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# THE IMPLICATIONS OF ANTITRUST LAWS IN THE MEDIA INDUSTRY

**May 24, 2022**

**10:45 - 11:35**

**Session 41**

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# UNDERSTANDING THE ANTITRUST STATUTES

BORGES - ANTITRUST -MFM/BCCA 2022

# ANTITRUST STATUTES

- ▶ **Sherman Antitrust Act of 1860**
- ▶ **Clayton Act of 1914**
- ▶ **The Federal Trade Commission Act of 1914**
- ▶ **Robinson-Patman Act of 1936**
- ▶ **Lanham “Trademark” Act of 1946**
- ▶ **The Antitrust Procedure & Penalties Act of 1976**
- ▶ **State Antitrust Statutes**

# The Sherman Antitrust Act of 1890

- ▶ Prohibits contracts, combinations and conspiracies in **restraint of trade** in interstate commerce or with foreign nations.
- ▶ Felony to conspire to *restrain trade*; or to *monopolize* (or attempt to monopolize).
- ▶ Definition of Price-Fixing (per the FTC)
  - ▶ An agreement, written, verbal or implied (express or implied) among competitors that raises, lowers, or stabilizes prices or competitive terms

# RESTRAINT OF TRADE

- ▶ “Combination / Conspiracy” --4 elements:
  1. Knowledge
  2. Common purpose
  3. *Actual* restraint, not merely *facilitating*
  4. Intent to restrain trade
- ▶ “Conspiracy” = unity of purpose, common design, meeting of minds re: unlawful purpose

# SIGNS OF RESTRAINT OF TRADE/PRICE FIXING

- ▶ Price fixing generally involves any agreement between competitors to tamper with prices or price levels, or terms and conditions of sale for commodities or services.
- ▶ Generally speaking, price fixing involves an agreement by two or more competing producers of a specific commodity, or competing providers of a particular service, in a defined geographic area, to raise, set or maintain prices for their goods or services.
- ▶ It may take place at either the wholesale or retail level and, although it need not involve every competitor in a particular market, it usually involves most of the competitors in the particular market.
- ▶ ***See DOJ archives***

# CLAYTON ACT

- ▶ 15 U.S. Code §18 states:
  - ▶ No person engaged in commerce ...shall acquire, directly or indirectly, ... the whole or any part ... or assets of another where ... the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly
  - ▶ This applies likewise to the acquisition of multiple businesses or assets



# ROBINSON PATMAN ACT (1936)

- ▶ The Robinson-Patman Act was designed to prevent discriminatory practices adversely affecting free competitive enterprise, to preserve competition generally, and to protect small businesses which are usually unable to buy in quantity against large competitors.
- ▶ Equally unlawful for any person engaged in commerce to “knowingly induce or receive a discrimination in price”

# ROBINSON PATMAN ACT (1936)

- ▶ **The Robinson-Patman Act of 1936 makes it**
  - ▶ Unlawful to “discriminate in price between different purchasers of commodities of like grade and quality”... where the
  - ▶ **Effect of such discrimination may be substantially**
    - ▶ to **lessen competition** - or
    - ▶ Tend to **create a monopoly** - or
    - ▶ To **injure, destroy or prevent competition** with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them

# PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT

- No necessity for agreement, combination, association or conspiracy - only needs one entity
- At least two transactions must have occurred
- Price Discrimination includes:
  - different price to different purchasers of physical goods
  - inequitable discounts or rebates
  - differences in terms and conditions of sale
  - preferential credit terms [Credit Terms Equals Price]
- Simply speaking - makes it illegal to sell the same or similar products at different prices to competing purchasers when competition will be impacted

# PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT

- ▶ Only applicable to sale of tangible goods
- ▶ Not applicable to services or other intangible items
  - ▶ NOT applicable to transportation or **broadcast** since neither transportation nor broadcast services involve tangible goods

# FTC ADVICE ON REFUSAL TO SUPPLY

- ▶ “In general, a seller has the right to choose its business partners. A firm’s refusal to deal with any other person or company is lawful so long as the refusal is not the product of any anticompetitive agreement with other firms or part of a predatory or exclusionary strategy to acquire or maintain a monopoly.”
- ▶ Draws a line between legal independent decision-making on the one hand and illegal joint or monopolistic activity on the other.

# U.S. DEPARTMENT OF JUSTICE

# U.S. DEPARTMENT OF JUSTICE

- **U.S. Department of Justice - Antitrust Division**
  - The mission of the Antitrust Division is to promote economic competition through enforcing and providing guidance on antitrust laws and principles.
- **Prosecutes**
  - Restraint of Trade circumstances
  - Unlawful Mergers & Acquisitions

# USA v. GOOGLE LAWSUIT UNDER SHERMAN ANTITRUST ACT

- Google was sued under the Sherman Antitrust Act over its search business alleging the company used exclusive distribution deals with wireless carriers and phone makers to lock out competition
- Action was commenced under Section 2 of the Sherman Act, 15 U.S.C. § 2, to restrain Google LLC (Google) from unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices, and to remedy the effects of this conduct.
  - Google accounted for nearly 90% of all general search queries in recent years
  - Google so dominant that the word is both a noun and a verb



# RELIEF SOUGHT BY THE DOJ IN THE GOOGLE LAWSUIT

- Adjudge and decree that Google acted unlawfully to maintain general search services, search advertising, and general search text advertising monopolies in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;
- Enter structural relief as needed to cure any anticompetitive harm;
- Enjoin Google from continuing to engage in the anticompetitive practices described herein and from engaging in any other practices with the same purpose and effect as the challenged practices;
- Enter any other preliminary or permanent relief necessary and appropriate to restore competitive conditions in the markets affected by Google's unlawful conduct;
  - LAWSUIT ONGOING

# USA v. GRAY TELEVISION INC. and QUINCY MEDIA, INC.

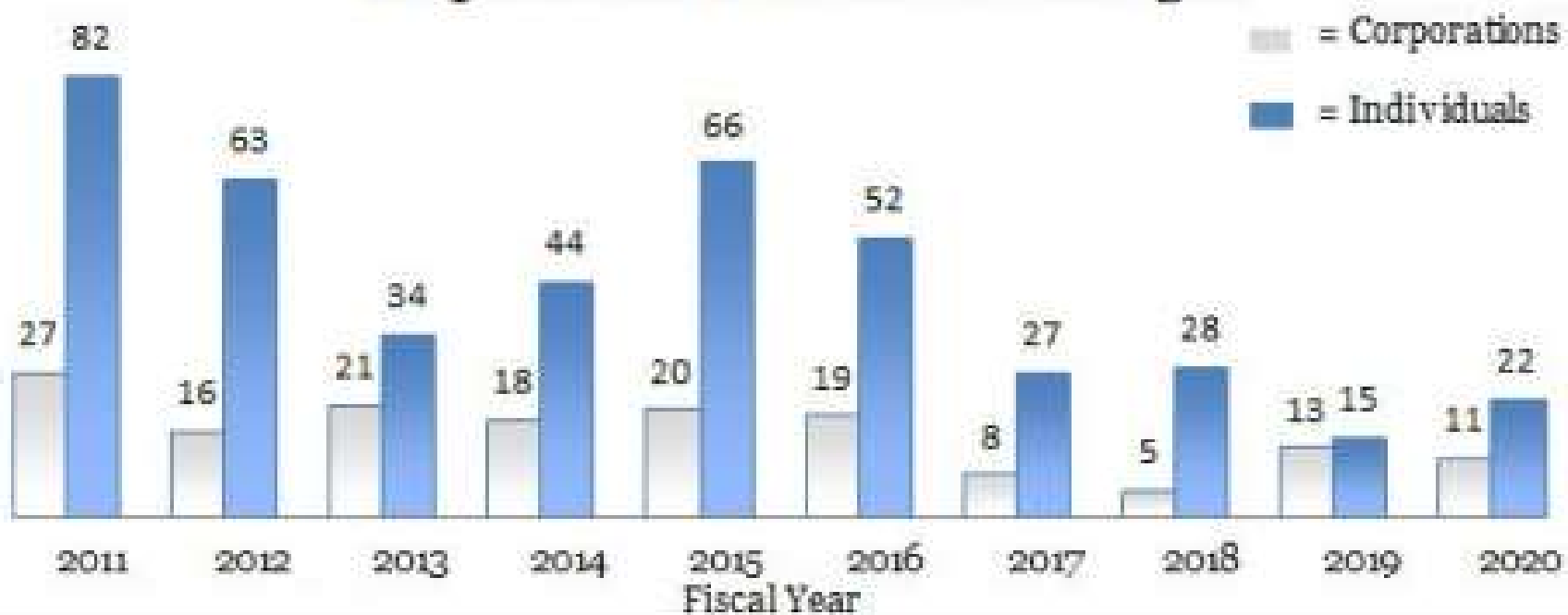
- DOJ Intention was to Stop Mergers that would have been injurious to consumers
  - USA claimed that merger of Gray and Quincy would restrict competition in violation of the Clayton Act.
  - Resolution reached whereby Gray and Quincy agreed to divest themselves of various assets in order to proceed with an approved merger

# USA v. VILLAGE VOICE MEDIA, LLC

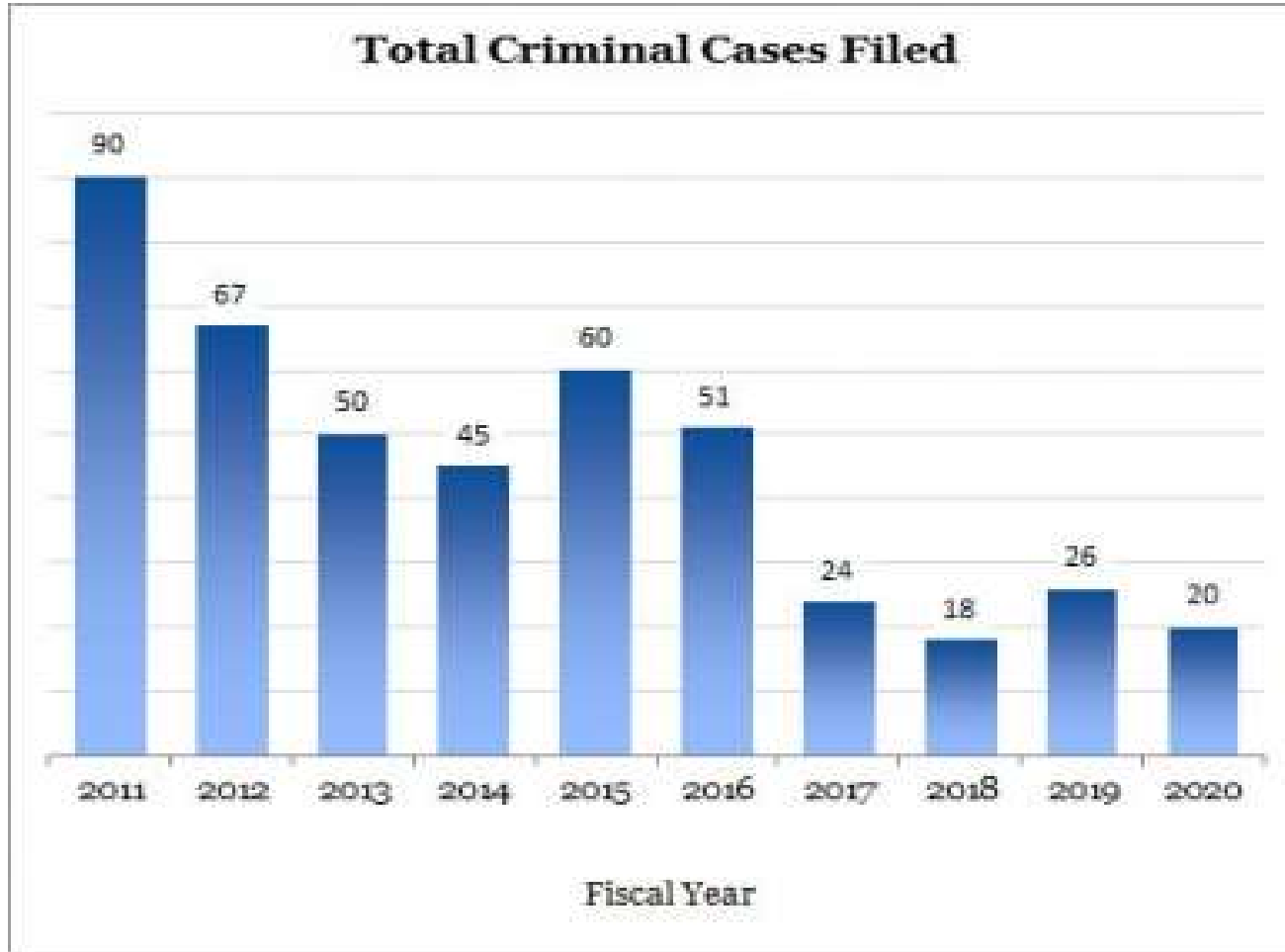
- Two publishers of alternative newsweeklies, apparently tired of competing with each other in Cleveland and Los Angeles--two cities in which their operations overlapped and where their profits had been "pinched"--simply swapped markets
  - Each agreed to withdraw from a market, effectively guaranteeing the other publisher a monopoly in that market.
  - They papered the agreement as though it were a merger, one paid the other \$2 million, and the other paid \$11 million.
  - DOJ claimed it was not a merger in any sense.
  - The agreements provided for no meaningful integration of assets, such as logos, articles, or staff.
    - Instead, when they reached their agreement, one publisher immediately shut down its operation in Cleveland, while the other shut down its operation in Los Angeles.
- DOJ reached a settlement with the publishers that required each to sell the critical assets of the former publication to an entrant capable of restoring the lost competition.

# CORPORATIONS AND INDIVIDUALS CHARGED THROUGH 2020

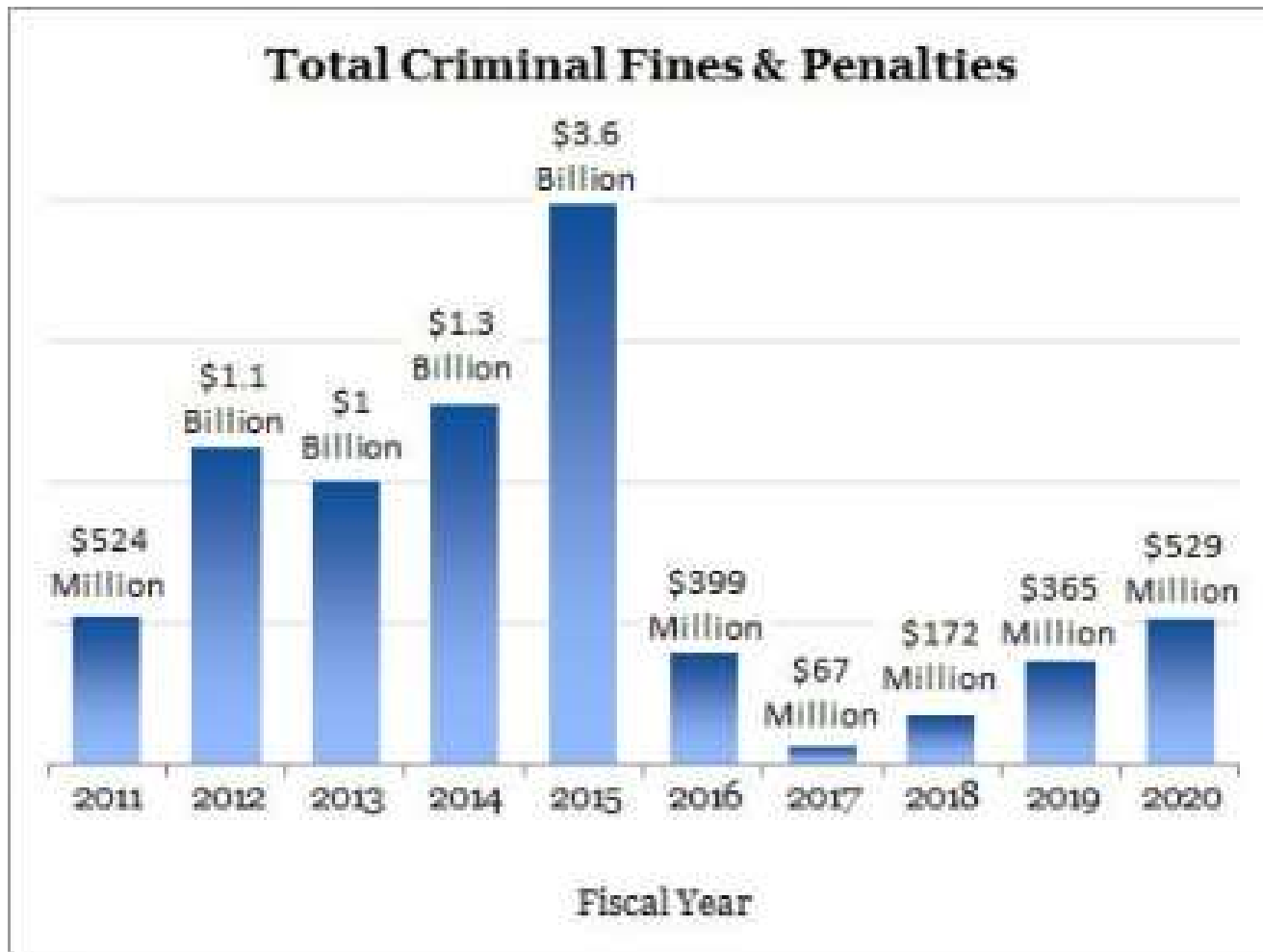
**Corporations & Individuals Charged**



# TOTAL CRIMINAL CASES FILED THROUGH 2020



# CRIMINAL FINES THROUGH 2020



**EXCHANGE OF CUSTOMER  
INFORMATION AND THE  
ANTITRUST LAWS  
[NOT JUST FOR CREDIT GROUP  
MEETINGS BUT AT ALL  
GATHERINGS AND IN OFFICE AS  
WELL]**

# PRICE FIXING ISSUES FOR CREDIT GRANTORS

- Discussion *beyond* a “mere announcement”
  - Agreement to *maintain prices*, with an enforcement mechanism (mfr./distrs.)
  - Agreement to fix or set *payment terms*



# PRICE FIXING ISSUES FOR CREDIT GRANTORS

- Agreements to establish or adhere to uniform price discounts;
- Agreements to eliminate discounts to all customers or certain types of customers;
- Agreements to adopt a specific formula for the computation of selling prices;
- Agreements on terms and conditions of sale, including discounts based on volume (monthly versus annually), or other differentials that affect the actual price of the advertising
- **NOTE: discounts or price differentials are PERFECTLY LEGAL as long as they are done independently and unilaterally**

# REFUSAL TO DEAL UNDER SHERMAN ANTITRUST ACT

- **PoolCorp. Litigation**
- **Over an 8 year period of time, PoolCorp adhered to a policy that it would refuse to deal with any pool product manufacturer that also sold products to new distributors looking to compete with PoolCorp.**
- **Because of this policy, manufacturers of more than 70% of all pool products refused to sell to any new distributor seeking to compete with PoolCorp.**

# POOLCORP LITIGATION CONT'D.

- **FTC alleged:**
  - **PoolCorp used illegal means (refusal to deal) to exclude new competition**
  - **PoolCorp maintained its monopoly position in local markets**
- **Settlement was reached between FTC and PoolCorp.**
- **More than \$16 million was paid in settlement in 2016**

# FTC ADMONISHMENT

- ▶ Price fixing relates not only to prices
- ▶ Antitrust scrutiny (by the FTC) may occur when competitors discuss the following topics:
  - ▶ Present or future prices
  - ▶ Pricing policies
  - ▶ Promotions
  - ▶ Bids
  - ▶ Costs
  - ▶ Capacity
  - ▶ **Terms or conditions of sale, including credit terms**
  - ▶ Discounts
  - ▶ Identity of customers
  - ▶ Allocation of customers or sales areas
  - ▶ Production quotas
  - ▶ R&D plans

# CREDIT TERMS = PRICE

## ➤ Catalano Inc. v Target Sales (Supreme Court 1980)

“Extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price”

# CASELAW SPECIFICALLY PERMITS THE EXCHANGE OF CREDIT INFORMATION

- ▶ **Cement Manufacturers (US Sup Court 1925)**
  - ▶ gathering and disseminating information ... free to act upon or not...cannot be held ... an unlawful restraint upon commerce
  - ▶ no discussion of current prices, or market conditions

# CASELAW cont'd

- ▶ **Maple Flooring Mfrs.' Ass'n (US Sup Court 1925)**
  - ▶ The public interest is served by certain information exchanges
  - ▶ competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction

# CASELAW cont'd.

- ▶ **Michelman v Clark Schwebel Fiberglass (2<sup>nd</sup> Cir 1976)**
- ▶ **Unlike exchanges regarding prices which usually serve no purpose other than to suppress competition...dissemination of information concerning creditworthiness of customers aids sellers in gaining information necessary to protect themselves against fraudulent or insolvent customers**
- ▶ **Still requires independent judgment and no agreement on action**



# ANTITRUST COMPLIANCE AT ALL TIMES

- ▶ Credit information exchanged by email (or fax) is under the same rules as that exchanged at credit group meetings
- ▶ A trade creditor should be cognizant that any credit information exchanged must be done in accordance with Federal Antitrust guidelines.
- ▶ **Telephone exchange of information is NOT RECOMMENDED**
  - ▶ There can be no discussions of any prices, terms, company policies or credit lines.
  - ▶ Remarks must be confined to present and completed transactions only, with no mention of any future plans of action.
  - ▶ All information exchanged is strictly confidential and not to be disclosed to anyone else

# Independent Exchange of Information Format

- ▶ If telephonic, record the call
- ▶ If by email or fax, keep a copy of the request and the response
- ▶ Provide only the information requested
  - ▶ Do not volunteer additional information
- ▶ Do **NOT** give credit limit information

# TRADE ASSOCIATION MEETINGS FORMAT

- ▶ **Independent representative present**
- ▶ **Written agenda followed**
- ▶ **Minutes of all meetings maintained**
- ▶ **No discussions outside the meeting**

# PERMISSIBLE DISCUSSIONS

- ▶ **Delinquent account information -NO discussion of *future* (i.e., intent).**
- ▶ **Exchange of factual credit information**
  - ▶ Do NOT give credit limit information
- ▶ **Reports of placement for collection**
  - ▶ ONLY if you have actually placed the account
- ▶ **Reports of initiation/continuation of lawsuit**
  - ▶ ONLY if the lawsuit is actually commenced and/or continuing

# PERMISSIBLE DISCUSSIONS

- ▶ **Reports of judgment obtained**
- ▶ **Reports of other factual information provided by customer**
  - ▶ Bankruptcy information, **ONLY** if confirmed
  - ▶ Sale of all or a portion of the business **ONLY** if confirmed
- ▶ **Exchange of contact information**
  - ▶ Accounts payable personnel
  - ▶ Corporate officers
  - ▶ New buyer

# NON-PERMISSIBLE DISCUSSIONS

- ▶ Credit terms.
- ▶ Production limits or Pricing
- ▶ Group Boycott
  - ▶ **Whether or not to do business with a particular customer**
  - ▶ **Involuntary Petition in Bankruptcy**
- ▶ Price fixing (key phrases could be misconstrued)
- ▶ Market or Territory Allocation
- ▶ Future Intention

# GROUP BOYCOTTING

- ▶ Concept of *sufficient market power*
- ▶ Hallmarks of illegal group boycott:
  1. Denial of access to a competitively useful commodity or service
  2. *Collective* refusal to deal
- ▶ Group boycotting can exist even through action of only one party

# INVOLUNTARY PETITION IN BANKRUPTCY

- ▶ **CAN BE DEEMED A GROUP  
BOYCOTT**
- ▶ **MUST NOT BE DISCUSSED  
BEFOREHAND**



# INVOLUNTARY PETITION IN BANKRUPTCY

- ▶ **Petitioning Creditors must not have claims which are subject to *bona fide disputes* as to dollar amount or liability**
- ▶ **Petitioning Creditor(s) can be penalized (fees & costs) for an improper involuntary petition in bankruptcy**

# INVOLUNTARY PETITION IN BANKRUPTCY - PROPER STEPS

- ▶ **MAKE INDEPENDENT DECISION**
- ▶ **GET COMPANY AUTHORIZATION**
- ▶ **RETAIN ATTORNEY**
- ▶ **SEEK OTHER CREDITOR(S)**

# NON-PERMISSIBLE DISCUSSIONS AT CREDIT GROUP MEETINGS

- ▶ Side conversations among a few members
- ▶ Extraneous comments
- ▶ Whispering
- ▶ Cell phone sharing

# ELECTRONIC CREDIT EXCHANGE

- ▶ **More common than ever before**
- ▶ **Antitrust Rules still apply**
  - **Request for references**
  - **Giving references**
- ▶ **Electronic data lasts forever**

# ELECTRONIC CREDIT EXCHANGE

## ▶ RECOMMENDED LANGUAGE ON ELECTRONIC TRANSMISSIONS

This Credit Reference is provided at the request of \_\_\_\_\_ and is based upon information maintained in my file as a result of my company's experience with \_\_\_\_\_.

No judgment or recommendation concerning credit decisions is given or implied by this information. The recipient must determine its own credit decision. The data contained in this report is for information purposes only.

# ELECTRONIC CREDIT EXCHANGE

## ▶ REQUIRE AFFIRMATION IN ADVANCE

The credit information you are about to view electronically is accurate information contained in my records and you are requesting same in order to determine the creditworthiness of \_\_\_\_\_.

You may make **one** printed copy of this Electronic Information for your own use. You may not distribute, transmit or otherwise circulate the Electronic Information to anyone else.

# ELECTRONIC CREDIT EXCHANGE

- ▶ **CREATE MANDATORY CONSENT**
- ▶ **I have read and understand this Use Agreement and Agreement to be bound by its terms**
- ▶ **Lock mechanism to disable anyone from proceeding without accepting restriction**

# PERMISSIBLE ACTIVITIES

- ▶ **All Changes must**
  - ▶ Be in good faith
  - ▶ Follow company guidelines
  - ▶ Be well-documented
- ▶ **Make Changes because it makes sense to do so NOT because others are doing so**
- ▶ **Placement of account for collection or suit - if internal records merit this (NOT because others are doing so)**



# PERMISSIBLE ACTIVITIES

- ▶ **Any Decision to Refuse to sell to/deal with a particular customer**
  - ▶ **Must be unilateral**
  - ▶ **Must be an independent decision**

# SUMMARY

- ▶ **Compete vigorously**
- ▶ **Consider your market power**
- ▶ **Consult with counsel when specific problems occur**
- ▶ **Maintain your records**

# WANDA BORGES

*WANDA BORGES, the principal member of Borges & Associates, LLC., has been specializing in commercial insolvency practice and commercial litigation representing corporate clients throughout the United States for forty years.*

*She is admitted to practice before the courts of the State of New York and the United States District Court for the Southern, Eastern, Northern and Western Districts of New York, the United States District Court for the District of Connecticut, the United States District Court for the Eastern District of Michigan, the Second Circuit Court of Appeals and the Supreme Court of the United States. She is a member of several professional organizations, including the American Bar Association, American Bankruptcy Institute. As a member of the Commercial Law League of America, she is a Past President of the League, is a Past Chair of its Bankruptcy Section, is a past Chair of the Creditors' Rights Section and currently serves on the Bankruptcy Section and Creditors' Rights Section Executive Council. She is currently the Vice-Chair of the Board of Associate Editors for the Commercial Law World and other CLLA publications. She is the President of the CLLA Fund for Public Education.*

# WANDA BORGES

*She is a regular lecturer for the National Association of Credit Management (NACM) and its various affiliates. She has prepared and continues to update courses on "Advanced Issues in Bankruptcy", "Basics in Bankruptcy", "Current Cases in Bankruptcy", "Creditor's Committees", "Credit and Collection Issues", Sarbanes-Oxley Act of 2002, "Litigation Issues" and "Antitrust Issues" which have been presented at past NACM Annual Credit Congresses and at trade credit association meetings. Even prior to the passage of the "Red Flags Rule", Ms. Borges worked with the NACM and the FTC to determine the applicability of the Rule to business creditors. Ms. Borges has prepared and presents seminars on the Red Flags compliance issues for the NACM, its various affiliates, corporations, collection agencies and various other organizations. Ms. Borges had been a faculty member for the NACM's Graduate School of Credit and Financial Management at Dartmouth College from 1994 through 2020. Ms. Borges has been a faculty member for the National Institute on Credit Management, a program jointly sponsored by the Commercial Law League of America and the National Association of Credit Management*

# WANDA BORGES

*She has been a regular lecturer for the American Management Association on the Uniform Commercial Code and Fundamentals of Business Law for the Non-Lawyer, and for both the American Management Association, the Media Financial Management Association (formerly the Broadcast Cable Financial Management Association) and the Broadcast Cable Credit Association on Creditor's Rights in Commercial Litigation and Bankruptcy Matters. Additionally, she has presented seminars and webinars for the National Conference of Bankruptcy Judges, the American Bankruptcy Institute, The Commercial Law League of America, The International Association of Commercial Collectors, various local and national Bar Associations, Thomson West Publishing Company, the New York State Food Service Distributors Association and Riemer/Plus.*

*Ms. Borges frequently presents live seminars, tele-seminars and webinars for various trade credit groups, many of whom are managed by NACM Affiliate Associations. Additionally, she has prepared and presented these educational programs for the American Automotive Leasing Association, the National Chemical Credit Association, the National Cement Trade Credit Group, the Health Industry Manufacturers Association, the Beauty and Barber Manufacturers Credit Association, the New Hampshire Association of Broadcasters and the Credit Association for Satellite History.*

# WANDA BORGES

*She has served as the Managing Editor and still is one of the contributing authors of the Manual of Credit and Collection Laws published by the National Association of Credit Management and is a contributing author to its Principles of Business Credit.. She is a member of NACM's Editorial Advisory Committee. She is an Associate Editor for the Commercial Law League of America's magazine "The Commercial Law World" and has contributed to the CLLA's Law Journal and the Bankruptcy Section Newsletter. Her treatise Hidden Liens: Who is Entitled to What? was published in the Fall, 1998 Edition of the Commercial Law Journal. She has authored Antitrust, Restraint of Trade and Unfair Competition: Myth Versus Reality, published by the NACM. Ms. Borges is the lead author and Editor-in-Chief of Enforcing Judgments and Collecting Debts in New York published by Thomson West Publishing Company and updated annually. She routinely publishes articles for the National Association of Credit Management "Business Credit" magazine and has published articles for its "Fraud Prevention News". Upon the passage of the BAPCPA in 2005, Ms. Borges prepared and presents educational programs on this new legislation and co-authored The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 - An Overhaul of U.S. Bankruptcy Law, published by the NACM.*

# WANDA BORGES

*She has published articles for the Broadcast Cable Credit Association "Creditopic\$" and continues to publish articles for the "The Financial Manager" on Commercial Creditors' Rights in Bankruptcy, Bankruptcy issues generally, the FTC's Red Flags Rule, the ECOA and Regulation B, Electronic Invoicing, "Dot Com" Businesses, and on Advertiser/Agency Liability; and has prepared the "white paper" on the discontinuance of notarization of broadcast invoices. She is a co-author of the National Association of Broadcasters' book Out of the Red and into the Black, as well as the Broadcast Cable Credit Association's Credit & Collection Handbook. Ms. Borges has appeared as a guest on the Fox News Channel program, "Fox on Consumers", speaking on consumer bankruptcy exemptions. In February, 2010, Ms. Borges prepared and presented a program entitled "Avoiding Bankruptcy Pitfalls: Creditors' Rights and Professional Obligations in Bankruptcy Proceedings" for the Georgia Bar Association and the Institute of Continuing Legal Education in Georgia" which was televised live and telecasted to satellite locations throughout the State of Georgia.*

# WANDA BORGES

*She has conducted "in-house" seminars on credit, collection, secured transactions and insolvency for corporate clients such as Agrium, Inc., Bristol-Myers Squibb, Burlington Industries, Inc., Cosmair, Inc., Doric Enterprises, Ferguson Enterprises, Inc., Ingram, Mars Incorporated, McKesson Corporation, Mobil Chemical Company, Multi-Arc Corp., Pfizer Inc., R.J. Reynolds Tobacco Company, Sandvik, Inc., Sharp Electronics Corporation, Simon & Schuster Corp., SONY Corporation, Southeastern Freight Lines, Inc., Stanley Works, Sumitomo Corporation and SunTrust Bank.*

*She is a past Chair of the Board of Trustees of Mercy College and served as a member of that board for nine years. She has served on the board of Regents College, and has taught Business Law at Seton College in Westchester County, New York. She is a past Chair of the Broadcast Cable Financial Management Association.*



# WANDA BORGES

*Ms. Borges actively participates in community events. She is a Leader of Song and has directed the Youth Music Ministry at her parish, Our Lady Star of the Sea. She remains a member of the Fairfield County Chorale for which she served as its president for the years 1995 through 1997, Executive Vice-President of the Fairfield County Chorale during the years 2012 through 2013 and served several years as a director on its Board.*

*She received the "Human Valor" Award by Noticias del Mundo, a New York based spanish-language newspaper in 1985, the Mercy College Alumni Association's "Professional Achievement" Award in 1991, honorary membership in Delta Mu Delta - The National Honor Society in Business Administration - in May, 1995 and in October, 1996, was awarded the Mercy College Trustee's Medal for outstanding dedication to her profession and alma mater. She is listed in Who's Who of American Women. In September, 2000 she was named one of the "50 Outstanding Alumni" of Mercy College. In February, 2001 she received the "Career Achievement Award" from the Broadcast Cable Credit Association. In May, 2004, she received the "Strength in Numbers Recognition Certificate" from the NACM. In December 2006, she was named one of "2006 Top25 Most Influential Collection Professionals" by Collection Advisor Magazine. Ms. Borges was recently inducted into Mercy College's Alumni Hall of Fame celebrating its 60<sup>th</sup> year in existence. In November, 2010, Ms. Borges received the "Robert E. Caine Award for Leadership" from the Commercial Law League of America. Ms. Borges has been included on the New York Super Lawyers - Metro Edition list (Bankruptcy & Creditor/Debtor Rights) each year since 2009. Ms. Borges received a "Woman of Distinction" Award from St. Catharine Academy in April, 2015. Ms. Borges is listed in Who's Who in America.*