

9.6.06

Lesson 4: What is unfair competition?

🕒 45 minutes

LESSON OVERVIEW

In this chapter students will look at a case involving companies that make generic drugs. The monopolization strategy of Mylan and the other defendants had direct impact on the price of two anti-anxiety drugs. This case underscores the importance of the government's role monitoring competition in the marketplace and how consumers can be hurt by antitrust violations.

OUTCOMES

As a result of this lesson students will be able to:

- *Identify and define unfair competition practices;
- *Describe the facts in the *Mylan* case and identify the parts of the case where the actions of the company collide with the public policy concerns behind antitrust law;
- *Explain why the actions of the corporation violated the Federal Trade Commission Act;
- *Describe how consumers were injured by this case;
- *Analyze a case and demonstrate communication skills in a mock press conference;
- *Identify two important things to keep in mind as a consumer hearing about this case.

PREPARING TO TEACH

- Post lesson outcomes.
- Show Documentary Chapter #3
- Use Handout #1 Discussion Questions for documentary chapter.
- The Attorney General's Press Conference strategy Handouts #2, 3 and 4.
- Debrief strategy.
- Handouts #5 and 6: Optional Exercises for Further Exploration

CALIFORNIA STATE STANDARDS

Antitrust Lessons	U.S. History/8th grade	U.S History and Geography- Twentieth Century/11th Grade	Principles of Economics/12th Grade
Lesson 4	8.12 Students analyze the transformation of the American economy and the changing social and political conditions in response to the Industrial Revolution.		12.3 Students analyze the influence of the federal government on the American economy. (Specific reference to "attempting to make markets more competitive)

HANDOUTS

Handout #1- Discussion Questions for Documentary Chapter #3 (need class set)

Handout #2: Key Issues for the Attorney General

Handout #3: Brief Overview of Mylan case

Handout #4: Key Issues for the Press

Handout #5: Optional Exercises for Further Exploration

Handout #6: Optional Exercises for Further Exploration

Description of Documentary Chapter #3

In this documentary chapter the students will see a case involving unfair competition practices. Mylan Laboratories is a company that makes generic drugs. A generic drug is a drug sold under a name that is not protected by trademark---an example is ibuprofen. However, the names “Motrin” and “Advil” are protected brands. This chapter begins with a consumer who describes her frustration at the tactics of Mylan. The consumer---Judy Subzinski----takes a generic anti-depressant for severe anxiety. Mylan Laboratories (and three other companies) were sued by the Federal Trade Commission along with the Attorneys General of 33 states for monopolizing the market and fixing the prices for two popular generic drugs used to treat tension, anxiety and insomnia. The case involved illegal price increases by Mylan for Lorazepam and Clorazepate, two medications widely used by nursing home and hospice patients and people with Alzheimer's disease. The defendants in this case paid \$100,500,000 to reimburse consumers and state agencies for over charges.

Community Resource People

You might want to invite a lawyer specializing in antitrust law or someone from your county prosecutor or state Attorney General's Office as a resource person for this lesson. Send a copy of the lesson when confirming the date and location of the class.

WEB RESOURCES

Insert websites

Teaching Tips

1. Before students enter the classroom, set up the DVD to show the chapter. When the students arrive, explain to them that they will be watching a chapter from the *Fair Fight in the Marketplace*, an antitrust documentary, showcasing some of the important issues and cases in the history of antitrust in the United States. The third chapter focuses on unfair competition.
2. Ask students to think about the following questions while watching the documentary chapter—

Did the company know that what they were doing was causing harm to consumers?

What was the impact of the corporate action on competition in the industry?

3. Show the chapter. (_____minutes)

4. Debrief the chapter using the following questions-

1. What happened in this case? What is Mylan alleged to have done? Why were other companies sued, as well as Mylan?

Mylan Laboratories is a company that makes generic drugs. A generic drug is a drug sold under a name that is not protected by trademark---an example is ibuprofen. Mylan Laboratories (and three other companies) were sued by the Federal Trade Commission along with the Attorneys General of 33 states for monopolizing the market for two popular generic drugs used to treat tension, anxiety and insomnia. The case involved illegal price increases by Mylan for Lorazepam and Clorazepate, two medications widely used by nursing home and hospice patients and people with Alzheimer's disease. The defendants in this case paid \$100,500,000 to reimburse consumers and state agencies for over charges.

In addition to Mylan the Federal Trade Commission sued three other companies. These companies agreed to supply the drug ingredients exclusively to Mylan and in exchange for that Mylan agreed to pay them a percentage of its profits on the sales of the two drugs.

2. What is an exclusive dealing contract?

An exclusive dealing contract is one in which a company agrees to provide products or services only to another company. In this case the companies

that were the major suppliers of two of the active ingredients found in the drugs lorazepam and clorzepate agreed to supply the ingredients only to Mylan. This created a problem for the other companies who were making the drug and needed the same ingredients.

3. What happened to consumers as a result of Mylan's actions?

After making the arrangement with these other companies Mylan raised the price of these drugs from about .02 to .75 per tablet for one and from .01 to .37 for the other. As a result, consumers had trouble paying the increased costs and many people reduced or stopped taking their prescribed dosage. These drugs are particularly effective for helping people with anxiety and depression connected to chronic conditions like Alzheimer's and hypertension.

4. Did the company know that what they were doing was causing harm to consumers?

Mylan was able to raise the cost of the drugs without raising the cost of production because of their exclusive dealing contracts. This increased their profits dramatically (about 2000 %)----costs born by consumers. This was a conscious decision made by the company.

5. What was the impact of the corporate action on competition in the industry?

Two other companies that were producing the anti-anxiety drugs could not secure the active ingredients for production. Mylan controlled nearly 100% of the market for the ingredients.

As a result of this litigation Mylan paid over 100 million dollars to purchasers of the anti-anxiety drugs, altered their supplier agreements in order to restore competition to the market and reimbursed \$8 million in legal costs of the states who participated in the litigation.

6. Was the remedy adequate? Would it compensate the victims for their loss? Do you think it would deter other companies from doing what Mylan did?

Student opinions may vary on this question.

5. The Attorney General's Press Conference

This strategy will involve students in discussing the roles of a state Attorney General and members of the press corps when announcing the results of the *Mylan* case. This is a small group strategy and will work best if the small groups include no more than 3-5 students. The strategy uses a modified jigsaw methodology—students will participate in two separate small group discussions during the strategy. The number of groups you have will depend on the number of students in your class.

In the first part of the lesson students will be in one of two different types of groups:

1. Attorney Generals groups-discussing the issues from the perspective of the Attorney General;
2. Members of the Press groups-discussing the issues from the perspective of the press.

In the second part of the lesson students will be in groups composed of members from both groups—for example, two students from the attorney generals group and three students from the press group).

Part 1

Divide the class into small groups (3-5 students).

Designate several of the groups to discuss the issues that the Attorney General would consider in preparing for the press conference.

These groups will prepare by using Handout#2: Key Issues for the Attorney and Handout #3; Brief Overview of *Mylan* case information.

These groups will have 5-7 minutes to discuss the questions on the handouts.

Designate some of the groups to discuss the issues that members of the press corps would consider in preparing for the press conference.

These groups will prepare using the Handout #3: Brief Overview of *Mylan* case and Handout #4: Key Issues for the Press.

These groups will have 5-7 minutes to discuss the questions on the handouts.

Part 2

After the small groups have discussed the issues and have prepared for the next discussion, move them into the new groups for the second part of the strategy. These small groups (3-5 students) will be composed of members from both groups. Each new group will be made up of students from each of the first groups. The goal is to involve students in considering issues from all perspectives and identifying the most important ideas to be conveyed to the public. At this point the groups can begin with the Attorney General making an opening announcement and then taking questions.

This part should last about 10 minutes.

6. Debriefing the Attorney General's press conference discussion

Ask students to critique how they feel they did describing this *Mylan* case and asking questions about it. Here are some additional questions to get the discussion going—

Why would an Attorney General want to have a press conference about this case?

What were the five most important points for the Attorney General to make about the Mylan case?

What were the five key issues that the press felt should be emphasized about this case?

What do you feel the public would be the most interested in hearing about in this case?

7. Homework Assignment

Have each student draft a newspaper article (3-4 paragraphs) announcing and describing the results of the *Mylan* case.

Handout #1 Discussion Questions for Documentary Chapter 3

1. What happened in this case? What is Mylan alleged to have done? Why were other companies sued, as well as Mylan?
2. What is an exclusive dealing contract?
3. What happened to consumers as a result of Mylan's actions?
4. Did the company know that what they were doing was causing harm to consumers?
5. What was the impact of the corporate action on competition in the industry?
6. Was the remedy adequate? Would it compensate the victims for their loss? Do you think it would deter other companies from doing what Mylan did?

Handout #2: Key Issues for the Attorney General

The State Attorney General has called a press conference to announce the settlement of the *Mylan* case. Work with your group to identify the most important information the attorney general should convey at the press conference. Be sure to use some of the antitrust vocabulary words and concepts in the discussion. Brainstorm the issues about the case that you feel are most important to emphasize at the press conference. Prioritize the issues.

How should the case be described to the press?

What message does the Attorney General want to send to the public about this case?

What message does the Attorney General want to send the corporate community in the state?

How does the Attorney General want consumers to feel?

What are some of the political realities of the announcement?

Handout #3: Brief Overview of Mylan case

Mylan Laboratories is a company that makes generic drugs. A generic drug is a drug sold under a name that is not protected by trademark---an example is ibuprofen. Mylan Laboratories (and three other companies) was sued by the Federal Trade Commission along with the Attorneys General of 33 states for monopolizing the market for two popular generic drugs used to treat tension, anxiety and insomnia. The case involved illegal price increases by Mylan for Lorazepam and Clorazepate, two medications widely used by nursing home and hospice patients and people with Alzheimer's disease. The defendants in this case paid \$100,500,000 to reimburse consumers and state agencies for over charges.

In addition to Mylan the Federal Trade Commission sued three other companies. These companies agreed to supply the drug ingredients to Mylan and in exchange for that Mylan agreed to pay them a percentage of its profits on the sales of the two drugs.

An exclusive dealing contract is one in which a company agrees to provide products or services only to another company. In this case the companies that were the major suppliers of two of the active ingredients found in the drugs lorazepam and clorzepate agreed to supply the ingredients only to Mylan. This created a problem for the other companies who were making the drug and needed the same ingredients.

After making the arrangement with these other companies Mylan raised the price of these drugs from about .02 to .75 per tablet for one and from .01 to .37 for the other. As a result, consumers had trouble paying the increased costs and many people reduced or stopped taking their prescribed dosage. These drugs are particularly effective for helping people with anxiety and depression connected to chronic conditions like Alzheimer's and hypertension.

Mylan was able to raise the cost of the drugs without raising the cost of production because of their exclusive dealing contracts. This increased their profits dramatically (about 2000 %)----costs born by consumers. This was a conscious decision made by the company.

Two other companies that were producing the anti-anxiety drugs could not secure the active ingredients for production. Mylan controlled nearly 100% of the market for the ingredients.

As a result of this case, Mylan paid over 100 million dollars to purchasers of the anti-anxiety drugs, altered their supplier agreements in order to restore competition to the market and reimbursed \$8 million in legal costs of the states who participated in the litigation.

Handout #4: Key Issues for the Press

The press corps will cover the Attorney General's press conference. Work with your group to think about what would be the most important information to report about the Mylan case. Be sure to use some of the antitrust vocabulary words and concepts in your discussion.

Brainstorm the key questions that you feel the press will need to consider in order to write articles for newspapers.

What is this case about?

What should readers understand about this case?

How should the case be explained to readers?

What message do you think the press wants to send to the public about this case?

How does the newspaper want readers to feel after they read this story?

Handout #5--For Further Exploration—

The town of Beautifica is home to many corporations. In order to make sure that it establishes a fair competitive environment for all the City Council wants to pass a law—
—“Unfair methods of competition are illegal in the marketplace.”

Look at the following situations and decide if the law will apply. Identify your reasons.

1. The shoe manufacturer wants to sell to wholesalers only if they agree to sell at a certain minimum price.
2. The three bookstores want to make an agreement that they will advertise and focus on one third of the city. They will each take one third and focus their resources advertising and market resources in that area.
3. A shoe retail outlet wants to open a store in Beautifica. About 3 months before the store opens the dominant local shoe outlet negotiates contracts with four major shoe companies to be the exclusive distributor of their shoes.
4. Insurance companies in Beautifica have formed an association and agree that the association will develop a price list for insurance services for the area.
5. A used car dealer buys used cars from a distributor. She makes an agreement with the distributor never to sell a used car for less than a specific price.
6. Because there are three t-shirt shops in Beautifica the price of t-shirts had just about bottomed out. Then a major t-shirt outlet store decided to open in town. Prior to opening they bought the building where two of the three t-shirt shops were located and evicted them from the property.
7. The Nash department store is a Beautifica landmark. Last year a new store, the Jones Superstore, opened. The new store is big and offers lots of discounts. The Nash department store recently discovered that one of their most reliable brands Go-Tex made an agreement with the Jones Superstore to sell exclusively to them. This line of clothes is a bestseller at the Nash Department store and the owners think that their business will be hurt.
8. The NCAA issues rules for all its member universities. For example, it has a rule that no student athlete can be paid while enrolled at the university. This rule has been held not to be a violation of the antitrust laws as it was seen as necessary to the survival of college athletics. Because of the increasing cost of college basketball, the NCAA initiated a new rule, which regulated the salaries of coaches (part-time coaches were receiving \$60-70,000 per year.) The NCAA said that there should be just four coaches: head coach, two assistants and a “restricted earnings coach” who could not be paid more than \$16,000 per year. A number of assistant coaches at Beautifica’s University – joined together and filed a class action case against the NCAA claiming it was violating antitrust laws.

ANSWER VERSION**Handout #5-- For Further Exploration -- ANSWER VERSION**
“No unfair competition in the marketplace.”

The town of Beautifica is home to many corporations. In order to make sure that it establishes a fair competitive environment for all the City Council wants to pass a law—“Unfair methods of competition are illegal in the marketplace.”

Look at the following situations and decide if the law will apply. Identify the reasons for your decision.

1. The shoe manufacturer wants to sell to wholesalers only if they agree to sell at a certain minimum price.

ANSWER --Resale price maintenance is generally per se illegal, but a supplier can announce in advance of the sale that it will supply only those who resell at a specified resale price, then can cut off customers that fail to do so—without violating the law. Maximum (as opposed to minimum) vertical price fixing is now subject to rule of reason.

2. The three bookstores want to make an agreement that they will advertise and focus on one third of the city. They will each take one third and focus their resources advertising and market resources in that area.

ANSWER-- Agreements among competitors to divide markets, either geographically or by customers are per se unlawful.

3. A tennis shoe retail outlet wants to open a store in Beautifica. About 3 months before the store opens the dominant local shoe outlet negotiates contracts with four major shoe companies to be the exclusive distributor of their shoes.

ANSWER -- If local shoe outlet enters into exclusive contracts that foreclose competition from a substantial part of the market, this can be illegal exclusive dealing, under the rule of reason.

4. Insurance companies in Beautifica have formed an association and agree that the association will develop a price list for insurance services for the area.

ANSWER -- A trade association normally cannot develop a price list for its members. However, the McCarran-Ferguson Act provides an antitrust exemption for the business of insurance, so this particular example may not be illegal.

5. A used car dealer buys used cars from a distributor. She makes an agreement with the distributor never to sell a used car for less than a specific price.

ANSWER –This is a vertical agreement on minimum price (price fixing) and per se illegal under the Sherman Act.

6. Because there are three t-shirt shops in Beautifica the price of t-shirts had just about bottomed out. Then a major t-shirt outlet store decided to open in town. Prior to opening they bought the building where two of the three t-shirt shops were located and evicted them from the property.

ANSWER --Eviction in the face of an existing lease would be a contract violation, not an antitrust violation. Once the leases expire, the landlord would be entitled to decide with whom it wanted to do business and could refuse to renew the leases of tenants (competitors.) This eviction would be an unfair practice under the law only if the outlet store had a very good chance of becoming a monopolist in this market and if it had no valid business reason for refusing to deal with its rivals. (Aspen Skiing Corp. v Aspen Highlands Skiing Corp.)

7. The Nash department store is a Beautifica landmark. Last year a new store, the Jones Superstore, opened. The new store is big and offers lots of discounts. The Nash department store recently discovered that one of their most reliable brands, Go-Tex, made an agreement with the Jones Superstore to sell exclusively to them. This line of clothes is a bestseller at the Nash Department store and the owners think that their business will be hurt.

ANSWER- This exclusive dealing arrangement could not result in the Jones Superstore becoming a monopoly since there are many lines of clothing available for sale at the Nash Department Store. This line was only "one of their most reliable brands." Only if Go-Tex had something approaching a monopoly share of the clothing market would this be a concern.

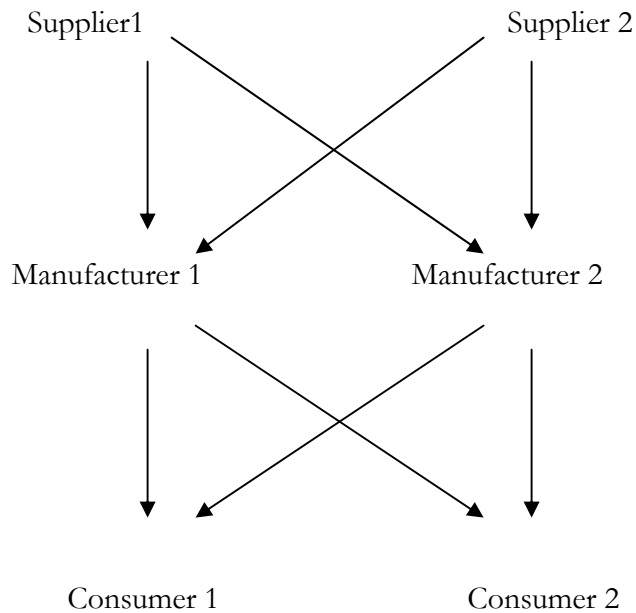
8. The NCAA issues rules for all its member universities. For example, it has a rule that no student athlete can be paid while enrolled at the university. This rule has been held not to be a violation of the antitrust laws as it was seen as necessary to the survival of college athletics. Because of the increasing cost of college basketball, the NCAA initiated a new rule, which regulated the salaries of coaches (some part-time coaches were receiving \$60-70,000 per year. Some, much less.) The NCAA said that there should be just four coaches: head coach, two assistants and a "restricted earnings coach" who could not be paid more than \$16,000 per year. A number of assistant coaches at Beautifica's University – joined together and filed a class action case against the NCAA claiming it was violating antitrust laws.

ANSWER -- In Law v. NCAA the 10th Circuit condemned this under the rule of reason. In this case the horizontal agreement was not necessary for them to be able to play basketball, and it had the effect of suppressing price competition for assistant coaches.

Handout #6: Optional Exercises for Further Exploration

Antitrust Schematics – (need to credit—Hanno Kaiser (Bert's friend) for diagrams)

Here is a drawing that represents competition:



This diagram shows competition. It shows suppliers competing with each other by supplying to both manufacturers. It also shows manufacturers competing with each other. How would the diagram look different if the manufacturer did what Mylan did in this case?

Answer for Handout #6 For Further Exploration

Monopoly based on exclusion. By cutting off M2, M1 creates a monopoly

