# ANTITRUST LAWS AND ENFORCEMENT

## ANTITRUST STATUES

### THE COMMON LAW AND CONTRACTS IN RESTRAINT OF TRADE

Earliest common law cases held that any contract in restraint of trade (my agreeing not to compete against you) was void *per se*, i.e., a nullity by definition. You could make the agreement, but you could not run to the court to enforce the agreement.. The rule was originally formulated to protect people from themselves from agreeing to not compete thus making them a public charge.

Later common law cases held that certain contracts in restraint of trade were enforceable. Specifically, contracts in restraint of trade would be enforced if they were 1) Ancillary to the core agreement (sale of a bakery); 2) partial (limited as to time, scope, and locality); and 3) reasonable ( in the interest of the public and the parties). The reasonableness requirement is strongly carried over to modern cases. These rules are still enforced today pursuant to the sale of business or employment contracts (i.e., non-compete clauses).

Originally monopolies were granted by the King as an exclusive right to deal in certain goods. Also prevalent were guild restrictions. The first case that squarely dealt with monopolies was *Darcy v. Allein,* 77 Enr. Rep. 1260 (1602) where an English judge held that Queen Elizabeth I's grant of an exclusive right to import playing cards was held invalid as against the common law. There was a royal grant of an exclusive import franchise to Bowes (who sold to Darcy) and a prohibition against domestic manufacture of cards. Presumably the public interest argument made by Bowes in favor of the franchise and monopoly was that card manufacturing was a waste of resources and the ne'er-do-well French should be allowed to spoil their economy in this exercise. The English court ruled against the franchise and, apparently, against royal monopolies in general. There is some vague reference to acts of Parliament supporting this judicial opinion.

What is important to know is the general background of a long history of common law responses to the tendency to monopolize. Also important to know is that the Statutes when enacted and first interpreted, were done so upon the backdrop of three hundred years of reported cases. Other elements of common law that set this backdrop are that predatory pricing and practices were ok, that is, not tortuous if conducted without force or fraud.

### AMERICAN ANTITRUST STATUTES

Two factors predominately led to the enactment of the Antitrust statutes—the formation of large national trusts and the actions of the railroads. First, in the late 1800's America was changing from agrarian to industrial. In addition, farming became more efficient and the cost of transportation was becoming more and more a part of the price of goods. RRs would use the need for transportation of farm products to charge high prices that could subsidize competitive routes. States responded to popular pressure and attempted to regulate RRs. These statutes were quickly trounced by the RRs on Constitutional Law grounds.

In addition to the actions of the RRs, many industries would form trusts in order to allegedly control output and prices. Examples were the Standard Oil Trust, American Cotton Trust, National Linseed Oil Trust, Sugar Trust, National Lead Trust and the Whiskey Trust. These factors combined to create a public swelling of support to protect the poor consumer from the ruthless, greedy capital forces. In the election of 1888, both parties had antimonopoly planks in their platforms.

The main statutes are the Sherman Act (1890) and the Clayton Act (1914).

***SHERMAN ACT (1890)***

Section 1 makes unlawful "every contract, combination, or conspiracy in restraint of trade" in interstate or foreign commerce. Section 2 prohibits monopolizing, attempts to monopolize, and combinations or conspiracies to monopolize any part of interstate or foreign commerce. Basics of a cause of action are: 1) a contract, combination, or conspiracy; 2) in restraint of trade; and 3) affecting interstate commerce. The commerce requirement is largely irrelevant. *See*, *Wickard v. Filburn*, S.Ct., where the Court held that wheat, grown on a small farm, for personal consumption, affects interstate commerce because the aggregate demand for wheat on a national level is diminished.

The maximum fine in the original Sherman Act was $5000. It was raised to $50,000 in 1955 and to $1,000,000 for corporations and $100,000 for other persons in 1974. The maximum term of imprisonment was set at one year in 1890; it was increased to three years in 1974.

> "Sec. 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.
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> 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 one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
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> Sec. 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 one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

***CLAYTON ACT (1914)***

The Clayton Act was passed in response to judicial over and under interpretation of the Sherman Act. See, *U.S. v. E.C. Knight*, where the Court held that the Sherman Act did not apply to the manufacture of commodities thus upholding a Sugar Trust; and *U.S. v. Trans-Missouri Freight Association*, where the Court held that every restraint of trade was illegal, regardless of the economic benefits of the arrangement. The Clayton Act and the Federal Trade Commission Act were passed to give businessmen some guidance on what was illegal.

The Clayton Act, together with the Federal Trade Commission Act, was passed in 1914 in the wake of the Supreme Court's decision in the govt.'s case against the Standard Oil Company. Although the Court held that Standard Oil had violated the Sherman Act, the vagueness of the Court's opinion created considerable disquiet (among both supporters and antagonists of anti-trust policy) concerning the scope and application of the Act. The desire for a more precise enumeration of antitrust violations expressed itself in the singling out in the original Clayton Act of four practices for specific regulation (price discrimination, section 2; tying and exclusive-dealing contracts, section 3; stock acquisitions, section 7; and interlocking directorates, section 8) and in the creation of a commission, the Federal Trade Commission, that was expected to enumerate additional specific restrains by interpretation of section 5 of the Federal Trade Commission Act, which forbade "unfair methods of competition."

Section 6 of the Clayton Act, exempting labor from the anti-trust laws, is noteworthy. The main purpose of labor unions is to raise wages by suppressing competition among workers, and before 1914 the Sherman Act had been applied to union activities, notably in connection with the famous Pullman strike of 1894. The precise scope of the labor exemption from the antitrust laws involves difficult questions, but this interesting subject is not developed in detail here.

Section 3 prohibits sales on the condition that the buyer not deal with competitors of the seller where the effect may be substantially lessen competition or tend to create a monopoly in any line of commerce. Includes tie-in sales, exclusive dealing, and requirements contracts.

Section 4 allows private enforcement of the Antitrust laws with treble damages.

Section 7—Mergers—prohibits acquisitions or mergers where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country.

Section 8—Director Restrictions—prohibits one person from being a director of competing businesses.

***FTC ACT (1914)***

The FTC Act created the FTC, with broad powers to enforce the Antitrust laws. FTC has exclusive jurisdiction to enforce the FTC Act and concurrent jurisdiction to enforce Antitrust laws. Private parties have no standing to enforce the FTC laws. Section 5 of the FTC Act prohibits "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

The original Act forbade only "unfair methods of competition." The prohibition of "unfair or deceptive acts or practices" was added by amendment in 1938, after the Commission had long held that the term "unfair methods of competition" included false advertising and other deceptive practices as well as monopolistic practices. The question of the precise scope of the term "unfair methods of competition" as applied to anticompetitive practices will recur from time to time throughout the book. Briefly, the term has been interpreted to forbid practices unlawful under the Sherman and Clayton Acts, and then some.

***OTHER STATUTES***

There have been two very important substantive amendments to the Clayton Act as well as a handful of minor revisions. The Robinson-Patman Act of 1936 and the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In 1936 the Robinson-Patman Act overhauled the price-discrimination provision of the original act (section 2), creating the complex provision, which is not generally highly regarded by economists. Robinson-Patman Act (1936) prevents sellers from discriminating among buyers based on price in certain circumstances. This is largely unenforced. The prima-facie case is: 1) engaged in commerce; 2) to discriminate in price between different purchasers; 3) of commodities of like grade and quality; 4) where the effect may be to substantially lessen competition; and 5) to injure, destroy or prevent competition. Defenses are that the effect is de minimis, cost differential due to quantity or other factors, changing conditions, or meeting competition.

In 1950 section 7 of the original act was amended to make it reach mergers and other asset acquisitions as well as stock acquisitions.

Hart-Scott-Rodino (1976)—The DOJ's investigative power is increased, mergers require-clearance, and a waiting period before the mergers in certain circumstances. Sate Attorneys general may sue in *parens patriae* under the Acts.

Three important procedural changes were made in the Clayton Act during 1976. The first change, which appears as sections 4C-4H, was enacted in response to Hawaii v. Standard Oil Co., 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). Hawaii held that states could not bring actions on behalf of their residents, either for particular damages suffered by the residents or for harm to the state's economy. The 1976 amendment establishes an elaborate procedure for the institution of suits and the distribution of any recovery.

The third addition is section 7A, which requires firms that acquire the voting securities of other firms to notify the Gov't before the acquisition is consummated. The acquiring firm must provide detailed information about the nature and market shares of the enterprises. Regulations have been promulgated that define the submission requirements with great particularity. Although antitrust officials can (and often do) shorten the mandatory wait between notice and consummation, the provision affords time for the Gov't to bring suit to halt an acquisition before it takes place. This provision grew out of concerns that the remedy of divestiture of assets after acquisition was not satisfactory.

Several more procedural changes were made in September 1980. Congress amended all three damages provisions (sections 4, 4A, and 4C(a)(2)) to allow courts to award prejudgment interest against defendants that multiply the issues or act in other dilatory ways. The provisions (which are not reproduced) essentially create a penalty for bad faith litigation. (At the same time Congress amended 28 U.S.C.A. 1927 to allow a court to require attorneys personally to pay the costs and counsel fees created by dilatory or vexatious conduct.)

Finally, the 1980 statute revised section 7 to refer generally to "persons;" it had been limited to acquisitions by (or from) corporations. It also inserted in section 7 an "affecting commerce" jurisdictional provision. The changes to section 7 apply only to mergers after September 1980.

## CASE LAW ON HORIZONTAL MONOPOLY

### HORIZONTAL RESTRAINTS

These are characterized as agreements among competitors at the same level or distribution. If Wal-Mart, K-mart, and Target stores were to agree to restrain trade, those would be horizontal restraints. Vertical is like GM-distributor-dealer. Horizontal restraints fall under the Sherman Act, Section 1. Every contract, combination, of conspiracy in restraint of trade is illegal. Elements of a Section 1 claim are that there is a contract, combination, or conspiracy and that this activity is in restraint of trade. Both must be shown although in some cases, merely showing the conduct occurs is enough to show a per se violation, Others are evaluated under the rule of reason (where all the pro competitive effects are considered).

***PRICE FIXING***

***UNITED STATES V. ADDYSTON PIPE***[1]

85 F. 271 (6th Cir. 1898) (Taft, J.)

TERMS:

"Proceeding in equity" –suit not for damages but injunction.

"Common law"–judge made law

"void contract"–not enforceable at law

[1] Cases in bold are available on <www.clemson.edu/~maloney>.

PARTIES: Plaintiff is the United States through the Attorney General. Defendant is Addyston Pipe Company as well as many other cast-iron pipe manufacturers.

FACTS: Defendants would rig bids for projects. Defendants got together to allocate territories among the U.S., specifically central and western states. For each territory, defendants would run an auction among themselves for the amounts they could fill certain orders for. The prices were designed to be set at levels lower than eastern manufacturers could compete, but higher than free, regional competition would produce. (Allowed due to the high cost of freight). Territories equaled about 30% of the market.

Once the defendants would agree on who would get the bid from the contractor, the chosen firm would make a "low" bid. The other firms would bid above the "chosen" firm's bid in order to give the illusion of competition. The winning firm would then distribute a "bonus" to other defendants to distribute the rents. AG learned of the practice, by a firm that had been frozen out, and sued for injunction. Court granted permanent injunction.

ANALYSIS: The Court began by discussing "naked" versus "ancillary" restraints on trade. "Naked" is straight up, actions taken to restrain trade (i.e., fix prices or limit competition). "Ancillary" is a restraint secondary to a legitimate purpose (Partnerships, sales of businesses, etc.) It looked to old common law as discussed in prior classes. Court concluded that this was a "naked" restraint on trade and was therefore illegal. Defendant tried to argue that their price was reasonable and that they could not affect the entire market (b/c they controlled 30%). Court stated that in this "naked restraint" reasonableness was irrelevant, and even if reasonableness was relevant, the prices here were unreasonable. This was the beginning of the per se versus rule of reason approach. Further, 30% market share was not too little for a violation.

KEY POINTS: 1) difference between "naked and ancillary and impact that has on the analysis; 2) appreciation for the common law interpretation overlaid on the statute.

- *Board of Trade of the City of Chicago v. U.S.* (1918)

This case involves a rule imposed by the Board of Trade on its members that restricted them from trading after hours at prices other than those announced during a period immediately following the close of trading on the exchange. The court recognized that the Board of Trade was a market and that it was necessary to impose certain rules of conduct on the market members. Hence, this action was ruled to be reasonable and not in violation of the Sherman Act.

***UNITED STATES V. TRENTON POTTERIES, ET AL.,***

273 U.S. 392 (1927)

TERMS:

"et al."–and others

"Respondents"–in the Supreme Court, parties are called petitioners or respondents when jurisdiction is under a petition for certiorari.

"Petition for certorari"–mode through which Sup. Ct. exercises jurisdiction. Parties must ask for Sup. Ct. to hear case. Certorari is an order to a lower court to send their record.

"indictment"–The beginning of a criminal case where the grand jury (made up of normal citizens) finds there is probable cause to believe there has been a violation of the law. In Federal court, unless waived, all felonies must proceed under indictment but misdemeanors can proceed under

"informations" where the prosecutor alleges a crime has been committed.

"Jury charge"–the judge's instructions on the law to the jury. Jury's must follow the law as given, and erroneous jury charges are the most common reason for reversal of a verdict.

FACTS: Respondents were defendants (including the trade group "Sanitary Potter's Association") at trial. All were criminal defendants accused of fixing prices for toilets. On Appeal there was no question whether they combined to fix prices. Court charged the jury that agreements to fix price were of themselves unreasonable restraints on trade. The government apparently wanted the judge to charge that only undue or unreasonable restraints on trade were illegal and that the focus should be on the injury to the public.

ANALYSIS: The Court began by saying that the Sherman Act and the cases interpreting it assume that monopoly and price control are evil to competition. The Defendants tried to assert as a defense that the prices they fixed were reasonable, so there was no Sherman violation. The Court rejected this notion by stating: 1) any price fixing is assumed injurious to competition; and 2) reasonable prices today are unreasonable tomorrow; and 3) Government, to enforce laws, should not be charged with monitoring on a day-to-day basis the reasonableness of prices. Prices must be determined by the market and not a small group of producers.

KEY POINTS: Horizontal Price fixing (specifically the power and intent to fix prices) is per se illegal, i.e., the Court does not care if it is pro-competitive or not.

- *Appalachian Coals, Inc. et al., v. U.S.* (288 U.S. 344 (1933)

TERMS: "injunction"–Court order requiring thing be, or not be done.

FACTS: Defendants were 137 coal producers in the Appalachians. They formed a selling agent (Appalachian Coals, Inc.) to act as their exclusive agent for sales. Producers owned Appalachian Coals, Inc, in proportion the their production. Sales were likewise apportioned. ACI set all prices.

ANALYSIS: Government's Argument—Plan eliminates competition between sellers in the scheme. Producer's Argument—API provides economies of scale and makes all producers compete as a whole with others. Ultimate effect is to promote competition.

COURT STATES: Test is clear "only unreasonable restraints illegal." "A close and objective scrutiny of particular conditions and purposes is necessary in each case." The Court analyzed this case under the rule of reason approach and concluded that API was procompetitive. Compelling was that there was 1) no limit on production of members; 2) a merger of all members would not be illegal; 3) and there was neither the intent nor power to fix prices.

QUESTION: Why different than Trenton Potteries? 1) Some claim differences because of depression and deplorable conditions of the industry; 2) no "power or intent to fix prices" and 3) no limits on production by members.

KEY POINTS: 1) key is the "power or intent to fix prices" in the per se v. rule of reason analysis. [Generally every time you have a rule of reason analysis, someone can come up with pro-competitive evidence]; 2) rule of reason analysis considers all factors surrounding the arrangement6 to see if the questioned conduct is pro competitive; 3) this case is seen as a momentary lapse in the judicial interpretation of pricing fixing as a per se violation.

***U.S. v. SOCONY-VACUUM OIL CO. ET AL.***

310 U.S. 150 (1940)

FACTS: Defendants were tried for criminal violations of Sherman §1. They had combined to purchase "distress gas" from independent refiners in order to ultimately stabilize prices in the market. Problem was "ruinous competition" because oil wells have with them an incentive to be pumped even if it costs more to pump than you can sell the oil for because abandoned wells cannot be reopened. Defendants successfully purchased gas from independent. refiners and sold the gas at a specific mark-up to retailers. This did raise and stabilize prices.

ANALYSIS: Court held this was per se illegal because the defendants had the power and intent to fix prices by buying distress gas from refiners. That the scheme was to stabilize prices, or that the original prices were competitively determined was irrelevant. Power or intent to fix prices, even with competitive inputs is per se illegal.

KEY POINT: Power or intent to fix prices is per se illegal.

"The reasonableness of prices has no constancy due to the dynamic quality of the business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system. But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." (pp. 221-222)

- *Goldfarb v. Virginia State Bar*, 421 U.S. 723 (1975)

TERMS: "State Bar"–in most states, like SC and GA, attorneys are only allowed to practice law if the Supreme Court of the State allows you to. State Bars are administrative bodies mandated by the Supreme Court of the State to keep track of attorneys, promulgate ethical recommendations, informally recommend adjudications of lawyer grievances, and control Continuing Education requirements. Only the Supreme Court can disbar an attorney, but may do so at the recommendation of the State bar. It is called a bar because in England, the barristers stand near the "bar", a sort of barricade that bifurcates between the gallery and the barristers. Members of the judiciary are "on the bench".

FACTS: Goldfarb was homeowner who wanted to buy a house in Fairfax County Virginia. The Fairfax County Bar published minimum fee schedules of 1% of property value for a title examination. Goldfarb then contacted many others who would not charge less than the suggested minimum. Goldfarb sued. claiming violation of Sherman §1 for price fixing.

ANALYSIS: Bar argued that "learned professions" like lawyers were exempt from the Sherman Act, that the fees were merely suggested, and that the State of Virginia was the actor. Court held that Congress intended no exemption from the Sherman Act for learned professions, that title examinations were "commerce" (i.e., service for money), that the fees were effectively mandatory in that 1) everyone charged the fees, and 2) there was prospective discipline for not charging the fees; and since there was no law respecting minimum fees, there was no state action.

KEY POINTS: Sherman Act applies to everyone.

- *National Society of Professional Engineers v. U.S.*, 435 U.S. 679 (1978)

In this case there were ethical canons against competitive bidding, or even discussing price in the engineering business, until the customer chose a professional engineer. U.S. sued for price fixing. Engineers defended by claiming the learned profession exception (rejected) and public policy (also rejected). The public policy argument was that allowing engineers to bid would cause low bids to get the contracts. These low bids in turn would give engineers the incentive to cut corners in design and supervision thus leading to increased safety risks for the public at large. The Court decided that the arrangement would be under the Rule of Reason and while not discounting that safety might be affected by competitive bidding, the concerted nature of the canon was illegal. Individual decisions to do the same thing would have been fine. Rule of reason does not recognize a defense that competition itself is unreasonable.

***BROADCAST MUSIC. INC. V. COLUMBIA BROADCASTING SYSTEM, INC.***

441 US 1 (1979)

FACTS: This case involved a blanket license for music by copyright owners. BMI and ASCAP are the copyright agents for almost 100% of the music you hear. Bars, restaurants, and radio stations must pay a license fee to BMI or ASCAP. The place then has the right to publicly pay the music for their customers. CBS sued under AT law for price fixing. Court said this was rule of reason because blanket license was a new product. Under rule of reason, arrangement efficient. Licenses are cheap, cost about $500 per year.

- *Arizona v. Maricopa County*, 457 U.S. 332 (1982)

TERMS:

Summary Judgment–a way to get rid of a case before trial. Newscasts call this “getting kicked out of Court. For summary judgment the court assumes all disputed facts are true in favor of the non-movant.

Dissent–in this case, Justices dissented. This is the justices opportunity to say they disagree with the majority's decision and to explain why. The dissent has no force of law, but it may provide arguments for lower courts, and allow parties to track shifting jurisprudence as the Court changes.

FACTS: Doctors got together to fix maximum prices. They created the “Foundation.” 70% of the doctors in the area were members. Members and insurers agreed to accept the maximum scheduled prices as full payment. Members could charge the uninsured any price, and could charge less than the maximum.

ANALYSIS: Issue here, as in all Antitrust, is the application of the rule of reason versus the per se approach. Since this is price fixing, albeit maximum prices, the per se rule applies. Foundation claimed argued arrangement subject to rule of reason because: 1) the agreements fix maximum prices (like the stabilization in *Socony*); 2) among members of a profession (like Goldfarb); 3) involve an industry with which the judiciary has little experience (goes to rule of reason v. per se application); and 4) are pro-competitive (again so what, this is per se).

Important in this case is the Court's statement of why we have a per se approach. The Court stated: The costs of judging business practices under the rule of reason, however, have bee reduced by the recognition of per se rules. Once the Court has decided that the rule of reason would condemn a practice, it is then, for the sake of brevity and clarity, per se illegal. “Conclusive presumption” (i.e., a rule of law). Fit is not perfect. Court then shows gravamen of per se rule’s problems and other bright line tests in law: “For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreement that a full blown inquiry might have proved to be reasonable." Price restraint is bad because it discourages competition.

DISSENT: 1) No decrease in competition–anyone may go anywhere and pay anything, unless subject to the foundation agreement. Everyone free to leave. 2) Insurers represent consumer interests–insured indifferent if all costs covered; insurer is not. Insurers only one who can "restrain medical costs." Dissent argues that the key inquiry is whether the purpose is to stifle competition. [Is the Court ignoring that competition is stifled, but it is OK in this case?].

KEY POINTS: The reason for a *per se* rule (eliminates costly litigation) and the downside of it (bad decisions).

### *NCAA v. Board of Regents*

468 U.S. 85 (1984)

FACTS: NCAA negotiated deals with its members and networks to provide a uniform contract for televising football games. The NCAA plan was to spread television and money over many institutions. Big name football schools, formed the CFA in an effort to secure more of the booty from their televised games. CFA negotiated another deal with NBC that provided more revenue for CFA members. NCAA threatened adverse action against CFA members (against football and otherwise) who went along with the CFA deal. CFA members sued under Sherman Act section 1.

ANALYSIS: First, this case was decided under the rule of reason. Per se was not used because college football could not exist without collaborative effort. Without concerted action, rules would not exist, etc. This concerted action is a restraint on trade because schools cannot compete based on, for instance, having the most violent team in town, they are restrained by common rules. This leads to the rule of reason approach.

The Court then went through a thorough rule of reason analysis and concluded that the arrangement was an unreasonable restraint on trade. Decreased the production of televised football. Key of Sherman is to allow consumer preference to determine price and output. This situation limited consumer preference because schools were limited in the number of times they could appear, and television stations were limited because they had to bid on the entire NCAA package.

NCAA responds that it does not have market power, thus any effect is de minimis. Court rejects: 1) Fact—it does; 2) Market power irrelevant in determining naked restriction.

How is like or different than *Appalachian Coals*? Different because: 1) NCAA would limit total production by having only 82 home games televised; 2) NCAA would fix prices. Appalachian Coals would not limit production, and would try to sell as much as, and at the highest available prices. Data: After NCAA-1983–89 games, $69 million, 195 games, $45 million (excluding regional and local syndication) by 1986–99 games (excluding regional and local), $53 million