

**NACM WESTERN CREDIT
CONFERENCE 2023**

**ANTITRUST COMPLIANCE:
WHAT THE CREDIT EXECUTIVE
NEEDS TO KNOW**

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**U.S. DEPARTMENT OF
JUSTICE**

**THE NATION'S WATCHDOG
FOR ANTRITRUST
VIOLATIONS**

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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**

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**COVID DID NOT STOP
U.S. DEPT OF JUSTICE ACTIVITY**

- Stopped Mergers that would have been injurious to consumers
- Ongoing Litigation against Google
- New Litigation against Amazon
- Litigation against generic drug companies and a cancer treatment center
- Price Fixing suit against one of the nation's largest chicken producers

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**LAWSUITS IN ONE
MANUFACTURERS' INDUSTRY**

- 9thCircuit Court of Appeals Decision August, 2015
- In Re: Musical Instruments and Equipment Antitrust Litigation against NAMM, Guitar Center Inc & Stores, Fender, Yamaha, Gibson, Hoshino, & Kaman
- Factors alleged in the complaint
 - Defendants shared a common motive to conspire
 - The manufacturer defendants acted against their self-interest
 - The manufacturer defendants simultaneously adopted substantially similar MAP policies
 - Retail prices for guitars and guitar amplifiers rose during the class period as the number of units sold fell

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**LAWSUITS IN
ONE INDUSTRY**

- Allegations in Complaint
 - Guitar Center pressured each of the manufacturer defendants to adopt MAP policies
 - The Manufacturers, in turn, agreed among themselves to adopt the policies
 - NAMM facilitated these illegal agreements
- Question for the Court:
 - Whether Plaintiffs pleaded sufficient facts to provide a plausible basis from which we can infer the alleged agreements' existence

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9th Circuit Ruling
Vindicated Manufacturers

- **No Common Motive – merely consciously parallel conduct**
- **Each of the manufacturers responded to Guitar Center’s pressure and coercion in exchange for Guitar Center’s agreement to purchase large volumes of stock.**
 - **Manufacturers’ decision to heed similar demands made by a common, important customer do not suggest conspiracy or collusion**
- **Ample independent business reasons existed why each of the manufacturers adopted and enforced MAP policies**
 - **Self-interested independent parallel conduct in an interdependent market**

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9th Circuit Ruling

- **Mere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement**
 - **SCOTUS ruling: Trade Associations often serve legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry and promoting demand for products and services**

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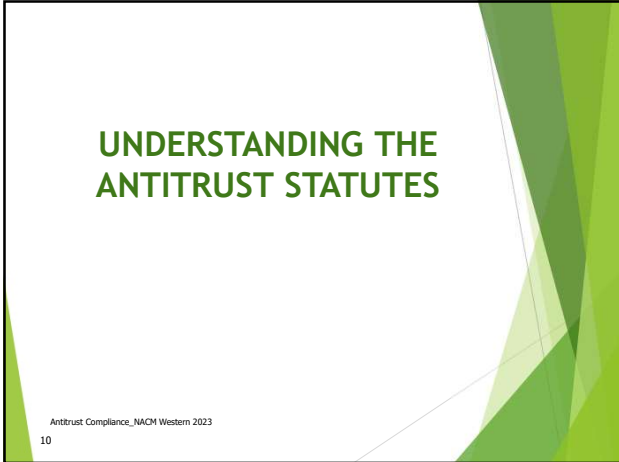
9th Circuit Ruling

- **Plaintiffs do not allege any facts connecting the purported price increase to an illegal agreement among competitors.,**
 - **Parallel price increases, without more, are no different from other forms of parallel conduct**
- **The customer was important to the manufacturers and ostensibly exercised its considerable market power to demand similar terms from each manufacturer for its own benefit.**
 - **The manufacturers’ similar response to this market pressure is a hallmark of independent parallel conduct – not collusion**

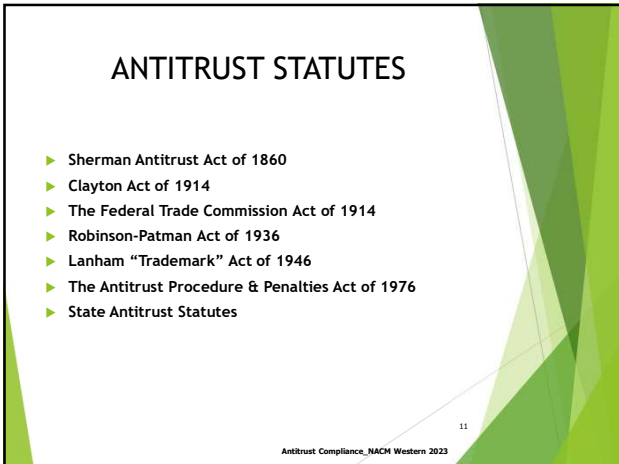
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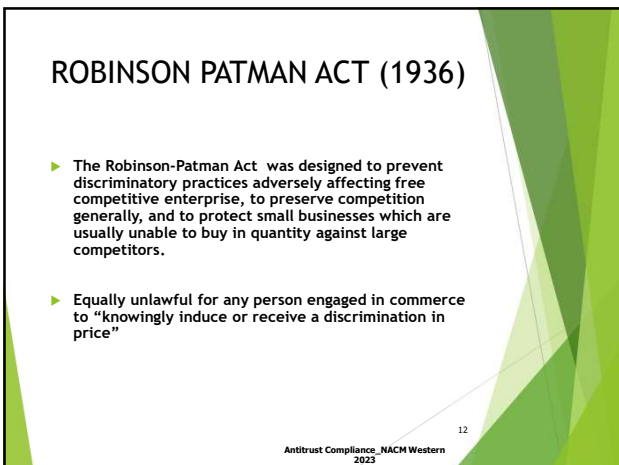
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ROBINSON PATMAN ACT (1936)

- ▶ **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

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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

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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

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NOT PRICE DISCRIMINATION

- ▶ Price differences resulting from cost of manufacture, sale or delivery
- ▶ Price differences resulting from quantities being sold
- ▶ Choosing who will be your customer/Refusing to sell to a particular potential customer
- ▶ Price changes from time to time resulting from
 - ▶ Changing conditions affecting the market or marketability of the goods
 - ▶ E.g. perishable goods, obsolescence of seasonal goods
 - ▶ Global Pandemic
 - ▶ Sales in good faith in discontinuance of business in the goods concerned

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REFUSAL TO SELL

- ▶ **1919 lawsuit against Colgate & Co.**
 - ▶ Colgate threatened to withhold products
 - ▶ Colgate policy terminated any wholesaler or retailer that did not comply with Colgate policy
- ▶ **U.S. Supreme Court – Colgate Doctrine**
 - ▶ *Purpose of antitrust statute is to "preserve the right of freedom of trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long-recognized right of a ... manufacturer engaged in any entirely private business, freely to exercise its independent discretion as to parties with whom it will deal."*

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**FEDERAL TRADE COMMISSION
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.

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HOW TO HANDLE CUSTOMERS' PUSHBACK FOR BETTER/LONGER TERMS

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ALONG COMES YOUR CUSTOMER DEMANDING BETTER/LONGER TERMS

- ▶ **Sales Department insists that credit must change/extend terms**
 - ▶ Argues that customer generates a lot of revenue
 - ▶ Argues that you are losing business to competitors
 - ▶ Argues that this is a large volume customer so you **MUST** change/extend terms

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"ALL MY OTHER VENDORS HAVE ACCEPTED MY SLOWER PAYMENTS"

- ▶ **Common tact by customer**
- ▶ **Customer claims **EVERYONE** has said "yes"**
- ▶ **Customer claims it will stop buying from you unless you accept extended terms**

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THINGS TO CONSIDER BEFORE MAKING A DECISION

- ▶ **Is there a credit application in place that contains contractual terms?**
- ▶ **Is there an actual written contract in place**
 - ▶ Consider other documents which may create a contract
 - ▶ Do you have Requirements Contract in place?
 - ▶ Is there a long term purchase order?
 - ▶ Are your goods needed for a specific project?
 - ▶ E.g. - new store opening
 - ▶ E.g. - construction project
- ▶ **Are you important to this customer?**
- ▶ **Is the customer very important to you?**

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INVESTIGATE BEFORE YOU ACT

- ▶ **Run a credit report**
- ▶ **Check with your credit group to ascertain what is happening with other vendors**
- ▶ **Review customer's financials**
 - ▶ Determine if this pushback is due to some more serious financial issue of the customer

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REVIEW YOUR COLLECTION SYSTEM

- ▶ **How has customer paid in the past?**
- ▶ **How is customer paying more recently?**
- ▶ **What is your collection activity?**
 - ▶ Are you doing anything about the slow pay or merely accepting it?
- ▶ **Have you communicated with customer to determine why the slowdown?**
- ▶ **Are there disputes which are causing slow pay?**
- ▶ **How fast does your company resolve disputes?**

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ALTERNATIVES TO CHANGING CREDIT TERMS

- ▶ Offer a discount for prompt pay
- ▶ Charge and collect interest for slow pay
- ▶ Switch to electronic payments
- ▶ Accept credit card payments
- ▶ Customers with contracts must adhere to contract terms or be in breach

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ESSENTIAL COMMUNICATION WITH CUSTOMER

- ▶ Discussions with your customer may discern that this is just a temporary pushback to fit customer's current needs.
 - ▶ Let your customer know that the slowdown is noticed and not acceptable
 - ▶ Don't change any of your terms
 - ▶ Determine (internally) how slow you will allow the customer to get before pursuing collection activities

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HOW TO HANDLE A FORMAL DEMAND

- ▶ More and more trade credit grantors are receiving formal demands for extended terms
- ▶ Extended terms dictated across the board to all vendors
- ▶ Not merely a verbal request but a verbal or written mandate

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CONSIDER YOUR STRENGTHS

- ▶ **Is your product/service unique?**
- ▶ **Are you the only source of this product/service?**
- ▶ **Is your product/service competitively priced?**
- ▶ **Is your product specially manufactured for this customer?**
- ▶ **Can the customer get your product elsewhere at the same or even lower price?**

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CONSIDER YOUR WEAKNESSES

- ▶ **How important is this customer to you?**
 - ▶ **What type of product/service does your customer purchase from you?**
 - ▶ **What is the quantity of product which your customer purchases from you?**
 - ▶ **Is this customer a distributor of your products?**
 - ▶ **If so, you likely have a contract**

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UNIFIED COMPANY DECISION

- ▶ **Credit**
- ▶ **Sales**
- ▶ **Finance**
- ▶ **Legal**

All must be involved in the decision to fight back or accept the customer's push back on terms

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PROTECT YOUR COMPANY

- ▶ **Implement Guidelines**
- ▶ **Create Protocols**
- ▶ **Document Communications and decisions**
- ▶ **Document the justification for pricing/terms differences**

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IMPORTANT TOOLS

- ▶ **You customer may already be receiving favorable pricing/terms from you**
- ▶ **Remind your customer of Robinson Patman prohibitions**

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IF I GIVE IN TO CUSTOMERS' PUSHBACK, AM I VIOLATING ROBINSON-PATMAN?

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**CASELAW
INJURY TO COMPETITION**

- ▶ **“does not ban all price differences charged to different purchasers of commodities of like grade and quality; rather the Act proscribes price discrimination only to the extent that it threatens to injure competition.” [“Volvo Trucks N. Am., Inc. v. Reeder-Simco GMG, Inc., 546 U.S. 164 (2006)"]**
- ▶ **“competition would not typically be harmed if non-competing purchasers received different prices for the same goods.”[ibid]**

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**CASELAW
LIVING ESSENTIALS**

- ▶ **Lawsuit commenced in 2018 by a group of small wholesalers claiming Living Essentials violated Robinson Patman by:**
 - ▶ **Granting lower price to Costco than to other wholesalers**
 - ▶ **Giving better promotional allowances & rebates**
- ▶ **Allegation was that Costco and other wholesalers were competitive because both sold 5-Hour Energy to independent retail stores**

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**CASELAW
LIVING ESSENTIALS**

- ▶ **Living Essentials Defenses:**
 - ▶ **Smaller wholesalers failed to prove that they compete with Costco for the same customers or that the alleged price discrimination injured competition.**
 - ▶ **Living Essentials employs a multi-level marketing strategy aimed at different distribution channels, which focus separately on club stores like Costco and convenience stores like the ones served by plaintiffs.**
 - ▶ **Living Essentials issued instant rebate coupons administered by club-store retailers to encourage new customers to try its products, and such discounts would not work in other channels (including small wholesalers that sell primarily to convenience stores), because those types of resellers could not be expected to pass the discount on to customers.**

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LIVING ESSENTIALS JURY VERDICT
OCTOBER 2019

- ▶ **Jury was persuaded that Costco and smaller wholesalers operated in different segments of the market**
- ▶ **There was no injury to competition - Because**
 - ▶ **No competition exists between them**
 - ▶ Evidence needed to be shown that the disfavored resellers lost customers in head-to-head competition with favored resellers

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DOES THE TRADE CREDITOR HAVE ANY PROTECTION?

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MEETING COMPETITION DEFENSE

- ▶ **A Seller can rebut an allegation of price discrimination by**
 - ▶ **Showing that his lower price to any purchaser or purchasers**
 - ▶ Was made in good faith
 - ▶ To meet an equally low price of a competitor

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TO WHOM AND WHEN IS MEETING COMPETITION DEFENSE AVAILABLE?

- **Defense is available to a Trade Credit Grantor**
 - **When offering pricing (payment/credit terms) on an area-wide basis**
 - **When offering those terms to new as well as old customers**
 - **Whether or not the price differential has been caused by a decrease or an increase in the pricing (payment/credit terms) offered**

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MANDATORY CRITERIA

- **Price being met by seller is lawful**
 - **Not predatory or the result of collusion**
 - **Not available if seller knew or should have known "as a reasonably prudent businessman" that price was unlawfully discriminatory under the Act**

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MEETING COMPETITION GENERAL RULES

- **In Good Faith, offer lower price (payment/credit terms) to meet an equally low price of a competitor**
- **Verify existence of competitor's offer**
- **Do not exceed competitors in size, duration or scope**
- **Refuse to meet the competitor's offer if illegal**

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TEST FOR DETERMINATION OF VALID MEETING COMPETITION DEFENSE

- "Show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor" [FTC v. A.E. Staley]
- "A good faith belief, rather than an absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient" [U.S. v. United States Gypsum Co.]
- Seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition [US Gypsum]

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GUIDELINES TO ESTABLISH THE MEETING COMPETITION DEFENSE

- Reasonably believe the situation is of competitive necessity
- Believe that granting a lower price will meet the lower price of a competitor
- Make substantial effort to verify actual price or credit terms
 - **DO NOT CONTACT COMPETITOR**

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HOW RIGID ARE THESE GUIDELINES?

- Accepting the word of sales personnel without corroboration may not be enough
- Accepting the word of your customer without substantiating it may not be enough
- Further investigation may be necessary to satisfy the requisite showing of good faith
- **Reiterate:**
 - Defense can be satisfied by efforts falling short of interseller verification
 - Don't contact your competitor

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ESTABLISHING DEFENSES

- **Seller must show particular prices/payment terms were given**
 - **in good faith**
 - **to meet equal or equivalent prices/payment terms offered or supplied by a competing seller**
 - **with reasonable belief that its offer is necessary to meet a competitor's offer**

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"GOOD FAITH" CRITERIA

- **Seller must prove that it had good reason to believe in good faith that it was meeting a lower, different or better price (or credit term)**
- **Standard of proof is that of a prudent business person responding simply and fairly to what is reasonably believable**

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"GOOD FAITH" CRITERIA cont'd.

- **Existence of sufficient facts concerning the nature, time and duration of the lower competitive offers which "would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor"**

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VERIFY EXISTENCE OF COMPETITIVE OFFER

- Any and all records relating to threats to stop buying from you
- Reports from other customers of similar discounts
- Efforts to corroborate by seeking documentary evidence
- Documentation as to an appraisal of the reasonableness of the competitor's offer in terms of available market data
- Past experience of the seller with the buyer

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WHEN ALL ELSE FAILS: CREATE AN INTERNAL RECORD

- The date of competitor's offer
- Name of competitor making offer
- Name of the Customer
- Terms and conditions of the offer
- Source of the Information
- A statement as to why you believe your source
- Details as to what investigation was conducted

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INTERNAL RECORD cont'd.

- Website or other medium where offer is stated
- Terms and conditions of the offer
- Investigation into customer to determine that it meets requirements for offer

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

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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

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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

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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*

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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

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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”

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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

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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

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CASELAW cont'd.

- ▶ **Michelman v Clark Schwebel Fiberglass (2nd Cir 1976)**
- ▶ Unlike exchanges regarding prices which usually serve no purpose other than to suppress competition...dissemination of information concerning the 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

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**U.S. DEPARTMENT OF JUSTICE
Business Review Letter**

- ▶ **1994 Response to NACM**
- ▶ **“engage in exchange of debtor credit history information among members who participate in the ... industry. ... information exchange will be limited to credit history information that will assist members in implementing unilateral credit policies and practices, as opposed to exchange of information on terms or conditions under which members do business with customers. ...”**

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**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

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**TRADE ASSOCIATION
MEETINGS FORMAT**

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

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COMPANY POLICIES REGARDING INFORMATION EXCHANGE

- ▶ Many companies have a written policy regarding information exchange between or among competitors
- ▶ One mandate: If you are in a discussion or group meeting and an improper discussion begins,
 - ▶ Demand that discussion be terminated immediately
- ▶ If discussion does not cease
 - ▶ Leave the meeting
 - ▶ Announce your departure
 - ▶ Make sure it is recorded somewhere (in minutes or in an email or text) that you are leaving the meeting

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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

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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

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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

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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

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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

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**INVOLUNTARY PETITION IN
BANKRUPTCY**

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

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**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**

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**Involuntary Petition in
Bankruptcy – Proper and
Necessary Steps**

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

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NON-PERMISSIBLE DISCUSSIONS AT CREDIT GROUP MEETINGS

- ▶ **Side conversations among members**
- ▶ **Extraneous comments**
- ▶ **Laughter**
- ▶ **Whispering**
- ▶ **Cell phone sharing**

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ELECTRONIC CREDIT EXCHANGE

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

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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.

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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.

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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

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PERMISSIBLE ACTIVITIES

- ▶ Credit Term Changes
- ▶ Price Changes to Meet Competition, etc.
 - ▶ See slides above
 - ▶ Must be in good faith
 - ▶ Must follow guidelines
 - ▶ Must be well-documented
- ▶ Placement of account for collection or suit - if internal records merit this (NOT because others are doing so)

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PERMISSIBLE ACTIVITIES

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

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SUMMARY

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

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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 more than 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, the New York State Academy of Trial Lawyers, 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 and Creditors' Rights Sections' Executive Councils and currently serves on the CLLA Eastern Region Executive Council. She is currently the Co-Chair of the Board of Associate Editors for the Commercial Law World and other CLLA publications. She is a Past President of the CLLA Fund for Public Education

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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

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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.

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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.

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WANDA BORGES

She has published articles for the Broadcast Cable Credit Association "CreditopicS" 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.

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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.

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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 1995, 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 60th year in existence. In November, 2010, Ms. Borges received the "Robert E. Coine 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.

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