Chapter 5

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Pushing the Frontiers of Antitrust Law: Recent Developments

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Synopsis

An Archer-Daniels-Midland executive once said to a roomful of competitors:

> [Our customers] can be smarter than us if we let them be smarter . . . . They are not your friends. They are not my friends. You're my friend. I wanna be closer to you than I am to any customer 'cause you can make us . . . money . . . . Let's put the prices on the board. Let's all agree that's what we're gonna do and then walk outta here and do it.[1]

The agreements reached at the meeting where this statement was made constituted illegal price fixing and resulted in what was at the time the largest antitrust fine in history, as Archer-Daniels-Midland (ADM) paid $100 million to the United States, and its co-conspirators paid another $95 million. This settlement is representative of both the traditional antitrust violations that the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have pursued, and the new approaches to government enforcement that have been implemented. Traditionally, antitrust prosecutors have intensely scrutinized agreements among illegal competitors to root out price fixing, bid rigging, and dividing of customers

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1 United States v. Archer-Daniels-Midland, 96-CR-00640 (N.D. Ill. Oct. 15, 1996) (transcript of videotaped meeting). On file with author.

or markets. However, the guardians of competition recently have expanded the scope of their investigations to confront the antitrust challenges raised by an increasingly globalized, deregulated, and technology-intense economy. As both producers and consumers of goods in this new economy, how the frontiers of antitrust law are being pushed by these agencies has increasing relevance to the energy and minerals industries.

This chapter discusses recent developments in the enforcement of U.S. antitrust law. A review of traditional antitrust principles will help place the expansion of antitrust enforcement in context.

§ 5.01. Traditional Antitrust Enforcement.

Congress enacted the Sherman Act[2] to "bust the trusts" and restore free and fair competition. The Sherman Act provides that "[e]very 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."[3] As the Supreme Court explained in *Northern Pacific Railway v. United States*:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[4]

Since every trade agreement or regulation restrains trade, the Supreme Court has deemed unlawful only those restraints of trade that "unreasonably" restrict competition.[5] Nevertheless, some restraints such

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2 Sherman Act, 15 U.S.C. §§ 1, *et seq.* (1994).

3 *Id.*

4 Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958).

5 *See* Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).