabricated & sold certain steel fabrication in competition with Consolidated.
    - Merger was vertical because Consolidated purchased rolled steel from U.S. Steel.
- Court rejected the government's Sherman challenge the the acquisition.
    - Vertical integration, without more, can't be held to violate the Sherman act. Additionally, the merger did not unreasonably foreclose the selling opportunities of rival producers of rolled steel because Consolidated's purchases only accounted for 3% of that market. Court believed the merger was motivated by the normal business purpose of securing an outlet for U.S. Steel's planned increase in rolled steel capacity.
        - Dissenters found U.S. Steel's motivation impermissible for "competition is never more irrevocably eliminated than by buying the customer for whose business the industry has been competing."

Monopoly and Merger Compared

- Market Definition often critical factor in determining legality of a merger.
- In monopoly cases, we ask whether the defendant already has monopoly power. In horizontal merger cases, we ask whether the firm that results from the merger will acquire or increase its individual power over price and, if not, whether the resulting increase in market concentration will create or reinforce oligopoly and the danger of anticompetitive price coordination.

Multiple Markets

- Where several different markets are affected by a single merger, 3 issues are present:
    - (1) Are the anticompetitive effects in one market sufficient to condemn the whole merger? (Yes)
    - (2) Where the merger must stand or fall as a whole, can an anticompetitive effect in one market be redeemed by a procompetitive effect in a different market? (NO)
    - (3) Should different low-order possibilities of competitive harm in each of several markets (or even within a single market) be cumulated somehow to condemn the merger? (General answer - NO)

Government Enforcement

- Government enforcement dominates modern merger practice
- Government has an opportunity to review all mergers above a moderate size because the Hart-Scott-Rodino Antitrust Improvements Act requires the parties to notify the FTC & the Justice department before the merger can take place.
    - The FTC & DOJ don't technically approve/disapprove a merger. The Act gives the agencies the time & information to decide whether the challenge a merger before it is finalized. If they do challenge a merger, they can get a preliminary injunction blocking the merger pending final adjudication.
        - Procompetitive justifications under the Clayton Act
            - Smaller competitors merging to compete w/ a larger company
            - One company won't survive w/o the merger
            - Barriers to entry are low
            - Increased operating efficiencies
    - In practice, the outcome of the pre-merger review will be the de facto final determination on the permissibility of the merger. If the government agency challenges the merger, most mergers are abandoned. Conversely, if the government does not challenge the merger, most mergers will not be challenged by private parties or states.

DOJ & FTC Horizontal Merger Guidelines

- Guidelines outline the enforcement policy of the DOJ & FTC concerning horizontal acquisitions & mergers
- Unifying theme of the guidelines: mergers should not be permitted to create or enhance market power or to facilitate its exercise.
    - Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time.
- A market under the Guidelines is a product or group of products and a geographic area for which a hypothetical monopolist that did not fear entry would impose a small but significant and non-transitory increase in price. The "relevant" market is the smallest market.
- Concentration and Market Shares
    - Market concentration is a function of the number of firms in a market and their respective market shares
        - Guidelines use HHI to determine market concentration. Calculated by adding the squares of the individual market shares of all the participants.
            - Post-Merger HHI Below 1000 - markets in this region are unconcentrated. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects & require no more analysis.
            - Post-Merger HHI Between 1000 & 1800 - markets in this region are moderately concentrated.
                - Merger producing an increase in the HHI of less than 100 points in moderately concentrated markets post-merger are unlikely to have adverse competitive effects. Merger producing an increase in the HHI of more than 100 in moderately concentrated markets post merger raise competitive concerns & require further analysis.
            - Post-Merger HHI Above 1800 - markets in this region are highly concentrated. When the post-merger HHI exceeds 1800, it will be

presumed that mergers producing an increase in the HHI of more than 100 points post-merger are likely to create or enhance market power or facilitate its exercise.

- Entry Analysis
  - A merger is not likely to create or enhance market power or to facilitate its exercise if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels.
    - Entry is easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.
- Efficiencies
  - Primary benefit of mergers to the economy is their potential to generate a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity or quality
  - Agency will consider only those efficiencies likely to be accomplished with the proposed merger & unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects.
    - "Merger-specific efficiencies"
  - The merging firms must substantiate efficiency claims so that the FTC or DOJ can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved,how each would enhance the merged firm's ability to compete, and why each would be merger-specific.
- Failure and Existing Assets
  - A merger is not likely to create or enhance market power or facilitate its exercise if the following circumstances are met:
    - (1) the allegedly failing firm would be unable to meet its financial obligations in the near future
    - (2) it would not be able to reorganize successfully under Chapter 11 bankruptcy
    - (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and
    - (4) absent the acquisition, the assets of the failing firm would exit the relevant market

Bankruptcy Overview

- bankruptcy is federal law (exclusively); currently set out in the bankruptcy code
- Bankruptcy Reform Act 1978 aka the Bankruptcy Code

Contents

- 1 Goals of Bankruptcy law:
- 2 Creditors and Their Liens
- 3 Collection of Debts Outside of Bankruptcy
- 4 Fair Debt Collection Practices Act

Goals of Bankruptcy law:

-
  - (1) seeks orderly and equitable repayment of claims for the benefit of creditors, and;
  - (2) if offers an economic fresh start to the proverbial "honest but unfortunate debtor"

There are two generic forms of bankruptcy relief:

-
  - liquidation
  - reorganization

Chapters we focused on:

- 7 – liquidation
- 11 – construction, restructuring, mostly for big businesses
- 13 – modest, for individuals, you keep your house

Creditors and Their Liens

- a LIEN is a form of security interest granted over an item of property to secure the payment of a debt or performance of some other obligation. The owner of the property, who grants the lien, is referred to as the lienor and the person who has the benefit of the lien is referred to as the lienee. Creditors who have valid lien interests in a debtor's property are usually able to retrieve that property from the bankruptcy proceeding, a valuable right
- *Consensual lien*s – the debtor voluntarily nominates some if his or her property as collateral to secure a loan
- *Judicial liens* – if the Δ is unwilling to pay voluntarily (after losing a lawsuit), you must now take steps to levy execution of your judgment

- this is generally done by sending out a bailiff or sheriff (court official) to seize property, which is then sold by the sheriff and the proceeds applied against the judgment debt

-
  - **(1) Garnishment**
    - If the debtor's property is in the hands of others (the debtor's employer may owe salary, for example, or a bank may carry an account for the debtor), it can be reached by a garnishment proceeding
    - Typically a court proceeding
    - A writ is issued to the person having the debtor's property – requires that person to surrender to the court whatever property of the debtor he or she currently holds

-
  - **(2) Receivership**
    - Debtor's affairs are a mess or debtor has been breaking the law (hiding property is an example), creditors of all kinds may apply to a court to ask the judge to appoint a receiver who will take charge of the debtor's property and make sure it is preserved
    - Does this create a judicial lien? Varies from state to state
    - Bankruptcy ensures the orderly dealings with the property of the debtor's estate – receivership does not

-
  - **(3)Assignment for the Benefit of Creditors**
    - Most states also have a statutory procedure whereby the debtor can go to court, make an assignment "for the benefit of creditors" – sometimes called an ABC, and have an assignee appointed

Statutory Liens - by statute or by virtute of the common law, certain creditors are automatically given liens on the debtor's property to protect a credit extension

- 1. Mechanics' Liens
  - Those who perform work on construction projects on real property ("mechanics") or those who supply materials to the jobsite ("materialmen") are entitled to file a lien on the realty in the real property records to secure the monies owed them from the construction project

- 2. Artisans' Liens
  - Those who perform work on personal property (the car repair shop, appliance repair) get an artisan's lien on any property repaired to the extent that the debtor does not make the required payments
- 3. Tax Liens
  - If you do not pay your taxes, the taxing entity will slap a tax lien on your property, seize it and sell it, and then come after you for any amount still due
  - The Federal Tax Lien is codified in Internal Revenue Code, 26 USC §§6321-6323
- 4.Many Others

- Landlords, innkeepers, those caring for livestock, etc, are all granted statutory liens by various laws
- *Retaining lien* – on any property of the client in the possession of the attorney and;
- *Charging lien* – any judgment obtained by the attorney's efforts

Collection of Debts Outside of Bankruptcy

(1) collection torts

- abuse of process
- malicious prosecution

Fair Debt Collection Practices Act

- statute is the Fair Debt Collection Practices Act, 15 USC §1692, which is also Title VIII of the Consumer Credit Protection Act

Barlett v. Heibl

- The Fair Debt Collection Practices Act (FDCPA) provides that within five days after a debt collector first duns a consumer debtor, the collector must send the debtor a written notice containing specified information
- Δ, an attorney hired to collect a consumer credit-card debt, sent a letter to Π advising him of his rights under the FDCPA
- Π claimed that Δ's letter violated the Act by providing information about his rights in a confusing manner.
- The fact that Π did not actually read the letter did not preclude his claim for statutory damages. T
- The court acknowledged that the Act was implicitly understood to protect unsophisticated consumers from confusion.
- The court, itself, found Δ's letter confusing for failing to explain how Π's right to demand verification of the debt within 30 days fit together with Δ's demand for payment within 30 days.
- the court concluded that Π was entitled to statutory damages and provided a model letter for attorneys to follow in advising debtors of their rights under the Act.

Consumer Bankruptcy

Contents

- *1* Chapter 7
- 2 Liquidation under Chapter 7 - Who Gets What
- 3 Chapter 13
- 4 Reorganization under Ch. 13 - Who Gets What

Chapter 7

Liquidation - Straight bankruptcy

- Case is commenced with the filing of a petition - voluntarily or involuntarily
- Once the petition is filed, an automatic stay goes into effect
  - Stays essentially all further action collection efforts of lien enforcement from creditors. However, creditors can seek relief from the automatic stay
  - Some things are not stayed by the automatic stay:
    - Criminal prosecutions, alimony & child support, to name a few

The Trustee

- Trustee is essentially the agent of the creditors of the debtor & administers the bankruptcy estate.
- Duties include: collecting the debtor's property, give the debtor his/her exempt property, challenge certain transfers & the validity of certain creditor claims, distribute the money after exemptions to the creditors with valid claims.

The Automatic Stay

- Prohibits any creditor's attempt to continue to collect from the debtor of the debtor's property

The Estate

-
  - Comes into existence upon the filing of the petition
  - all of the debtor's legal and equitable interests in property as of the commencement of the case - essentially everything the debtor owns
    - Note: the post-petition wages and earnings of a debtor in Ch. 7 are not property of the estate

Eligibility

- Available to individuals and businesses

In re Shaw

- Shaws were pretty well off. House worth $400K in N.C. - "living large." Mrs. Shaw lost her job - was working for RJ Tobacco Company. The couple had 3 vehicles.
- Gross income for past two years: $138K, $157K
- Debts: Secured: $469K (2 mortgages & car loans). Unsecured: credit card debt: $131K.
- Listed monthly expenses - $7,517.59
- Court: debtors did not satisfy the criteria to be Ch. 7 debtors.
  - The facts illustrated the debtors could repay a meaningful portion of their unsecured debt over 36 months.
  - Debtors' proposed family budge was excessive & unreasonable under Ch. 7
    - College expenses for the debtors' daughter were not reasonable and necessary expenses
  - Debtors' desire to retain their $400K house, 3 cars & maintain a lifestyle they could not afford at the expense of their creditors weighed against a finding that the debtors filed in good faith.
  - Debtors could convert the case to a case under Ch. 13

Means Test

- Income
  - If the debtor's income is low enough, the debtor is exempt from the means test & is eligible for Ch. 7
  - Threshold test: whether the debtor's income exceeds the median income for similar families in the state where the debtor filed
    - If the income is equal or lower to the median, the debtor has qualified for Ch. 7
    - If the debtor's income is above the median, more calculation must be done (look at how much debtor can pay off after regular deductions are made)

In re Kimbro

- Issue: whether in the means test, a debtor may deduct an ownership expense for a vehicle that is subject to neither secured debt nor a lease.
- Holding: in the bankruptcy means test, a debtor may deduct an ownership expense for a vehicle regardless of whether the debtor has a debt or lease payment on that vehicle.
  - Every debtor who owns a vehicle incurs expenses arising from the ownership of the car regardless of whether the debtor incurs a debt or lease payment associated with the vehicle

Exempt Property

- Reasons to exempt property:
  - (1) debtor's family will become a charge on the community if there are no exemptions
  - (2) give the debtor enough basic property to get out of debt & become a contributing member of the economy

- (3) a lot of property (i.e., clothes) have little resale value to the creditors, but have a lot of value to the debtor

- State/Federal System of Exemptions
    - Debtor can choose between state or federal exemptions, but can't mix & match. However, states have the option to legislatively preclude the debtor from choosing the federal exemptions and require a debtor to use the state exemptions only. Many states have done this.
        - Most debtors opt for state exemptions rather than federal exemptions
    - Typical exemptions
        - Homestead exemption
        - "Wild card" - certain amount of $ can be used towards anything
        - Clothing, furnishings, household goods
    - Federal exemptions of note:
        - payments from crime reparations laws, unmatured life insurance, retirement funds

Classification of Property

-
    - exemption statutes are written to exempt only listed types of property, so debtors often try to argue that property they intend to keep fits within the statutory description & creditors are likely to argue the property does not fit.

In re Johnson

- Issue: is Johnson's bus a bus, or is it a motor vehicle under the exemption statute?
- Holding: the bus is a motor vehicle and therefore the debtor was entitled to claim the bus as an exemption

In re Pizzi

- Pizzi won the lottery ($3.2 million). Pizzi then incurred a substantial amount of debt over the years and then filed for Ch. 7. Pizzi wanted to discharge her debts without giving up the right to receive 12 more annual payments of the $128K from Connecticut to finish out the payment of her lottery winnings.
- Court: the payments of Pizzi's lottery winnings are not annuity payments and therefore she is not entitled to have the payments exempted
    - Lesson: always check the lump-sum on the back of the lottery ticket & then get an annuity

Valuation of Exempt Property

-
    - In addition to determining if the property sought to be exempt fits within the allowed categories, it is also necessary to determine whether the property fits within the permitted valuations as well

In re Walsh

- Case before the court on an application for appraisal
- Trustee wanted the property appraised at fair market value rather than liquidation value
- Meaning of "fair market value" – interpreted in a liquidation context
- FN 3 – main reasoning of the case
    - Example: a debtor owns an automobile free & clear of any lien, which, if sold under ordinary market conditions – the willing buyer and willing seller approach to fair market value – would yield $2000. The debtor, pursuant to federal exemption statute, claims the car as exempt to the extent of $1200. If the court deems the asset to be worth $2000 b/c of a theoretical fair market value std & authorizes a sale by trustee, the actual sale may only bring $1200 (b/c it's a liquidation)
        - In this hypo, the unsecured creditors are getting nothing
        - Debtor has no car – has $1200 to buy a car, won't be as nice of a car
        - Whoever buys the car at the liquidation sale is getting a discount

Proceeds and Tracing

In re Palidora

- Dealing with child support payments
- AZ Statute – exempts wages before they are paid to you but not after the wages are placed into your bank account
- Child support payments end up not being exempt or being in the estate, but are held in trust for the children, therefore they are not property of the bankruptcy estate

Security Interests in Exempt Property

- When potentially exempt property is encumbered by a security interest valid in bankruptcy, the secured party moved ahead of both the debtor and the Trustee
    - If a car is valued at $1,000, and the secured creditor's claim is for $2,000, the secured party would take the car. The debtor would have no exemption and the Trustee would have nothing to distribute. If the car is worth $3,000, the car would be sold, sale expenses paid, and the debtor would keep the remaining money. Only when the value of the car exceeds the sum of the allowed secured claim and the debtor's exemption will the Trustee be able to reach an value from the property.
        - So: (1) take out the sale expenses; (2) take out the lien; (3) take out the exemption; (5) only then can the Trustee pay the unsecured creditors

Avoiding Judicial Liens and Non-PMSI Liens

- Section 522(f) permits the avoidance of these two liens
- In order to void the liens, the collateral must be exempt property
- Effect of this provision - the creditors who hold these types of liens can be treated like any other unsecured creditor - entitled only to a pro rata share of the debtor's entire estate
    - Nonpossessory, nonpurchase money consensual security liens
    - Judicial liens (liens that are imposed by a court after a judgment has been rendered & the defendant has not paid)
        - Generally, debtors may avoid all judicial liens on exempt property, regardless of the nature of the debt secured by the lien or the type of property

        - One exception: judicial lien that secures a debt for a domestic support obligation - these remain intact no matter what

Claims and Distribution

- Non-exempt property , proceeds of sales distributed pro rata to creditors.
- Creditors must file proof of claims within 90 days after first meeting of creditors. If a creditor does not file proof of claim, the creditor will not receive any distribution.

Unsecured Claims

- Unsecured = creditor does not have a lien
- Unsecured creditors do not receive interest on their unsecured claims after the filing of bankruptcy and while the bankruptcy is pending
- Example: A debtor has 50 unsecured creditors with a total debt of $50K. The net estate is worth $5K. If every creditor filed his/her proof of claim, each creditor would receive 10 cents on the dollar.

Secured Claims

- Secured = creditor has a lien on the property
- The creditor's claim is secured only to the extent of the value of the property (collateral). Any excess of the claim over the value of the collateral is unsecured.

Discharge

- Exceptions to Discharge
    - Most taxes
    - Alimony and child support
    - Debts obtained by lying on a credit application
    - Debts for luxury goods worth more than $500 obtained within 90 days of bankruptcy
    - Fraud by a fiduciary
- Bankruptcy Crimes
    - Can go to prison for trying to abuse the system by filing fraudulent petitions

The Debtor's Post-Bankruptcy Position: Reaffirmation

- Note: discharge applies only to personal liability; Discharge DOES NOT remove a lien
- Three options for satisfying a debt despite bankruptcy
    - (1) Redemption: requires the debtor to pay the creditor the full loan or the full value of the collateral in cash, whichever is less
    - (2) Reaffirmation: requires a creditor willing to agree to let the debtor keep the collateral in return for a promise to repay that will survive the bankruptcy
    - (3) Ride-through: situation where the debtor is not in default at filing & continues to make his/her contracted payments while the creditor simply does not do anything to reclaim the collateral - continuing making payments throughout the bankruptcy
        - circuits are split on whether this is allowed

Liquidation under Chapter 7 - Who Gets What

General Principles of Liquidation

- At the moment of filing, the debtor's non-exempt property becomes property of the bankruptcy estate.
- That property will then be liquidated – turned into cash – and distributed to creditors. The pre-petition debts will then be discharged.

Rules of Distribution under Chapter 7

- FILL & SPILL: Each entity in each category 1 thru 6, and in each subcategory ("priority") i thru x, must be paid in full before any entity in the next category or subcategory is paid anything.
- CENTS ON THE DOLLAR: If there is not enough to pay all the creditors of a category all amounts owed, but if there is enough to pay them something, then all creditors in that category receive a pro-rata share, often stated as so many "cents on the dollar" of the outstanding claim.

Order of Distribution under Chapter 7 AT THE OUTSET IS THE NON-ASSET QUASI-CATEGORY:

- 0. Secured, exempt, post-petition, and non-estate property
    - Property securing the claims of secured creditors, to the extent of their security

interest, after costs of sale (see §506, §541(d))

-
    -
        - Unless invalid (see §522(f))
    - The debtor's exempt property (see state exemption statutes, §522)
    - Income earned or property acquired after filing (see §541(a))
    - Property held in trust for others (see §541(b))
    - Qualifying retirement funds, college-savings plans (see §541(b))
    - Property shielded by asset-protection trusts, fraternal-benefit societies

WHAT QUALIFIES AS PROPERTY OF THE ESTATE IS THEN DISTRIBUTED FILL-N-SPILL STYLE AS FOLLOWS:

- 1. Priorities under §507 (see §726(a)(1)) in the following order:
    - i. Domestic support obligations and certain administrative expenses of the estate (see §507(a)(1))
    - ii. Administrative expenses of the estate (see §507(a)(2))
    - iii. Ordinary-course-of-business expenses in involuntary cases (see §507(a)(3))
    - iv. Wages earned within 180 days before filing (or cessation of business) up to about

$10,000 per employee (see §507(a)(4))

-

- v. Employee-benefit plan contributions incurred within 180 days before filing (or

cessation of business), subject to a formula-prescribed cap (see §507(a)(5))

vi. Amounts owed to farmers and fishermen, up to about $4,000, by grain and fish

buyers (see §507(a)(6))

-
  - vii. Consumer deposits, up to about $1,800, for undelivered services or property (see

§507(a)(7))

-
  - viii. Taxes, subject to certain time limitations (see §507(a)(8))
  - ix. Amounts owed to the FDIC and the like by banks and other depository institutions (see §507(a)(9))
  - x. Personal injury or wrongful death damages from driving, boating, or flying while intoxicated (see §507(a)(10))
- 2. Allowed unsecured claims filed on time (or late but excused) (see §726(a)(2))
- 3. Allowed unsecured claims filed late (see §726(a)(3))
- 4. Fines, penalties, “multiple” damages, and punitive damages (see §726(a)(4))

THEN, THEORETICALLY, IF ANYTHING ELSE IS LEFT, THERE ARE TWO MORE CATEGORIES:

- 5. Interest on the claims in categories 1–5, above (see §726(a)(5))
- 6. Debtor takes the remainder (see §726(a)(6))

Chapter 13

Ch. 13 Adjustment of Debt or Wage Earners' Plan

Overview

Focuses on using future earnings, rather than accumulated assets to pay creditors

Debtor keeps all the property in the estate, but agrees to turn over a portion of all future income for at least 3 years. Trustee takes a percentage of debtor's income for each pay period, deducts a percentage to cover administrative expenses, and then distributes the remainder to the creditors under the court-approved plan

Voluntary filing only

Same automatic stay principle as Ch. 7

Trustee

Role different than Ch. 7 trustee

Ch. 13 - debtor retains control of the property of the estate.

Trustee is in charge of ensuring that the debtor gives up the required amount of income

Trustee's main duties are in connection with the confirmation of the plan and distribution of payments

The Plan

- Essentially is the price the debtor agrees to pay creditors out of future earnings
- Plan must be confirmed by the court
- Plan must provide for full payment of priority claims, and provide equal treatment for claims in a particular class

Payment to Secured Creditors

- Issues:
  - Protection of the secured party's interest in the collateral during the case.
    - Usually solved by providing adequate protection to the secured party, i.e., cash payments, or a substitute or additional lien
  - Adequate payment to the secured party

In re Radden

- Debtor financed the purchase of a Mustang. Debtor failed to pay the contractually requirement payments to GMAC – company to which the installment sales agreement was assigned. Debtor wanted the car turned back over to him – needed the car to get to and from work
- Court: GMAC needed to turn the car back over to debtor
  - Debtor could get the $ for the insurance (adequately protect GMAC's security interest)
  - Debtor needs the vehicle in order to carry out the Ch. 13 plan - needs the car to get to work so he can make the payments under the plan

Modifying the Secured Creditor's Contract

- Two requirements for payments to secured creditors:
  - (1) a secured creditor must be paid its allowed secured claim in full
  - (2) a secured creditor must be paid interest on that claim
- Regarding any unsecured claim of a secured creditors, Section 1325(a)(5) contains a "Cramdown" provision
  - Restructuring the extent to which the secured creditor's claim is unsecured - the restructured debt is "crammed down" because it can be imposed over the secured creditor's objection
  - Example: Couple granted a security interest for a a loan on office equipment & two years later file for bankruptcy. At the time of filing, the loan was $10K, but the

collateral was only worth $5K. Assuming they have promised to pay 50% of their unsecured debt, they will pay:
        - $5K on the secured claim, plus $2500 for the unsecured claim, to the creditor with the security interest in the equipment. Treatment of the unsecured claim is the cramdown.
- Some limits under the 2005 Amendments
    - Any purchase money security interest granted within the year before bankruptcy is exempt. If the debtor wants to keep the collateral, he/she must promise to pay the debt in full.
    - For the holder of a purchase money security interest in a motor vehicle (car loan) the time period is rolled much further back to exempt security interests granted w/in 2 and a half years (910) days prior to the bankruptcy petition (exempt from the cram down)
    - Purchase money security interest
        - Bank give the debtor a loan & the debtor uses that loan to purchase the collateral

Computing the Amount the Secured Creditor Must Be Paid

- Once the court has determined that the security interest in the collateral was a secured claim, it has to make 2 factual determinations under the Ch. 13 plan:
    - (1) The amount of the allowed secured claim under Section 506(a); and
    - (2) The present value of the allowed secured claim under Section 1325(a)(5)(B)(ii)
        - Present value - value as of the effective date of the plan. Concept that a dollar due to be paid a year from now is worth less than a dollar paid now.

Payments to Unsecured Creditors

- Unsecured creditors are pooled together for pro rata treatment
- Disposable Income
    - Debtors in Ch. 13 must dedicate all of their disposable income to the Ch. 13 plan
    - Means test
        - If the debtor's income is below the applicable state's median family income, he/she must make payments under the plan for 3 years
        - If the debtor's income is above the applicable state's median family income, he/she must make payments under the plan for 5 years
    - Note: disposable income is the floor - a minimum amount of what a debtor must pay.
        - If, for example, a debtor does not have enough $ to pay his house payment, his allowed secured claim on his car, his outstanding administrative expenses, his child support, and have enough left to live on, then he cannot confirm a Ch 13 plan.

In the Matter of Wyant

- Court: veterinary expenses on elderly animals is not something you have to do, BUT the disposable income doctrine does not deprive debtors of all discretionary spending, so they can continue to pay the bills
- disposable income doctrine kind of implies that debtors are deprived of discretionary income
- Note: the judge’s values often reflect what will be permissible/impermissible under disposable income

Tax Claims

- Tax Code is subservient to the Bankruptcy Code regarding the automatic stay
  - Ch. 13 can stop the interest from accumulating on the debtor's taxes during the completion of the plan

Modification and Dismissal of Ch. 13 Plans

- Debtors often seek modification is they lose their jobs or have other events that make it difficult to pay on the plan.
- When a plan is modified, it still must meet all the Ch. 13 requirements, including the 5 year time limit
- Creditors can demand modification if the debtor's income goes up

Threshold Eligibility for Ch. 13

- Limited to natural persons with limited debts and regular income

Reorganization under Ch. 13 - Who Gets What

General Principles of Reorganization

- The debtor keeps their property, the obligation is to make the payments required by the court-approved plan over the life of the plan, usually from three to five years. After successful completion, all pre-petition debts are discharged.
- The debtor must propose a plan that meets the Chapter 13 requirements and show that there will be sufficient income to make the plan work.
- If the debtor can't get a plan approved, then the case must be converted to another chapter or dismissed.

Requirements for plan approval under Chapter 13 SECURED CLAIMS - payment in full to the extent of the security interest

- Secured claims are claims secured by collateral
- Stripdown – If a secured creditor is owed more than the value of the collateral – that is, if the claim is undersecured – then the debt may be stripped down, giving the creditor has two claims, a secured claim for the value of the collateral, plus an unsecured claim for the remainder (see §506)
- A secured claim can be satisfied by any of the following:
  - Voluntary modification – A secured creditor can voluntarily agree to modifications of the loan and payment schedule (see §1325(a)(5)(A))
  - Cramdown – A secured claim can be satisfied, whether the creditor likes it or not, if the debtor proposes an accepted plan that pays (1) the full value of the secured claim (i.e., the portion of the claim secured by collateral) at the time of filing (i.e., reduced to present value), and (2) interest on that claim accruing over the life of the plan payments (see §1325(a)(5)(B)). (Remember the stripdown: the portion of the debt not secured, if any becomes an unsecured claim and is treated accordingly .)

    - Surrender – A secured claim is satisfied if the debtor surrenders the collateral to the creditor (see §1325(a)(5)(C))

RECENT PURCHASE-MONEY CLAIMS THAT ARE STRIPDOWN IMMUNE - payment in full

- Two categories of purchase-money loans with a security interest are immune from stripdown, and thus must be paid in full (see §1325(a)(at end)):
    - Any purchase-money security interest granted within one year before filing
    - Auto loans granted 910 days (2.5 years) before filing

UNSECURED PRIORITY CLAIMS - payment in full

- Priorities under §507 must be paid in full (see §1322(a)(2)) with the exception of some domestic support obligations (see §1322(a)(4))
    - Domestic support obligations and certain administrative expenses of the estate (see §507(a)(1))
    - Administrative expenses of the estate (see §507(a)(2))
    - Ordinary-course-of-business expenses in involuntary cases (see §507(a)(3))
    - Wages earned within 180 days before filing (or cessation of business) up to $10,000 per employee (see §507(a)(4))
    - Employee-benefit plan contributions incurred within 180 days before filing (or cessation of business), subject to a formula-prescribed cap (see §507(a)(5))
    - Amounts owed to farmers and fishermen, up to $4,000, by grain and fish buyers (see §507(a)(6))
    - Consumer deposits, up to $1,800, for undelivered services or property (see §507(a)(7))
    - Taxes, subject to certain time limitations (see §507(a)(8)) Amounts owed to the FDIC and the like by banks and other depository institutions (see §507(a)(9))
    - Personal injury or wrongful death damages from driving, boating, or flying while intoxicated (see §507(a)(10))

GENERAL UNSECURED CLAIMS - payment pro-rata from all disposable income

- Assuming the debtor cannot pay back all unsecured debts, then the debtor must pay all "disposable income" over the life of the plan to unsecured creditors on a pro-rata basis (see §1325(b)).
- Disposable income is "current monthly income," other than received child support, less:
    - amounts reasonably necessary for the debtor and debtors' dependents to live on (see §1325(b)(2)(A)(i))
    - domestic support obligations (see §1325(b)(2)(A)(i))
    - qualifying religious and charitable contributions (subject to a 15% of gross income cap) (see §1325(b)(2)(A)(ii))
    - amounts necessary for maintaining the debtor's business, if applicable (see §1325(b)(2)(B))
    - payments on secured debt under the plan
- If and only if the debtor has above-median family income, then IRS expense standards are used to determine what is reasonably necessary in terms of expenses (see §1325(b)(3)). *The unsecured creditors will get payments as long as the plan lasts, which will be:
    - three years for below-median debtors (see §1325(b)(4)(A)(i))

    - five years for above-median debtors (see §1325(b)(4)(A)(ii))
    - less than three years or five years, whichever applicable, if unsecured debts can be paid off in full (see §1325(b)(4)(B))

Business Bankruptcy

Chapter 7 Liquidation

Key things to keep in mind:

- No discharge of debt for a corporation like there is for a natural person
- When some big company goes into BK, you can take all of the assets (factories, cars, good will from trademarks) and transfer that to a new entity
- Corps. can live on in a practical sense if someone buys up everything and lets it live on in a new entity
- Under state law, whoever can get there first to grab assets is going to get their money
- Instead of bucket system in consumer chapter 7 (fill and spill) it is more like a race
- Also a way to get negotiations moving and come to a deal

Chapter 11 Reorganization

(a lot like Chapter 13 for consumers)

- What happens? The company becomes like the trustee and exercises trustee-like powers
    - Why? because it is not a person like in consumer BK, it is a company (so likely a CEO)
- the discharge happens upon confirmation of the plan – as soon as everything is liquidated
- debts get discharged and then everyone has to live by the plan
- powerful tools to aid in negotiations:
    - the automatic stay and breathing room it brings
    - the possibility of adopting a plan that will legally bind all creditors, even though a minority reject it
    - for six months or more the company has the exclusive right to present a plan before they have to argue with creditors
    - the turnover and avoiding powers

Mechanics of Chapter 11

- Automatic stay is applicable
- No exemptions for corporations
- Debtor in Possession (DIP)
    - business continues to operate in the ordinary course under control of the DIP
    - DIP essentially serves as Trustee (no trustee is appointed in Ch. 11)
    - Duties/Powers of the DIP
        - May obtain financing and other credit during bankruptcy with approval of the court

        - Has avoiding powers - power to recover preferences (payments or transfer or property to favor creditors within 90 days of bankruptcy)
        - Power to assume or breach outstanding executory contracts
        - Power to void fradulent transfers
- Creditor's committee is appointed to scrutinize the debtor's activities on behalf of all creditors and to negotiate with the debtor
- The Plan
    - The plan proposes reorganization - offers to pay each "class" of creditors a certain percentage of their claims over a stated period of time, with the payment to be made in cash, in property, or in securities issued by the reorganized debtor
    - Ch. 11 plan is put to a vote of the creditors (unlike in Ch. 13)
        - If the plan is approved by the specified majorities of the creditors in each class, it will be confirmed by the court
            - Debtor must treat all creditors in a particular class equally
    - Upon confirmation of the plan, the debtor is discharged from all its pre-petition debts except as provided by the plan (unlike in Ch. 13, in which there is no discharge until the plan is completed)

Consumer Law Overview

Introduction to Consumer Law

Compared to Anti-Trust and Bankruptcy

- Both federal
- Both full schemes

CL is Different

- Collection of specific fixes to prevent people from being laid off
  - Think plugging holes
  - Keep competitiveness in the market and stop unfair business practices
- Meant to ensure good outcomes for consumers

CL goes against Laissez Faire (LF) economics

- LF assumes actors in the market are rational
  - WRONG, people constantly make decisions they regret and act irrational
- CL aims to basically save people from themselves vs. "We live in a Nanny State"
  - Therefore, CL is limitations on the free market

FTC Act (Handout)

- Federal Law 15 USC 41-57
- Unfair and deceptive trade practices "unlawful"
  - Aka "screwing consumers over"
- Section 1
  - Membership – Commissioners
    - 5 Commissioners, no more than 3 from the same party
    - appointed and
- Section 4
  - Definition – Commerce, etc.
- Section 5
  - Methods of competition unlawful; prevention by Commission
    - Declared unlawful
      - Commission's job to enforce this, interpretation, binding rules, and punishment/appeals
    - Allows for hearings about these practices
      - Can issue show cause orders
      - Hold the hearings
      - Issue fines starting at 10K
    - No Rules against practices that are "reasonably avoidable" by consumers
- Section 18
  - Interpretative Guidelines
  - Rules

- Judicial Review

Unfair and Deceptive Sales; Warranties

Unfair and Deceptive Sales

Unordered Merchandise, Telemarketing, Spam, Door-to-Door Sales Telemarketing

- National Do Not Call List
  - Does not prohibit calls from charitable organizations or from businesses with which the consumer has had past volitional contacts
  - Attorneys are covered by the rules
- Consumer Law
- Remedies
  - No private right of action
    - Makes it so telemarketers can still rip people off in some amounts
  - Therefore, important to have the FTC or the State's AG to pursue a violation
- *Reichbach v. Chung Holdings, LLC*
  - Facts: Plaintiff received a recorded call at home from Precision Windshield Repair. The message did not identify a caller, but gave an option to be called back by Precision. When plaintiff got a representative on the phone, he asked for a copy of the company's do not call policy, which he never received.
  - Rule: It is illegal under the Telephone Consumer Protection Act (TCPA) to make an unsolicited call using a prerecorded voice. A private cause of action is permitted in state court to enjoin the calls or recover actual loss or $500 in damages for each violation, whichever is more. The exceptions to this rule are:
    - (1) The call was not made for a commercial purpose.
    - (2) The call is made for a commercial purpose, but it does not include the transmission of any unsolicited advertisements.
    - (3) The call is to someone that the business has an established customer relationship with.
    - (4) The call is from a charitable organization.
  - Notes:
    - "Unsolicited" means any material advertising the quality of any property, goods, or services, which is transmitted to any person without that person's prior express invitation or permission.
      - Offers for free goods/services are still unsolicited.
    - A company must have a written do not call policy.
    - For live calls, there needs to be more than one call to violate the TCPA.

Email Spam

- Federal Can Spam Act
  - Prohibits untruthful emails, requires senders to be identified.
  - No right to private action
  - Widely ignored by Spammers and not really enforced besides a few cases thus far.

Home Solicitation

- Cooling off Period
    - Some time in which to decide if they really want what they buy from a door-to-door salesman
        - This includes anywhere (walking your dog, at a friends house, etc.) outside the regular place of business
        - Seller must give an oral notice and you cant misrepresent the right to cancel
    - Policy – people are irrational and need protection

Warranties

State Warranty Law State Warranty Law

- UCC Article 2
    - UCC governs sales of goods
    - Express warranty and what is said in the contract
    - Look to UCC 2-313 and 2-316
        - 2-313
            - Express warranties are created by:
                - (1) Any affirmation of FACT made by the seller to the buyer which relates to the goods and becomes part of the basis for the bargain.
                - (2) Any description of the goods made part of the basis for the agreement.
                - (3) Any sample or model which is made part of the basis for the agreement.
            - A seller does not need to use any magic words to create a warranty, but an affirmation of the value of the goods or a statement purporting to be the seller's opinion or commendation about the goods does not create a warranty.
                - Ex. A seller can "puff"
        - 2-316
            - Words or conduct relevant to the creation of an express warranty cannot be negated or limited unless reasonable, subject to the parol evidence rule.
        - 2-202 - Parol Evidence Rule
            - A written contract cannot be contradicted by evidence of a prior agreement or of contemporaneous oral agreement, but can be explained or supplemented:
                - (1)By evidence of consistent additional terms, unless the agreement is fully integrated (i.e. a full and complete statement of the agreement between the parties).
        - Unconscionability, fraud, and the langauge of the rule itself are the only ways around the parol evidence rule.
- Implied in Law Warranties
    - Created by common law or statute
    - 2-314 - Implied warranty of merchantability

            - The product will do its intended purpose
                - Only applies when the seller is a merchant
    - 2-315 - Implied Warranty of Fitness
        - Where the seller know that the buyer is buying for a particular purpose and relying on the seller's skill or judgment to furnish a suitable good, there is an implied warranty that the goods will be fit for such purpose.
            - Applies to all sellers.
    - 2-316 - Exclusion or Modification of Implied Warranties
        - Merchantability
            - The exclusion language must mention merchantability and in the case of a writing, must be conspicuous.
        - Fitness
            - The exclusion MUST be in writing and conspicuous.
                - To exclude all implied warranties, it is sufficient to state "there are no warranties which extend beyond the description on the face thereof"
        - All implied warranties may be excluded by using "as is," "with all faults" or similar language.
        - When the buyer has fully examined the goods or refused to examine the goods before entering into the contract, there is no implied warranty.
    - Remedies for Breach of Warranties
        - Acceptance
            - Keep the goods and get the fair market difference in price as damages.
        - Rejection
            - Not going to keep the goods, but hold them in a security interest.
            - Must be made within a reasonable time after delivery.
- Used Cars and Warranties
    - FTC Used Motor Vehicle Rule
        - Requires sellers of used cars to post a sticker in the window explaining the scope of any warranty protection.
            - Statement must be part of any contract to buy the vehicle.
- Warranties in Service Contracts
    - UCC doesn’t govern (doesn't cover sale of homes, other real property, or services)
        - State common law usually follows the same logic as the UCC
        - 'Humber v. Morton
        - Facts
            - House not suitable for living because of defective fireplace and chimney
            - Builder argues Caveat Emptor
        - Reasoning
            - Court didn’t address the condition of the house, but any implied warranties
                - Implied in law warranty that the house was habitability
                    - The particular purpose of living in it

Policies for Consummer Law

- Caveat Emptor
    - Lowers expectations of a buyer to a reasonable degree
    - Higher transaction cost if consumers relied on the court to set expectations

    - Higher information cost if consumers relied on the court to set expectations

Magnuson-Moss

- FEDERAL QUALITY CONTROL STATUTES WARRANTY ACT
- Intent
    - Consumers get complete info about warranties
    - Consumers get the ability to compare warranties
    - Promote competition on the basis of warranties
    - Strengthen existing incentives to perform on warranty obligations
- Does not:
    - Require warranties
    - Apply to oral warranties
    - Apply to services, only to goods
    - Apply products sold for resale
- Three Basic Requirements
    - 1) As a manufacturer, must designate the warranty as either full or limited
    - 2) must specify certain information details
    - 3) you must make available warranty term before the sale
        - used a comparing warranty tool
- Basic Prohibitions
    - Cant disclaim/modify implied warranty
        - CAN limit the implied warranty in time
    - Sellers who are not manufacturers can limit implied warranties
- What Magnuson-Moss does:
    - Gives consumers the right to sue over warranties
    - Gives manufacturers the right to prevent consumers from suing until they go through a process to resolve the complaint with the company (ex: Alternative Dispute Resolution)
- What a full warranty does:
    - Doesn't limited the implied warranty of merchantability
    - Cannot limit coverage to first purchasers-must be transferable
    - Warranty service must be free of charge
    - The consumer gets the choice of a full refund or a replacement if after a reasonable amount of time, repairs can't be make
    - Aren't required to perform any duties besides notifying the provider that something is wrong
- *Universal Motors v. Waldock*
    - FACTS: Waldock bought a BMW from Universal. It was warranted to be free of defects in materials or workmanship for a period of 3 years of 36,000 miles. Within the warranty period, the car's engine failed and was extensively damaged. Universal refused to repair ir, saying Waldock had damaged it.
    - RULE:
        - Performance of warranty is not required if the warrantor can show that the damage was caused while in the possession of the consumer or by unreasonable use, rather than by defect.
        - The Magnuson-Moss act created no new implied warranties; it created a federal cause of action for breach of consumer warranties. ***The elements of proof are the same, whether under state UCC or Magnuson-Moss.

        - The burden is on the buyer to show a breach of warrant with respect to the goods.
        - Once the buyer offers credible evidence that the defect is materials or workmanship related, the burden shifts to the warrantor to prove consumer abuse.
    - NOTES:
        - A breach of warranty can give rise to 2 claims: (1) State UCC; and (2) Magnuson-Moss.

Payment and Consumers

- The way that the UCC is set up, if you sign a promissory note (the written instrument that comes along with the loan), you promise to pay a certain amount of money over a certain amount of time
    - The promissory note can then be transferred to another party
    - UCC has a policy of upholding promissory notes so they are readily transferable
- If fraud occurs, you could withhold payment under the regular legal background; but under the UCC, makes the note transferable and dependable
    - The holder in due course can collect no matter what, even if the car sold is no good
- Lemons Problem
    - A used car is one in which ownership is transferred from one person to another, after a period of use by its first owner and its inevitable wear and tear.
    - The defective cars are known as lemons
    - Buyers and sellers can't exchange info that has an understood level of authenticity to get the right level of efficiency
        - Used car warranties are a powerful way to do this
- Signaling
    - Can signal that a car is good by offering a warranty upon purchase
        - If it was a lemon car, they wouldn't offer a warranty because it wouldn't be worth their money
    - Federal law provides the warranty is enforceable in court through Magnuson-Moss Act
        - If the warranty wasn't enforceable, it wouldn't be a very good signal to tell who was really willing to come through on a warranty obligation

Loans, Credit Cards, Billing Disputes; Credit Reports

Loans

Credit Cards, Billing Disputes

Credit Cards and the Credit CARD Act of 2009

- The modern multi-retailer revolving-balance credit card was introduced by Bank of America in 1958 by sending out 20,000 unsolicited BankAmericards to consumers in California. The BankAmericard was later renamed Visa.
- The consumer financial services industry spent more than $13 billion on direct-mail advertising in 2007.
- Banks and credit card institutions earned a return-on-investment of $13.37 per dollar spent on direct-mail.
- Credit cards are a $160 billion business.
- The average credit-card debt for card-holding households:
  - $2,966 in 1990
  - $9,659 in 2008
- Credit card industry profits:
  - $27.4 billion in 2003
  - $40.7 billion in 2007
  - Up 49% in 4 years
- Lack of regulation of credit cards
  - Choice of law
  - Banking deregulation in 1970s
  - Smiley v. Citibank, 517 U.S. 735 (1996)
- Katie Groves, 42
  - The interest rate on Katie's Chase Visa card jumped from 12% to 29.99% even though she had never missed a payment and owed only $500 — because Chase checked her credit report and looked at the levels of debt she owed to other parties.
- Janet Hard, 42, of Freeland, Mich.
  - Discover raised her rate from 7.9% in 2000 to 24.4% in 2007.
  - She was charging her family of four's dentist bills to the card, because they were without dental insurance.
  - "When I look at the money that we have paid to Discover during just the last two years, I feel sick. Of the $5,618 made in payments to Discover, $3478.39 went to interest ... My husband and I feel as though we've been robbed."
  - Discover said the rate increases were because Hard was too close to her credit limit and was late on payments to other banks.
- **Credit CARD Act of 2009**
  - Credit Card Accountability, Responsibility and Disclosure Act of 2009
  - THE POLITICS:
    - Passed in the House of Representatives 361-64 • Passed in the Senate 90-5

        - Signed by Pres. Obama on May 22, 2009 • Changes taking effect in February and August 2010 • Provides credit-card consumer with a "bill of rights"
        - Allows visitors to carry guns into national parks and national wildlife refuges
    - Kinds of requirements
        - Information
        - Time
        - Choices and defaults (opt-outs & opt-ins)
        - Fee caps
        - Restrictions for underage consumers
        - Restrictions on application of payments and methods of charging interest
    - Billing
        - Issuers must mail bills no less than 21 days before the payment is due
        - There must be a consistent due date every month (ex: the 15th or last day of the month)
        - The payment cut-off time cannot be earlier than 5PM on the due date
        - If you payment due date is on a weekend or holiday, you will have until the following business day to pay
    - The Bill Must Disclose:
        - How long it will take you to pay off your entire balance by making only the minimum payments
        - How much you would have to pay every month in order to pay off the whole balance in three years
        - How much in total you would end up paying over those timespans
    - Changes in terms: Notice
        - Issuers must give 45-day notice of significant changes to terms. This includes:
            - Interest rate hikes
            - Changes to annual fees, late fees, and cash advance fees
    - Changes in terms: Choice
        - Opt-out: Issuers must provide the choice to cancel the account before the changes go into effect.
            - If the consumer cancels, the issue may, subject to limitations, increase your monthly payments
            - Issuers may, ex., require consumers to pay the balance off in five years, or they can double the percentage of the balance used to calculate the minimum payment.
    - Opt-n for over-the-limit transactions
        - You must tell your credit card company that you want it to allow transactions that will take you over your credit limit. Otherwise, if a transaction would take you over your limit, it may be turned down. If you do not opt-in to over-the-limit transactions and your credit card company allows one to go through, it cannot charge you an over-the-limit fee.
        - If you opt-in to allowing transactions that take you over your credit limit, your credit card company can impose only one fee per billing cycle. You can revoke your opt-in at any time.
    - Highlights of substantive restrictions
        - No interest rate increases for the first year
            - Your credit card company cannot increase your rate for the first 12 months after you open an account. Exceptions:

        - If your card has a variable interest rate tied to an index; your rate can go up whenever the index goes up.
        - If there is an introductory rate, it must be in place for at least 6 months; after that your rate can revert to the "go- to" rate the company disclosed when you got the card.
        - If you are more than 60 days late in paying your bill, your rate can go up.
        - If you are in a workout agreement and you don't make your payments as agreed, your rate can go up.
- Increased rates apply only to new charges
    - If your credit card company does raise your interest rate after the first year, the new rate will apply only to new charges you make.
    - If you have a balance, your old interest rate will apply to that balance.
- Over-the-limit charges limited to once per cycle
- Caps on high-fee cards
    - If your credit card company requires you to pay fees (such as an annual fee or application fee), those fees cannot total more than 25% of the initial credit limit. For example, if your initial credit limit is $500, the fees for the first year cannot be more than $125. This limit does not apply to penalty fees, such as penalties for late payments.
- Restrictions for underage consumers
    - If you are under 21, you will need to show that you are able to make payments, or you will need a cosigner, in order to open a credit card account.
    - If you are under age 21 and have a card with a cosigner and want an increase in the credit limit, your cosigner must agree in writing to the increase.
- Reasonable penalty fees
    - Your credit card company cannot charge you a fee of more than $25 unless:
    - One of your last six payments was late, in which case your fee may be up to $35; or
    - Your credit card company can show that the costs it incurs as a result of late payments justify a higher fee.
    - In addition, your credit card company cannot charge a late payment fee that is greater than your minimum payment.
- Payments directed to highest interest balances first
    - If you make more than the minimum payment on your credit card bill, your credit card company must apply the excess amount to the balance with the highest interest rate.
    - There is an exception:
        - If you made a purchase under a deferred interest plan (for example, "no interest if paid in full by March 2012"), the credit card company may let you choose to apply extra amounts to the deferred interest balance before other balances. Otherwise, for two billing cycles prior to the end of the deferred interest period, the credit card company must apply your entire payment to the deferred interest- rate balance first.
- Additional fee protections

            - No inactivity fees
            - One-fee limit. No more than one fee for a single event or transaction that violates the cardholder agreement.
    - Explanation and re-evaluation of rate increases
        - If the credit card company increases the card's APR, it must state why.
        - If the credit card company increases the APR, it must re-evaluate that rate increase every six months. If appropriate, it must reduce the rate within 45 days after completing the evaluation.
    - Main themes of the Credit CARD Act
        - Abetting free market
            - Disclosures
            - Choices
        - Restraining market
            - Capping fees
            - Restricting credit to minors
            - Giving consumer the best of offered interest rates

Credit Reports

Credit Reports and the Fair Credit Reporting Act

- The Credit Bureaus
    - Equifax
    - Experian
    - Transunion
- State law causes of action against credit bureaus
    - Defamation
        - Barriers to defamation actions
            - qualified privilege
            - actual damages
    - Invasion of privacy
        - Barriers to invasion of privacy actions
            - Public disclose of private facts
            - Offensive and objectionable to reasonable person
    - State statutes on credit reports
        - Barriers to actions from state statutes
            - often pre-empted by federal law
- **Fair Credit Reporting Act**
    - "aimed at protecting consumers from inaccurate information in consumer reports an at the establishment of credit reporting procedures that utilize correct, relevant and up-to-date information in a confidential and responsible manner." Jones v. Federated Financial Reserve (6th Cir. 1998).
    - Consumer rights
    - Duties on information furnishers
        - Cannot furnish information with actual knowledge of errors
        - Cannot furnish information that is inaccurate after consumer has notified furnisher that the information is inaccurate

    - If information is disputed and furnisher provides information to a bureau, the furnisher must notify the bureau that the information is disputed
    - Generally must notify bureau of voluntarily closed accounts.
    - Must notify consumer when negative information is furnished to a bureau
- Duties on users
    - Users must inform a consumer if information from a report results in an adverse action against the consumer.
        - Must provide the name and address of the credit bureau that furnished the report
        - Must explain the reason for the adverse action
        - Must advise consumer of the right to obtain a free copy of the credit report and the right to dispute the accuracy of the report
    - Adverse actions include
        - Denial of employment, credit, insurance, or a license.
- Duties on bureaus
- Consumer rights v. bureaus: Seeing the Information
    - Consumers have the right to know what is in their file
        - Free from each bureau once every 12 months
        - Free after adverse action because of report
        - Free for people who are unemployed, on welfare, or the victim of identity theft
    - Consumers have the right to see their credit score
        - But not for free
- Consumer rights v. bureaus: Disputing and correcting
    - Governed by §611
    - Consumers have the right to dispute incomplete or inaccurate information.
        - The bureau must investigate the claim, unless frivolous.
    - Inaccurate, incomplete, or unverifiable information must be removed, usually within 30 days.
        - Accurate information may continue to be reported.
- Sunsetting bad information
    - Bureaus generally cannot report:
        - Negative information more than 7 years old
        - Bankruptcies more than 10 years old
- Access to Credit Reports
    - §604 exhaustively lists circumstances under which bureaus can provide reports.
    - Generally, only valid business reasons in connection with offering credit, insurance, employment, or a lease
    - Plus government investigations
    - Use by employers
        - Employers and potential employers must written obtain consent from consumers before obtaining a credit report on them.
        - Credit bureaus must not give out information about a consumer to an employer without the consumer's consent.
- Use for "prescreened" offers
    - Okay to check credit for making unsolicited offers of credit, BUT
    - Consumers can opt out - 1-888-5-OPT-OUT
- Remedies and Enforcement
    - Civil liability for willful non-compliance - Section 616

        - Compensatory damages
            - Actual, or
            - Statutory damages of $100-$1000
        - Punitive damages
        - Plaintiff's attorneys fees in any successful action
            - Defendant's attorneys fees for bad faith/harassment
    - Civil liability for negligent non-compliance - Section 617
        - Actual damages
        - Plaintiff's attorneys fees in any successful action
            - Defendant's attorneys fees for bad faith/harassment
    - Criminal liability - Section 619
        - Only where a person obtains information under false pretenses
        - Up to 2 years in prison
    - Administrative enforcement - Section 621
        - Enforcement by FTC
            - Injunctions
            - Up to $2500 per knowing violation after injunction or order from FTC
        - Enforcement by other federal agencies
        - Enforcement by states, in state or federal court

Cyberspace

Contents

- 1 Consumers in Cyperspace
- 2 General Notes:
- 3 Contracting in Cyberspace
- 4 The Uniform Computer Information Transactions Act (UCITA)

Consumers in Cyperspace

Johnson's Economic Information Point – the "long tail" *– RELATION of number of units saleable TO sku's (single product line that is the most specific unit that a company would look at in terms of what kinds of things it is producing – every sku has a UPC # and price)*

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    - Ex.) blue marker is one sku, black marker is another sku (used to track sales)
    - Ex.) book sales (drew a graph on the board) – stores would probably only stock on their shelves, the books that sell a lot of copies UNLESS you are Amazon.com, the online store!)
    - Ex.) itunes is another long-tail example (if you want to find something obscure)

General Notes:

- Cyberspace has done both good and bad for consumers (Issues)

- **GOOD** – enlarged the marketplace; supply and demand curves will always look good; maintains competition; more open and economically efficient market; cheaper for consumers; optimal amount of products produced and sold at an optimal price; may not be good for established players (companies)

- **BAD** – easy to be ripped off because you don't know who you are dealing with and cannot go complain to them in person
    - might be hard to get jx. over them if they are overseas; to get around this you could use trademark law (amazon is a registered trademark company so even if it costs more, you can probably rely on them more)
    - another way is to have a centralized market-maker that acts as a neutral party to keep track of reputation (like ebay – trust their ability to keep track of the many merchants on their site)

- **There is an incredible amount of centralization in the market**
    - only a few big players: amazon for general retail, ebay for auctioning, itunes for music
    - barriers to entry against someone like amazon seem low but are actually high because they can stock the "long-tail"
    - (ex.) barnes and noble can compete with amazon on the book level, but no others
    - market power of amazon is therefore high
    - (ex.) amazon tried to use price discrimination through using your purchasing history (they know what you are willing to pay for stuff because you have paid it in the past) – they got a lot of bad press and had to quit doing this

- there is little bargaining power on the web
- FTC created net fraud
- Identity theft is a major issue
- Issues with targeting consumers under 18 and distribution of pornography
- Use of cookies to trace where you go and what you buy – risk of credit information being stolen
- Warranty laws still apply on the web

Contracting in Cyberspace

HILL v. GATEWAY 2000

- Facts:
    - Consumers bought a pc over the phone from Gateway
    - Terms in the box containing the system had an arbitration clause
    - Hills accuse Gateway of racketeering
    - Gateway wants the arbitration clause enforced.
    - Hills argue that they did not notice the arbitration clause.

- HOLDING: A contract need not be read to be effective. If arbitration clauses are part of the contract, and the party had an opportunity to read the contract, then the arbitration clause must be enforced. Terms inside the computer box bind consumers who use the software after an opportunity to read the terms and fail to reject them by returning the product.
- NOTE:
    - This is an example of a "shrink-wrap license"
        - Not all courts enforce them.
    - **A license is not a contract** – a license is an affirmative defense; also **a warranty is not a contract**, it is a promise to make right with something (you can sue for breach of warranty b/c of the Magnusson Moss act); a warranty can be a term of the contract if you want but usually acts as an independent enforceable promise
    - Arbitrators get paid by the people who pick them to arbitrate disputes – there is incentive for them to come out on the side of the corporation who is paying the bills (why Gateway would rather arbitrate) – not favored by the independent consumer
    - Arbitration also avoids the risk of a class action lawsuit; for the consumer it is a way of saying you have no remedy because generally arbitration costs more than the computer itself!
    - Federal Arbitration Act – Title IX
        - Arbitration clause does not have to be prominent to be enforceable
    - This case represents a bad decision but it is good to note how they are made

SPECHT V. NETSCAPE COMMUNICATIONS CORP.

- FACTS: Netscape provided free computer software programs that enable and facilitate the use of the use of the Internet. Users simply clicked to allow these programs to download. There is a license agreement that accompanies each download, which contains an arbitration clause. There is no requirement that users to agree to the license by "clicking." The plaintiffs in this case challenge the enforceablility of the arbitration clause.
- RULE: First, the contract itself must be binding between the parties. Then, if binding, consider the enforceability of the arbitration clause. In order for a contract to be binding, both parties must assent to be bound.
- ANALYSIS: Downloading without a "click to proceed" notice is not a sufficient indication of assent to the license agreement. Thus, neither the agreement or the arbitration clause are enforceable.
- NOTES: understand that this is a distinct legal concept from a K (can be a feature of the K)
    - ***click-wrap license agreement*** – clicking on something to agree to the terms (like ProCD case)
    - ***browse-wrap agreement*** – by surfing a website you agree to the terms of use (Specht case)
        - less likely to be enforced against a consumer, more likely to be used against a competing company that used a robot to steal data from the website
    - ***shrink-wrap agreement*** – when you open a box and the agreement is inside (Gateway case)
    - Take-away → a lot of procedural battles involving the above agreements – but a **powerful weapon for corporations is the FAA**; **for consumers it is the class action and the jury**

The Uniform Computer Information Transactions Act (UCITA)

- A controversial proposed new article 2B to the UCC
- Opposed by numerous entities including the FTC
- A lot of fine print
- American law institute said it was too anti-consumer to put in the UCC so they went to states individually to enact it into state law
- Virginia has a huge computer industry and does not have a long tradition of pro-Π laws (still has contributory negligence, for example) – they enacted the UCITA, so did Maryland

Opinion piece entitled, "Why We Should Fight UCITA" by Richard Stalman

- author thinks computer programming should be done for fun and not for profit
- author is a leader in open-source software (important for the server side on the web)
- UCITA would threaten the free software community with disaster
- Big companies should be held with a strict standard of liability to their consumers
- UCITA does the opposite, making consumers and amateurs liable and not big companies