Outline for Antitrust II: Applications

Background

- The Sherman Act and the Clayton Act are the principal statutory foundations for US Antitrust law
- There is a Schumpeterian rub in antitrust. On the one hand, competition lowers prices and increases quality. On the other hand, creative destruction can upend people's lives.
- There are four principled themes to concern ourselves with
  - Migration of antitrust law away from formal modeling
  - Rising trends in globalization (as illustrated by cartels etc.)
  - The increasingly complicated marketplace when dealing with digital acquisitions
  - The skill set which is required of contemporary practitioners.
- Eventually everything becomes competing crystal ball gazing

Initial Questions to Ask

- Does the party have standing?
  - Private enforcers can bring cases, but need to demonstrate an **antitrust** injury.
  - Private enforcers will also need to demonstrate constitutional standing
- What is the statutory authority being leveraged?
  - Clayton 7
    - Horizontal Mergers, see Antitrust I outline. Remember *Philadelphia National Bank*
    - Vertical Mergers, see Antitrust I outline. *Baker Hughes* burden shifting framework without PNB. *AT&T* gives us two theories of harm that can arise (unilateral harm)
      - Input foreclosure (or partial foreclosure) – merged entity can deny content (inputs) to rivals
      - Raising Rivals Costs – merged entity can raise the fee for content (inputs)
  - Sherman 1 – See Antitrust 1 outline. Remember to classify (per se, QL, rule of reason)
    - Sherman 1 is agreements in restraint of trade.
  - Sherman 2 – See Antitrust 1 outline. Remember to classify the theory of harm and the *Grinnell* formulation (exclusive dealing, unilateral refusal to deal, illegal tie, predation)
    - Sherman 2 is monopolization and attempted monopolization
  - Robinson Patman Act – see below – discriminatory (heterogeneous) pricing and promotional allowances.
- Is there a *Cellophane* fallacy?
  - *Cellophane* will pop up if a monopoly price is already being charged when diagnostics are being done on a merger. Because we are already charging a monopoly price, the merger wont result in additional price changes. See Antitrust 1 outline.
- Did merging parties follow the process under Hart-Scott-Rodino?
  - Threshold One:
    - Value of the transaction is more than $403.9mm
  - Threshold Two:
    - Value of the transaction is more than $101mm, AND
    - One party is valued at a minimum of $202mm, AND
    - The other party is valued at a minimum of $20.2mm
  - Basic Flow: [See Antitrust 1 Outline]
    - filing notice → clearance → initial waiting period (30 days) → substantial compliance with 2nd request → second waiting period (30 days)
- NEVER FORGET: Mergers don't get approved. They just don't get condemned.
- NEVER FORGET: Having a monopoly and charging monopoly prices is not illegal.

Additional Questions

- Does the case involve mergers and potential competition?
  - After addressing Clayton 7 issues, see below. Consider this a conglomerate variant
- Is a competitor placing restraints on pricing further up or down the supply chain?
  - See vertical restraints. This is a mixture antitrust / property issue.
  - Restraints may be price based (minimum / maximum prices) or non-price based (marketing rules, areas of operation).
  - Horizontal restraints among competitors are *per se* illegal. *Topco*.
- Are we dealing with a multi-sided market (e.g. platforms)?
- Are we dealing with a merger that could plausibly be stopped under Section 2?
  - Clayton 7 is our primary animal, but consider the disagreement under Sherman 2.
- Does the alleged anticompetitive behavior emanate from state legislative policy?
- Is there a first amendment issue? This would occur from some firm petitioning the government in a way that results in market meddling.
- Is plaintiff seeking damages? What is the statutory authority by which they are seeking damages?
- Are we dealing with heterogeneous prices from the same vendor?
  - That might raise Robinson-Patman issues

Theories of Harm and Procompetitive Effects

Harm

- There is overlap in defining theory of harm and market definition, i.e., what is the harm within the relevant market. A claim under Sherman or Clayton must have a theory of harm.
- Raising Rivals Costs
- Foreclosure of the market: 30 / 60 / 90 – *Areeda and Hovenkamp. ALCOA*
- Anything that increases consumer prices or limits output
- Unilateral Effects – the post-merger entity can profitably raise prices
- Coordinated Effects – the post-merger *market* will be conducive to collusion
  - Section 7 does not require proof that a merger caused higher prices. What is necessary is the creation of an appreciable danger based on a probabilistic judgement. – *Hospital Corporation of America v FTC*

Procompetitive Effects

- For merger analysis, procompetitive effects are essentially an afterthought. The only time they carry the day is in *T-Mobile. (New York v. Deutsche Telekom AG (2020))*
- Go nuts economically, whatever you can think of that might intensify competition such that prices drop or production rises
- Elimination of Freeriding
- Merger specific efficiency gains (does not include logistics)

Potential Competition

- In potential competition, we aren't dealing with a vertical or horizontal merger (although there may be elements of each). It should be thought of more like a conglomerate merger.
- Potential efficiency gains that can be argued
  - Production of complementary products and general efficiency gains
  - Economies of scale
  - Name brand recognition for the acquired firm
  - Poor management of the acquired firm (acquirer will run it better)
  - R&D improvements

- Theory of harm – but-for the merger, the firm would have entered the market *de novo* and had a pro-competitive effect by stimulating competition
    - In short, the theory is that without the merger, the acquiring entity would have entered the market *de novo*, and this would create competition
    - There is no theory for this harm in the 2020 vertical merger guidelines
    - The 1984 guidelines ground the theory of harm in "limit pricing". Under a limit pricing theory the monopolist or oligopolists, post-merger, will set prices low enough to deter entry but high enough to be profitable
- *Marine Bancorp* is the main historical case. See additional details on perceived and actual potential competition below. A merger may violate antitrust law if the market is (three elements):
    - Highly concentrated (*Marine Bancorp*) and few potential entrants (*Proctor & Gamble*)
    - Could the acquiring company could enter the market as an independent competitor or foothold acquisition (purchase of 5% of stock or less)?
        - *De novo* and foothold acquisition are seen as equivalent
        - This is a little confusing. In *Marine Bancorp* the firm was prevented from entering the market by local statute.
    - If the acquiring company's inability to enter the market, sans acquisition, is having a deleterious effect on current market competition
        - See below, but this is the real hook. Does the merger make the industry more competitive? Or does blocking the merger make the market more competitive?
- What must plaintiff show after high concentration to block the merger? Two prong test generally, but see application in *Meta / Within* and formal test from *Areeda and Hovenkamp*
    - "acquiring firm has the characteristics, capabilities, and economic incentives to be perceived as a *de novo* entrant", (i.e., current competitors view the acquirer as a potential entrant (this is heightened or very heightened, not illusory))
    - "the firm's premerger presence on the fringe of the target had a disciplining effect" (i.e. firms in the market are already reacting to the potential competitor)
        - Demonstration through standard HMT / GUPPI / etc.
- There is also a subjective intent element, as plaintiff must show that, but-for the merger, the acquiring firm would have entered the market anyway. Contrast this with *Marine Bancorp*, whose acquisition was permitted because they were statutorily prohibited from entry.
    - Two theories of potential competition (more below)
        - Perceived Potential Competition – competitors believe that the acquiree will enter. Under the perceived potential competition theory, competitors in a concentrated market are constrained by the perceived threat of entry from some formidable competitor (the belief is disciplining the market)
            - *Polypore v FTC* gives us indicia of Perceived Potential competition
                - The acquired firm need only retool its product line to compete in the acquiring firm's market
                - The acquired firm was already contemplating such entry
                - The acquiring firm had already lowered prices in anticipation of the acquired firm's entry
                - The acquiring firm raised prices subsequent to acquisition
        - Actual Potential Competition – the entrance plans of the acquiree itself. Under actual potential competition, courts require proof that the firm entering the market had feasible means to enter the market, other than the merger, and that these other means significant procompetitive effects
    - Thus, perceived is competitor's view of the acquirer. The acquirer is disciplining the market because of a perceived thread. Actual competition is easier to understand because it is an entry story (which is similar because it's something of a but-for world). See diagnoses below
- How to differentiate between potential competition and actual competition?

- Franchise bidding – standard conglomerate merger issue which superficially bears note – a market contains room for only one supplier at a given time, but any number of people might bid to be a supplier. This is actual competition
  - *United States v El Paso Natural Gas* – Court condemns a merger of two gas suppliers. El Paso was acquiring a large portion of another supplier who frequently bid in its market but had never managed to enter. This is actual competition
  - Plaintiff can block such mergers as impermissible conglomerate mergers
  - Differentiate from potential competition and frame under conglomerate mergers
- On the edge of the market – MOST COMMON POTENTIAL COMPETTION ARGUMENT– the firm has never bid to enter the market but is positioned very closely (geography or product line) to enter the market if the market becomes profitable enough
  - *FTC v Proctor and Gamble* – Court condemns a merger between P&G and Clorox (bleach market). Merger was stopped for three reasons
    - Bleach market was highly concentrated (50% market share for Clorox)
    - Although P&G had not contemplated entering the market, it was the MOST LIKELY entrant
    - P&G acquiring Clorox eliminated the possibility of *de novo* entry and undermined the possibility that the market would become more competitive
  - Two subsequent theories emerge
  - Perceived potential entrant theory – a merger can be anticompetitive when it eliminates a firm whose perceived presence on the edge of the market tended to restrain pricing
    - *United States v Falstaff Brewing* – Court condemns a merger of brewers where one larger brewer had yet to sell in the geographic market (New England). Entry would have increased competition. Merger is condemned because Falstaff had a disciplining effect which would have disappeared post acquisition
    - Factors to consider (necessary elements)
      - The acquirer's position on the edge of the market is disciplining the market in terms of prices / output already
      - Target market must be highly concentrated and conducive to oligopolistic behavior
      - Barriers to entry must be substantial
        - Note that in *Meta / Within* the court was not overly concerned with substantial barriers to entry in a nascent market. There were a lot of entrants but they weren't affecting market concentration in a meaningful way
      - There must be a plausible explanation why these high barriers to entry DO NOT apply to the acquirer (potential entrant)
      - There must be very few perceived potential entrants (2 or 3). More means barriers are not substantial
      - The merger MUST NOT INCREASE competition (i.e. by buying someone the potential eliminates the disciplining effect they were having on the market prior to acquisition)
  - Actual Potential Entrant Theory – Even more fuzzy than perceived. For this to apply, the merger can be prohibited if it has no effect on current levels of competition but reduces the possibility that the market might become more competitive later. Test:
    - All factors from perceived + the acquiring firm would have entered *de novo* if it had no opportunity to enter via merger (greater than 50%)

            - This *Marine Bancorp* – Firm absolutely would have entered if it was not statutorily prohibited from entering due to banking laws
            - *Meta / Change* – Court holds Meta was interested in entering the market buy was only going to do so via acquisition or joint venture
        - Thus, this theory requires convincing evidence that the firm would have entered the market quickly (*de novo*) if not permitted to enter via merger.
- Application of potential competition (*FTC v Meta / Within*)
    - Top Line Takeaway: Case surrounds the Meta purchase of Within, who makes Supernatural. Argument: Beat Saber is on the edge of the market and Supernatural is within the market. Defendant is acquiring the large competitor within the market and eliminating competition.
        - Plaintiff (FTC) loses perceived potential competition theory because competitors were presumptively not constrained by the potential entrance of Meta
        - Plaintiff loses actual potential competition theory because plaintiff failed to show that the acquisition would have had a competitive impact on the market (RRC)
    - Legal Standard
        - To get a preliminary injunction, plaintiff must "raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Warner Commc'ns Inc.*
        - Thus, plaintiff must go beyond "mere questions or speculations"
    - The first step in analyzing a merger challenge under Clayton 7 is to determine the relevant
    - market. *Brown Shoe Co.* This is a combination of
        - (1) the relevant product market and
        - (2) the relevant geographic market.
    - Product Market
        - "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*. We are looking for substitution.
        - Both quantitative (HMTs, GUPPIS) and qualitative (*Brown Shoe Indicia*) are accepted
        - Plaintiff proposal - market for VR dedicated fitness apps, meaning VR apps "designed so users can exercise through a structured physical workout in a virtual setting." These are distinct from (1) other VR apps and (2) other fitness offerings.
        - Court finds plaintiff has made a sufficient evidentiary showing that there exists a well-defined relevant product market consisting of VR dedicated fitness apps.
            - This is informed by the HMT and the Brown Shoe practical indicia.
            - The industry and public recognize that VR dedicated fitness apps are their own thing
            - The market has peculiar characteristics (meant specifically for fitness, tracking fitness goals, can be trainer led, the 360-degree immersion (distinct core functionality)
            - Within also has unique assets that are specialized, and the market is ill-equipped to provide supply side substitution
            - These apps are used by different demographics (more female, older)
            - Distinct pricing across VR dedicated fitness apps and non-VR fitness apps
                - [see *Brown Shoe* indicia from Antitrust 1 outline]
    - Geographic Market
        - The geographic market is the US. This is uncontested.
    - Threshold for potential competition (any kind): Is there substantial market concentration IN the market. This is required by *Falstaff* and *Marine Bancorp*. There is a burden shifting framework for determining if the market is "substantially concentrated"

        - Plaintiff may establish *prima facie* case that the relevant market is substantially concentrated by introducing evidence of concentration ratios.
            - Plaintiff successfully meets this using HHI per the guidelines.
            - >1500 is moderately concentrated, > 2500 is highly concentrated.
        - If established, the burden shifts to the merging companies to "show that the concentration ratios, which can be unreliable indicators of actual market behavior, did not accurately depict the economic characteristics of the market."
            - Defendant argues nascency. The nascency of the market makes this hard because no one knows if nascent markets are easier to coordinate.
            - Defendant argues there are many entrants to the market. Court rejects this argument because it has not deconcentrated the market
            - Defendants suggest that new entrants are evidence of low barriers to entry which the court is also unimpressed by
            - Court finds that the defendant has not rebutted plaintiff.
        - If the prima facie case is not rebutted, then the market is suitable for the potential competition doctrines.
    - <u>Actual Potential Competition. Two-Pronged Test:</u>
        - Under actual potential competition, courts require proof that the firm entering the market had feasible means of entry other than the merger and that these other means would have significant procompetitive effects
        - (1) the alleged potential entrant must have "available feasible means for entering the [relevant] market other than by acquiring [the target company]"; AND
            - "available feasible means" for entry may be established either by de novo entry or a toehold (less than 5% acquisition)
            - Plaintiff does not argue for toehold
            - Standard of proof (circuits run the gamut from would likely enter to strict proof of entry). The Court goes with "reasonable probability" – 5th Circuit
            - This can be demonstrated through objective (preferred) evidence or subjective evidence (supplemental evidence that can't overcome objective)
            - Basically, we are arguing that the have MEANS and WOULD ENTER
        - (2) those "means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects."
    - Testing Prong 1
        - Objective evidence that Meta would have entered the VR dedicated fitness app de novo – (Meta has the resources to enter, Meta has VR staff but not fitness staff, Meta lacks the studio infrastructure for VR dedicated fitness, Meta has economic incentive). Objective evidence does not strongly point to feasibility of entry
        - Subjective evidence of de novo entry – (strategy documents, desire to collaborate)
        - In sum, the subjective evidence indicates that Meta was subjectively interested in entering the VR dedicated fitness app market itself. However, these incentives would support both market entry by acquisition and de novo, Court's inquiry is only concerned with the feasibility of de novo entry
    - Means of entry
        - Means are important to consider. This is not mandatory, but is illustrative
        - Defendant's zeal to enter the market is insufficient
        - Evidentiary record suggests Meta would only have entered via acquisition (Peloton, Within, etc.), so entry by acquisition is the real only way
        - Court thus finds that Meta did not have "available feasible means" to enter the relevant market other than by acquisition.

    - Court concludes that the plaintiff has not established an "available feasible means for entering the [relevant] market other than by acquiring [the target company]" No need to proceed to prong 2. Actual potential competition theory fails.
    - Theory of Perceived Potential Competition
        - Under this, plaintiff argues the acquisition eliminates the competitive influence that plaintiff exerts on the market by being on the fringe of the market
        - To prevail on this claim, plaintiff must establish—in addition to showing a highly concentrated market:
            - (1) Plaintiff possessed the "characteristics, capabilities, and economic incentive to render it a perceived potential de novo entrant"; AND
                - Do market participants see the acquirer as a possible entrant?
            - (2) Meta's "premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants"
                - Are market participants changing prices or output because otherwise the potential entrant will enter
        - Based on actual potential competition, there is limited evidence of *de novo* entry
        - For tempering, plaintiff must produce some evidence—direct or circumstantial—that plaintiff being on the fringe had a direct effect on market firms
        - Under this standard, the FTC's evidence on this element is insufficient.
    - In summary,
        - Court finds that the objective evidence does not support a reasonable probability that firms in the relevant market perceived Meta as a potential entrant.
        - Even if it did, the Court finds that there is no direct or circumstantial evidence to suggest that Meta's presence tempered oligopolistic behavior or resulted in any other procompetitive benefits
- Application of potential competition theories from *United Health Group / Change*.
    - United Health Group / Change is an excellent example of cauterizing Section 7 claims up front by divesting the troublesome part of the acquisition.
    - UHG is attempting to acquire Change. Change is a healthcare technology company that provides data solutions aimed at improving decision-making and simplifying payment processes. It offers solutions, claims editing, and is an EDI clearing house
    - Pre-trial Divestiture and Firewall
        - In Jan 2022, UHG announced its intention to divest Change's ClaimsXten upon consummation of the proposed acquisition. It will be purchased by private equity firm TPG. The divestiture package includes all of Change's claims editing products.
        - In May 2022, UHG issued its "UnitedHealth Group Firewall Policy for Optum Insight and Change Healthcare," which addresses the sharing of customers' competitively sensitive information (CSI) following the transaction
    - Legal Standard
        - Second 7 prohibits mergers and acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." To prove a Section 7 violation, "the government must show," by a preponderance of the evidence, "that the proposed merger is likely to substantially lessen competition, which encompasses a concept of reasonable probability."
        - Regardless of if this is a vertical or horizontal merger. *Baker Hughes* applies.
            - For horizontal, you get the PNB structural presumption.
            - For vertical, plaintiff meets its *prima facie* burden by making a "fact-specific showing that the proposed merger is likely to be anticompetitive."
    - Analysis – Defining Product and Geographic Market. Plaintiff offers.
        - (1) the sale of first-pass claims editing solutions in the United States;

    - (2) the sale of commercial health insurance to national accounts in the United States;
    - (3) the sale of commercial health insurance to large group employers in core-based statistical areas that are also metropolitan statistical areas
        - All of these are accepted by defendant and the Court
  - Theories of competitive harm (3)
    - Plaintiff argues that the proposed acquisition is an illegal horizontal merger because it would tend to create a monopoly in the sale of first-pass claims editing solutions in the United States.
    - Plaintiff that the proposed acquisition is an illegal vertical merger because UHG's control over a key input—Change's EDI clearinghouse—would give it the ability and incentive to use rivals' CSI for its own benefit, which in turn would lessen competition for national accounts and large group commercial health insurance
    - Plaintiff argues that the proposed acquisition is an illegal vertical merger because United's control over Change's EDI clearinghouse would give it the ability and incentive to withhold innovations and raise rivals' costs to compete in those same markets for national accounts and large group plans
  - Analysis Harm 1: Illegal horizontal merger for first-pass claims editing solution
    - Change has 70% of the market. UHG has 25% under OptumInsight elimination of head-to-head competition (meets *Philadelphia National Bank*)
    - UHG has agreed to divest to TPG upon consummation, that is the defense
    - As UHG does not dispute the pre-divestiture market-share statistics, the issue is whether the divestiture of ClaimsXten to TPG resolves the horizontal claim
        - Note, as the acquisition and divestiture are different transactions, burden falls on defendant to prove that the divestiture will not substantially lessen the competition
    - Defendant contends—Court agrees—that the evidence shows the lack of falling competition. Divestiture will restore the competition lost because of the acquisition
    - Plaintiff meets *prima facie* burden under *Baker Hughes* (90% of the market)
    - Burden shifts. To assess whether a divestiture will restore competition, courts consider several factors, including: "the likelihood of the divestiture; the experience of the divestiture buyer; the scope of the divestiture[;] the independence of the divestiture buyer from the merging seller[;] and the purchase price." *RAG-Stiftung*
        - Court finds that the divestiture is virtually certain (contracts are signed and all conditions met)
        - TPG has sufficient experience, its a large private equity group and is experienced with carveouts (and in healthcare)
        - Scope of divestiture sufficient to permit the divested assets to operate standalone
        - TPG is independent, the fact that it has worked with UHG in the past wont make them not compete
        - Price is reasonable
    - Taken in sum, the divestiture solves the problems of the horizontal merger, and must be consummated when UHG acquires change
  - Vertical Theory of Harm
    - Plaintiff argues United's control over Change's EDI clearinghouse would give United the ability and incentive to use rivals' CSI for its own benefit.
    - Plaintiff argues that United's control over Change's EDI clearinghouse would give United the ability and incentive to foreclose rivals' access to key inputs
    - Four part causal chain. Plaintiff must establish:

            - (1) Optum will gain incremental access and use rights to the claims data of UHC's rivals;
            - (2) Optum will have an incentive to share these data—or the competitively sensitive insights derived from the data—with UHC;
            - (3) rival payers' fear of UHC using these data or insights will chill innovation; and
            - (4) less innovation means less competition in the relevant markets
        - Court holds that the central issue with the vertical claim is that it rests on speculation rather than real-world evidence
    - Data Misuse Theory
        - Evidence presented at trial indicates that for this to occur, UHG would have to uproot its strategy and corporate culture; intentionally violate or repeal longstanding firewall policies; flout existing contractual commitments; and sacrifice financial and reputational interests
        - There are thus two critical defects:
            - Data access and use rights - the flaw in the plaintiff's argument is that UHG already deals with these issues. This matters for two reasons.
                - First, if United is already in possession of data such data, something about the new data much change standard operations
                - Second, if the ability and incentive already exist, then present circumstances can serve as a natural experiment for what might occur in the post-acquisition world.
    - Sharing data and competitively sensitive information theory
        - Plaintiff argues that Optum (subsidiary) will have a strong incentive to share rival payers' data and CSI with UHG. Limited evidence presented beyond execs generally being interested in extra data. But they are execs of a data firm.
        - Theory fails because evidence suggests
            - The incentive to protect customer data outweighs the incentive to abuse it.
            - Approach is inconsistent with current corporate culture (which external customers and rival payors rely on)
            - Structural guarantees also prevent them from doing so (i.e. the firewall policies)
            - Optum's contracts prevent this
    - Future Innovation Theory
        - Functional theory, competitors will not innovate if Optum has all the data
        - This is undercut by the lack of evidence for the data misuse theory
        - Also, plaintiff provided zero real-world evidence that rival payers are likely to reduce innovation. Testimony from rival payers who were asked about innovation is inconsistent with plaintiff's theory of competitive harm
- Application of Potential Competition Theory: *FTC v Microsoft / Activision*:
    - Wheelhouse RRC argument. FTC argues that Microsoft's acquisition would have led to higher prices, less creativity, decreased output, etc. by either withholding content from competitors like Sony, degrading content to Sony, or significantly increasing prices.
- Also keep in mind *United States v Microsoft.* In that case, the definition of nascent (potential) competition has three components:
    - (1) that the Netscape browser held promise as the foundation of an innovative new software development platform;
    - (2) that the potential of Netscape's innovation had not fully come to fruition but might have done so in the future; and
    - (3) that this prospect posed a serious threat to Windows

- Final things to keep in mind for identification of a potential market competition complaint
    - Evidence of an anticompetitive plan
    - Later Acquired evidence which stems from consummated mergers (backward looking)
    - Documentary evidence
    - A pattern of acquisitions
    - Actual effects
    - Market competitions which suggest the durability of a monopoly is limited

Vertical Restraints

- A vertical restraint is one that is passed down the supply chain rather than across competitors
- There are both pricing constraints (e.g., minimum or maximum prices) and non-price restraints (e.g. exclusive dealing, setting minimum prices, location constraints)
    - Almost all vertical restraints are subject to rule of reason except tying arrangements, which is analyzed under Sherman 2 rules (or a structured rule of reason *US Steel v Fortner Enterprises* depending on the theory of harm).
    - Tying is notable because if a plaintiff is challenging a tying arrangement, which is a *de facto* vertical constraint, and can show that the defendant holds market power, a rebuttable presumption exists that the tie is anticompetitive. See Sherman 2 rules for tying.
- Is the restraint horizontal (agreements between competitors) or vertical (up and down supply chain)
    - Horizontal restraints (pricing or non-pricing) are per se illegal under Sherman 1. *Topco*. In *Topco*, the Court determines that an agreement to divide the market into exclusive territories is a per se violation of Sherman 1
    - Vertical restraints are subject to rule of reason analysis. *Continental TV v GTE Sylvania*
- Where are we in time? A historical perspective
    - Vertical price restraints grow out of *Dr Miles Medical v John D Park,* wherein the manufacturer contractually compelled vendors to set a minimum price for goods (medicines). The Court holds that a manufacturer has no right to place a restriction on the resale of goods. Only restraints that are "reasonable and necessary" are permissible.
        - This wasn't an antitrust case. But as the contracts were held illegal, it led to a view of *per se* illegality.
    - Eight years later, in *US v Colgate*, the court held that a firm was free to imposes minimum prices on distributors unilaterally as long as it was not a monopolist or enlisting compulsory contracts.
        - *Colgate* was not contractually limiting downstream sales, it was just monitoring and refusing to later sell if minimum prices were not adhered to.
        - Court reasoned that because there was no monopoly, or attempt to monopolize, this was not a violation of the Sherman Act
    - *United States v General Electric* then comes along and narrows *Miles* further. This is a light bulb consignment case. In short, the court holds that a firm is legally incapable of conspiring with its own agent (single firm) under Sherman 1. Still good law.
        - See below for a consignment test, which would create single entity
    - Between *Schwinn* and *White Motor* this eventually all falls apart, notably when the court starts recognizing the difference between inter and intrabrand competition
        - In *White Motor*, vertical territory and customer restraints were not per se illegal. White Motor sells trucks and parts to dealers and placed limitations on where the distributors could sell.
        - In *Schwinn* the court reverses, holding that manufacturers subjecting vendors to territorial restrictions on reselling was a per se violation of Sherman. Schwinn sold bikes to distributors who were assigned direct territorial limitations.
- Vertical restraints rule of reason approach (borrowed from *Amex*)
    - Plaintiff must show the restraint has substantial anticompetitive effects

        - This includes standard market definition and things. Usually, plaintiff doesn't have to show the market if plaintiff shows actual effect on prices or output.
        - The district court holds you've proven actual effects so you don't have to define the market. *FTC v. Indiana Federation of Dentists*. But SCOTUS pushes back that the actual effect manifests (this is a footnote 7)
        - This decision (*AMEX*) changes rule of reason because plaintiff must both define the market AND show effects for the vertical restraint.
    - If plaintiff demonstrates harm AND defines the market (product and geography), burden shifts to the defendant to show procompetitive effects
    - Burden then shifts back to plaintiff to show this is not the least restrictive means of implementation
        - Lease restrictive means is a judgement call (judge or jury). Its not black letter law.
        - The question is was there another way for defendant to get the benefits of the vertical restraint without creating the observed competitive harm.
- Is the vertical restraint a consignment wherein goods are not paid for up front, but are instead commissioned on sale (and usually remitted back to the original seller if they are not sold)?
    - These are (generally) per se legal. *US v General Electric. ValuePest of Charlotte v Bayer Corp*. The issue with consignment is that we have a single entity.
    - Test for consignment agreement
        - Formal parting of title
        - If the manufacturer or distributor the risk of the good's loss when it is in the distributor's possession
        - Remittance of unsold inventory
        - Exclusive carrying of the manufacturer's goods
- Is the vertical restraint a restriction on selling in certain locations? *Continental TV v GTE Sylvania*
    - Old stance. *United States v. Schwinn (1967)*, Court holds that it is a per se antitrust violation when a manufacturer sells a product to a distributer subject to customer or location restrictions on product.
    - In *Continental TV,* the court leans into the intrabrand competition v interbrand competition element. This is previously unconsidered.
    - Because Continental is placing restrictions on the sales of its own products, by reducing the number of outlets where its products can be sold, it might plausibly be increasing interbrand competition. A rule of reason analysis should therefore be conducted
    - What are the potential benefits for inducing greater intrabrand competition?
        - Induced additional services for customers and eliminating freeriding (et al)
        - Creating within brand monopolies might induce showcasing
        - This can protect snob goods and premium brands
        - This can limit product liability and quality issues
        - Intrabrand restrictions can induce entry by competitors by thinning the market
- Is the restraint harming intrabrand competition or interbrand competition? *Continental TV v Sylvania*
    - If we are doing intrabrand, it is not a per se violation downstream. Rule of reason
    - Interbrand restraint (price, geography, etc.) is still per se illegal! *Topco*
- Are we setting a vertical <u>maximum</u> price for a good in a vertical restraint? *State Oil v Khan*
    - This is subject to rule of reason (happens before *Leegin* so only notable)
    - In *State Oil,* the oil company (wholesaler) was attempting to compel a gas station owner not to exceed maximum prices. Suit ensues
    - Overturns *Albrecht v Herald Co* (maximum price fixing previously per se violation)
- Are we setting a <u>minimum</u> price for a good in a vertical restraint? *Leegin Creative Leather*
    - In *Leegin,* agreement between a manufacturer and a distributor regarding minimum price is not a per se violation. It is instead subject to a rule of reason analysis. Leegin was selling

premium women's beds and accessories and stopped servicing vendors who sold below their minimum price.
        - Note that with the except for consignment, no vertical restraints are per se legal
    - Three factors should be considered when assessing the legality of the vertical restraint.
        - Scope of the minimum resale price management (aka vertical price fixing) in the market. Is this pervasive in facilitating cartels.
        - Source of the restraint (supplier or dealer). Does this facilitate competition in the market or does it result in coordination?
        - Market power of the supplier and dealer. The court is apprehensive about monopolists doing this or if cartels are beginning to manifest
            - End of the day, does the minimum resale price management promote interbrand competition or does it facilitate cartels
    - Be aware of other locations where pricing strategies were permitted under rule of reason
        - Cooperative advertising programs
        - Minimum advertised pricing programs
        - Discount pass through programs
    - Keep in mind the freeriding arguments from Ben Klein
        - If retailers have a bigger margin, they will market it more
        - It could be beneficial in contexts where you don't need value added services
        - There's a consumer welfare issue, avoiding anticipated regret issue
    - There are some states which have maintained that retail price management (RPM) is per se *illegal* (e.g. California, Maryland)
- Can a MONOPOLIST pivot to exclusive dealing? *E&L Consulting v Doman Industries*
    - E&L has a lumber distribution agreement with Doman, a monopolist who supplied them
    - Doman also has an agreement with Sherwood, who it makes the exclusive distributor
    - Holding is that a manufacturer with monopoly in the relevant market does not violate antitrust by selecting an exclusive DOWNSTREAM distributor unless there is an adverse effect on market competition
    - Reasons
        - Presumption that exclusive distribution agreements are legal. This is rebuttable if there is an observable anticompetitive effect.
        - Court reasons that because if there is already a monopoly, there's likely no harm in creating a secondary downstream monopoly
            - This is the opposite of a double marginalization argument ← ME!
        - How do we square this with *Aspen Ski*? I (Greenwood) presume it's because the lumber company isn't selling directly to consumers. If it did that, as a monopolist, we could be in Sherman II land
- How do we distinguish between a horizontal and vertical restraint?
    - This isn't a stupid question because there's a lot of horizontal in the vertical and vice versa
    - What's going to differentiate it is if it is a hub and spoke. *Interstate Circuit. Toys R US*
        - In *Toys R Us*, the retailer approached suppliers to limit shipments to competitors who sold at discounts. Toys R Us was in effect a broker of a horizontal agreement to boycott discount chains
        - In *Interstate*, there is a conspiracy among distributors and movie theatres which amounts to price fixing for second run firms. The threat is limited distribution

Multi-sided Markets

- The only case in here is *Ohio v American Express*. This is a Sherman 1 case.
    - *Areeda and Hovenkamp* argue that this holding is idiotic because it
        - 1) raises prices for consumers,
        - 2) reduces revenues for sellers, and

        - 3) harms the market for credit cards by compelling them to abandon their low strategy.
    - The key takeaway is that contractual anti-steering provisions do not necessarily violate Sherman 1. In *Amex,* the firm contractually implemented an anti-steering provision where merchants could not push a customer to another credit card (e.g. Visa, which is cheaper) for the merchant to execute the sale in.
    - The court breaks restraints of trade into two groups, vertical and horizontal. Horizontal are per se illegal. *Topco*. All other restraints, vertical et al, require a three-step rule of reason. Greenwood reads into this that the rule of reason almost makes vertical restraints *per se* legal.
        - Plaintiff must show the restraint has substantial anticompetitive effects (something that decreases output or increases costs)
            - This includes standard market definition and things. Usually we don't have to show the market if we show actual effect. *FTC v Indiana Federation of Dentists*
            - The district court says you've proven actual effects so you don't have to define the market. But SCOTUS pushes back that the actual effect manifests (this is a footnote 7)
            - This changes rule of reason because you have to both define the market and show effects for the vertical restraint
        - If plaintiff demonstrates this, burden shifts to the defendant to show procompetitive effects
        - Burden then shifts back to plaintiff to show this is not the least restrictive means of implementation
            - Lease restrictive means is a judgement call (judge or jury). Its not black letter law. The question is was there another way to get the benefits of the vertical restraint without creating the observed competitive harm.
    - Multi-sided markets get funky. This is a two-sided market because there are two simultaneous transactions through the brokerage. The majority thus determines that there needs to be an anticompetitive HARM in BOTH SIDES of the market.
        - Plaintiff's burden is to show harm to both the customer AND the seller. In *Amex*, the two sides are the merchant and the customer. Less worried about the brokerage
            - Focus on the transacting parties.
        - Plaintiff cannot exclusively consider one side of the market
- Jan emphasized to bear *Topco* in mind. *Topco* determines that horizontal restraints are per se illegal. In *Topco*, the Court determines that an agreement to divide the market into exclusive territories is a per se violation of Sherman 1
- There is a very stupid THOMAS line in the *Amex* decision: "Only two-sided markets can compete with other two-sided markets."
- BREYER – DISSENT AMEX (PERFECT)
    - Parties in this AMEX should be evaluated under the three-step "rule of reason"
        - First, the court looks at the restraint to assess whether it has had, or is likely to have, anticompetitive effects. *FTC v. Indiana Federation of Dentists*
            - Does the restraint impede competition in a way that increases prices or decreases output.
            - In these cases (Sherman I) we do not always need to assess market power
        - Second, if plaintiff meets the burden of showing that an agreement will likely have anticompetitive effects, the "burden shifts to the defendant to show that the restraint in fact serves a legitimate objective." *Areeda & Hovenkamp*

        - Third, if the defendant successfully bears this burden, the plaintiff may carry the day by showing that it is possible to meet the legitimate objective in less restrictive ways or that the harms don't outweigh benefits
  - ISSUE WITH STEERING: Steering makes a difference, because without it, the shopper does not care whether the merchant pays more to American Express than it would pay to a different card company—the shopper pays the same price either way.
  - MAJOR CONCERNS
    - The majority ignores the factual findings of the district court.
      - District Court found that beginning in 2005 and during the next five years, American Express raised the prices it charged merchants on 20 separate occasions. Merchants testified that because (but-for) of the antisteering provisions they were compelled to raise prices
      - District Court found that even though American Express raised its merchant prices 20 times in this 5-year period, it did not lose the business of any large merchant. This suggests market power
      - District Court also found that, in the absence of the provisions, prices to merchants would likely have been lower. But because they were prevented from steering, other credit cards (e.g. Discover) abandoned their low-price business model. This shows the lack of competitive benefit for shoppers
    - The majority and the appellate court stop at Step 1 of the rule of reason.
      - District Court found that the challenged provisions have had significant anticompetitive effects. It has disrupted standard price setting and raised prices. It also compelled competitors to do so
    - The majority says the District Court should have looked at both the market for credit card companies' merchant related services AND the market for shopper related services and combined them into a single market. This is a new theory.
      - In *Times-Picayune v. United States*, the Court held that a court should begin its definition of a relevant market by focusing narrowly on the good or service affected by a challenged restraint.
      - Every newspaper is a two sided market between readers and advertisers, but we considered only one side there
    - The majority conflates substitutes with complements.
      - We include substitutes in market definition because there can be reasonable diversion. Complements make no sense to include in the market definition. Thus, looking at the market for credit card companies' merchant related services AND the market for shopper related services and combined them into a single market is economic nonsense
    - While a market definition is usually needed, it is legally unnecessary in step one of a rule of reason analysis if there is direct evidence of anticompetitive effects from the restraint. AMEX changes this (*Indiana Federation of Dentists*)
      - Thus, he majority's argument ignores proof of actual adverse effects on competition and proof of market power. Without such power, the restraints could not have brought the anticompetitive effects that the plaintiff proved
    - The majority's discussion of market definition is flawed.
      - The majority argues that because both transacting parties need to agree to the transaction both should be included. But no reason is given for why, as a matter of antitrust law, a two-sided credit card firm means that merchant-related and customer-related services should be combined

                - There is no case law to support this. And prior case law explicitly pushes back on recombining non-substitutable goods in market definition - *Eastman Kodak*.
                - The fact that the company connects the two groups of customers to each other in a simultaneous transaction is both common and irrelevant. This would apply to any brokerage market (travel, stock exchanges, farmers market (example BREYER uses)
            - To justify special treatment for "two-sided transaction platforms," the majority relies on *United States v. Grinnell Corp*
                - In *Grinnell*, the Court treated as a single market several different "central station services," including burglar alarm services and fire alarm services.
                - Even though, for consumers, "burglar alarm services are not interchangeable with fire alarm services.", the services were interchangeable
                - Substitutability was a commercial reality.
                - The shopper-related and merchant-related services that American Express provides are not substitutes, meaning *Grinnell* does not apply and credit-card companies cannot respond merchant-related price increases by shifting production
            - The majority mischaracterizes a critical aspects of two sided markets
                - In these markets that one side of the market can subsudize the other in order to increase transactions (Rochet and Tirole). This makes the majority's carveout for two sided markets unnecessarily broad.
            - All else aside, even if the majority were right about the market definition, and even if the District Court should have defined the market, the restraint should still be condemned based on the factual showing that prices rose.
                - The majority ignores this, saying that demand for credit cards were constantly rising, so how can it be a real restraint
                - This is flawed because merchants spread the cost of all credit card services across all customers and the market for credit cards was organically expanding.
            - What would Amex show in Steps 2 and 3.
                - No procompetitive effect is ever established or argued
                - Its unlikely that it could be because vertical price fixing usually involves a manufacturer regulating INTRABRAND competition
                - Here, the vertical restraint affects the terms on which merchants accept both Amex and other cards (i.e. it affects interbrand competition).

Section 2 Merger Debate

- *Microsoft* is helpful for Section 2 because it initiates a burden shifting framework (recall that *Microsoft* was an illegal tying case). Some have raised Microsoft as a merger bulwark under Section 2.
- NEVER FORGET: It is not illegal to be a monopoly. It isn't illegal to charge monopoly prices (*Trinko*). It is only illegal to use your monopoly power to unfairly hinder trade.
    - "Simply possessing monopoly power and charging monopoly prices does not violate § 2" – *United States v Grinnell Corp*
- How To Determine Exclusionary Conduct - *Microsoft* . Under *Microsoft*, a MONOPOLIST must have:
    - An anticompetitive effect
    - It must harm the competitive process and by extension customers
        - NOTE: Harm to competitors will not suffice.
    - A Unitary framework thus flows from *Microsoft*
        - Plaintiffs Burden

            - Step 1: establish theory of harm to competition, not just to competitors
                - For private plaintiff, establish antitrust injury
            - Step 2: establish anticompetitive effects
        - Defendants burden
            - Step 3: Establish procompetitive justifications
        - Step 4: back to plaintiff, establish that anticompetitive harm outweighs procompetitive justification
            - This differs slightly from *Trinko* and *Aspen* (where there is no real Step 4)
        - Note that writing usually does not get to step four from opinions, judges will attack step 3 and step 4 to determine the way that they are going
        - This differs from rule of reason cases, where you will get deep into step 4
- Have we met the *Grinnell* Formulation? Does Defendant have both:
    - i) possession of monopoly power in the relevant market
    - ii) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product
        - This does not include luck, skill, foresight, better products, or business acumen
        - The *Grinnell* formulation is goofy important in this because we're arguing over monopolists in *some* market who might be buying outside market to maintain it (nascent or potential competition)
- What constitutes monopoly power in the relevant market?
    - "Market power is the ability to raise prices above those that would be charged in a competitive market" *NCAA v Board of Regents of Oklahoma*
    - Direct Methods
        - Staples-Office Depot (heterogeneous prices)
        - Infer from effects of the action (raising prices / lowering output)
    - Indirect or Structural
        - *ALCOA* 30(no)-60(probably)-90(definitely) rules (*Areeda and Hovenkamp*)
        - Entry conditions
        - Changes in prices and cost mark ups
    - Mind the *Cellophane* Fallacy!
    - Note: Even if a firm lacks monopoly power in a primary market, it can possess monopoly power in a secondary aftermarket based on purchasers being locked in.
- How can we use Section 2 to stop or unwind mergers?
    - Usually we challenge under Clayton 7. But Clayton 7 has a but-for world requirement.
        - You can lean on *PNB* pre-merger, but you don't get *PNB* post-merger. And if it is a nascent competition case, then you get double but-for. Double but-for means that we must consider the market but-for the merger and but-for the acquiring firm's entry into the nascent firm's market
    - Hoffman argues we can lean on Section 2 in order to unwind mergers under a lower bar. Ginsburg takes issue with this, i.e. the suggestion that Section 2 is a lower bar than Section 7.
        - Reading *Microsoft* literally, the holding relies on finding an anticompetitive effect in the first place. Whether or not there was a justification for the anticompetitive act is germane to the analysis but not covered as part of plaintiff's burden
        - Recall, the court does not support the attempted monopolization complaint in *Microsoft*
    - The tension between Hoffman and Ginsburg
        - Ginsburg would say, there's no reduced standard. You still need to show anticompetitive effects by foreclosing the market
        - HOFFMAN would respond, that's fine, that's not the anticompetitive effect I care about. What I care about is that they are cutting out a competitor in the OS market.

Netscape was a nascent competitor that's being foreclosed. What Microsoft is doing is preventing a competitor in the OS market from emerging.
    - TAKEN IN SUM – maybe we should treat monopolists differently? Maybe we should be more cautious when it's a monopolist
      - Be aware of a pattern of behavior. Hoffman says a pattern of behavior is important as it is indicative of intent. Is defendant consistently foreclosing nascent competitors. This didn't carry the day in *FTC v Meta*, but it is worth considering in a nascent competition case. Ginsburg says the pattern of behavior doesn't matter because we don't consider intent.

- Hoffman's Argument (Formal)
  - Microsoft leaves us in a world with differences between Section 7 and Section 2
    - Under Section 7, you get a structural presumption and basically no acknowledgment of efficiency benefits
    - Under Section 2, you can argue efficiencies, making it a balancing test.
      - This is particularly relevant for nascent competition cases because you are getting away from market structure and asking the net effect question
  - The FTC has a long history of bringing monopolization cases under Section 5 of the FTC Act, following the standards laid down for Section 2 of the Sherman Act
  - Two aspects of monopolization are of significance in digital industries:
    - (1) There is generally a higher bar facing monopolization claims - While this unremarkable, it is important to remember that monopolization claims require monopolies. That means that the defendant must alone possess monopoly power post-merger (what is the digital market? This is tricky…)
    - (2) a lower bar facing such claims; - Section 2 imposes a more relaxed test for the causal relationship between the exclusionary conduct and the acquisition or maintenance of monopoly power (it isn't a but-for world like Clayton 7). Some kind of relationship between the challenged conduct and the maintenance of monopoly power is needed. But, plaintiff does not need to show that, on the balance, in the but-for world, the defendant would not have acquired or maintained monopoly power
      - Quoting *Microsoft*, "To require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action."
  - The test the DC Circuit thus articulates requires that the conduct in question was reasonably capable of making a significant contribution to monopoly power. If contribution to monopoly can be shown, and the conduct was "not competition on the merits," then it's for the defendant to show that conduct was procompetitive.
    - This doesn't turn on the actual effects in the specific case at issue. It's a matter of general tendency: the kind of effects that can broadly be expected
    - Thus, plaintiff need not show but-for causation of the monopoly. What matters is that conduct is reasonably capable (in general) of making a significant *contribution* to monopoly
  - This has two important implications.
    - One is that Section 2 merger blocks or unwinds arise only in the exceptional case of actual monopoly power— with an actual deadweight loss already being inflicted on society and exclusionary conduct
    - Second, if we do not take this approach we would reward monopolists for taking more aggressive anticompetitive steps earlier, and, perversely, would result in the most effective and egregious monopolists
- Ginsburg Argument (Formal)

- Hoffman claims that, under the *Microsoft* decision, Section 2 doesn't turn on the actual effects in the specific case. It's a matter of general tendency. Further, through this lens of generalization, a plaintiff need not show but-for causation of the monopoly. Hoffman contends that what matters is conduct reasonably capable of making a significant contribution to monopoly
- There are four flaws with this
  - Section 2 does require proof of anticompetitive effects. The assertion that it does not conflates the *Microsoft* court's standard for proving competitive effects with its standard for establishing causation. Only after showing the conduct had an anticompetitive can we turn to the second question of causation (i.e. was there a causal link between Microsoft's anticompetitive conduct and the alleged maintenance of its operating system monopoly?
    - No quantification of harm was necessary as *Microsoft* lacked cognizable business justifications. Therefore, no balancing between procompetitive and anticompetitive effect
    - This does not mean that plaintiff doesn't need to raise anticompetitive arguments, just that the need not be entirely quantified if there is no procompetitive argument for what is going on. Ginsburg would say you still need to prove existence and size if there are procompetitive effect.
  - Second, there is limited applicability of the "reasonably capable of" standard, as compared with the pure causation standard (i.e. the but for world)
    - The *Microsoft* more lenient "reasonably capable" standard applies by its terms only to exclusionary conduct lacking any procompetitive justification—and, therefore, not typical of a merger.
    - This more lenient standard should not be applied to actions that might have a procompetitive effect because without requiring but-for causation, there is risk of condemning acquisitions that may be procompetitive
  - Third, the contention that Section 2 presents a "lower bar" than Section 7 ignores *Brown Shoe*. The Clayton Act was enacted to lower the burdens in merger cases. Sherman is well accepted to have higher burdens.
  - Fourth, in a consummated merger setting, the focus should be on the real-world evidence of what happened in the market following the acquisition (e.g., effects on price, output, and innovation)
    - DOJ had evidence of increased prices in *Microsoft*. Evidence that post-merger prices decreased or output expanded would be procompetitive
    - Thus, if plaintiff is going to use Section 2 to unwind mergers, plaintiff is compelled to show anticompetitive effects on the market directly.
  - NOTE: relying on evidence of intent is inconsistent with Section 2, which requires proof that the merger had anticompetitive effects.
    - More than 30 years of case law makes clear that "[a]nticompetitive intent alone, no matter how virulent, is insufficient to give rise to an antitrust violation," and that "[a]nimosity, even if rephrased as 'anticompetitive intent[,]' is not illegal without anticompetitive effects."
- DOJ and FTC officials have also argued that Section 2 can overcome the difficulties of serial acquisitions involving small targets (5- 10%) or acquisitions outside core markets. This is not consistent with *Microsoft* based on the facts.
- Key Takeaway:
  - Plaintiff is not absolved of its Section 2 obligation to prove that a merger resulted in actual anticompetitive effects

        - To claim that Section 2 presents a "lower bar" than Section 7 ignores the historical relationship between Clayton and Sherman and the more defense-friendly efficiency standard of Section 2.
- Wilder argument (Formal)
    - There are numerous problems with enforcing the Clayton Act to block mergers in platform markets. Platforms enjoy market power, experience network effects, economies of scope and scale, and can easily tip. Further, they can acquire small potential competitors early to maintain their monopolies, even if those competitors have yet to compete directly.
    - There are three notable challenges with potential competitions cases in platform markets
        - The allegation centers on the fact that the potential competitor (usually a start-up), will reposition itself to compete against the monopolist. This requires a but-for analysis and but-for analysis is inherently difficult in potential competition
        - Current tools (GUPPI, Diversion Ratios) are ill suited for this analysis
        - Incumbent platforms often have credible merger specific efficiencies to gain (e.g., Uber acquiring an autonomous driving firm).
    - Second complicating factor. We do not know if the entrepreneur will:
        - Innovate and compete directly with the incumbent
            - This is good!
        - Innovate to completement the incumbent (in the hope of being acquired)
            - This could stymie innovation but cutting out an exit path for start-ups
    - Third complicating factor with potential competition merger management (pre or post)
        - It is hard for Courts to determine harms and benefits in standard horizontal mergers. You are now layering on additional challenges (assessing repositioning)
    - Application of Sherman 2 to mergers characterized by potential competition (pre or post)
        - These markets are durable and prone to tipping. Sherman 2 is intended to address anticompetitive action which is meant to maintain or acquire monopoly power
        - Sherman 2 puts a greater emphasis on a pattern of conduct. This would include serial acquisition of potential competitors with small market shares. We miss this when considering each transaction in isolation.
            - Is there serial acquisition? Have efficiency claims not been realized? What was senior management's strategic plan?
        - There are challenges that Clayton 7 doesn't have though. Plaintiff would need to prove monopoly power or intent to monopolize in an individual transaction and a dangerous probability of achieving that monopoly power
        - How might plaintiff succeed under such conditions?
            - Demonstrate network effects and the existence of a winner-take-all market through low multi-homing, high barriers to entry, etc.
            - Have the acquisition or series of acquisitions promoted tipping into WTA
                - In short, are we quashing potential competitors early
        - Quoting *Microsoft:* "[T]he question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue."
        - Thus, the question should be whether the acquisition of the competitor is reasonably capable to contributing to continued monopoly power. Defendant can then rebut this claim using efficiencies and business justifications.

State Action Immunity

- Key Note: Under State Action Immunity (*Parker v Brown*), state and municipal authorities are immune from federal antitrust enforcement when their action is taken as part of i) expressed STATE policy and that policy had ii) evidently foreseeable anticompetitive effects.
    - Municipal entities can act pursuant to state authority.
    - Pure actions of municipalities are not actions of the state. *Town of Hallie v City of Eau Claire*
- The major exception to what follows will be if the state attempts to deputize a private person to restrain trade and do so without govt oversight. *California Retail Liquor v Midcal Aluminum*
    - Oversight could be review, veto, subject to political process (*NC Dental Examiners*)
    - But if the state said "grocery stores can get together and set prices" it would fail *Midcal*
        - In *Midcal,* market actors were setting minimum prices for wine without oversight from the state. Midcal sold wine for less than this price and was subsequently fined.
- Did a state govt take an action, via legislation, that had an anticompetitive effect? *Parker v Brown*
    - Actions taken by state governments are generally immune from antitrust liability
    - In *Parker*, California instituted the California Agricultural Prorate Act to minimize food waste. The act setup zones for marketing and rated raisins as standard, substandard, or inferior. The goal of the act was price stabilization.
    - Because CAPA is a duly enacted law by the CA legislature and run by a state entity which was subject to oversight. It's pretty much good to go
    - Exceptions
        - States cannot grant individual citizens exemption from Sherman
        - States cannot restrict federal enforcement. We should really think about this as it relates to federal preemption (a la *Seminole Tribe*)
            - DOJ could not have brought this case under Sherman (as it stands) but federal legislators could amend and preempt the act
        - The fact that private citizens participate in the program does not mean it is subject to antitrust enforcement, because the program constitutes state action
    - KEEP FEDERAL PREEMPTION IN MIND. What's critical is that here is that this is state conduct through the legislative process and the result is subject to oversight or the political process in some way.
- Was the state conspiring with a private entity when enacting restrictions?
    - There is no conspiracy exception for state action doctrine. *Columbia v Omni Outdoor.* State action doctrine does not immunize a conspiracy, but that won't happen through antitrust
        - In *Columbia,* the city restricted billboard locations to places where a monopolist already had billboards (basically), pursuant to a state statute. Thus, the city is immunized.
    - SCALIA notes that it would be impossible to separate an unlawful conspiracy from the inevitability that government officials will pass laws that benefit some private actors.
        - See first amendment discussion below
        - We would handle a conspiracy claim under other statutes (not antitrust), e.g., 18 U.S.C. § 201 Bribery of public officials. Requirements:
            - You must have a Public Official
            - Defendant must directly or indirectly, corruptly gives, offers or promises anything of value to any public official
- Is the allegation in a market that has rules created by an administrative agency (e.g. finance)?
    - If the govt creates an agency that explicitly regulates part of the market, it is implicitly exempted from antitrust scrutiny. *Credit Suisse v Billing*
        - In *Credit Suisse,* parties were challenging actions taken by bankers in the IPO market. The allegation is that pooling arrangements and coordinating underwriters is inherently anticompetitive and forecloses part of the market.

        - BREYER reasons that the SEC was specifically delegated this task to manage the market. Its complex and hard. But there are rules and processes. THOMAS is mad
        - Because the activity is occurring pursuant to an authority, and the alleged violation of antitrust laws lies squarely within that regulation, there is immunity.
    - TEST for this immunity from BREYER. Plain repugnancy doesn't exist with:
        - (1) the existence of regulatory authority under the law to supervise such activity
        - (2) evidence that the responsible regulatory entities exercise that authority;
        - (3) a resulting risk that the administrative rules and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards
        - (4) the conflict resulted in an effect within the market
- Is the allegation being made against a substate entity (e.g. municipality empowered by the state)?
    - If the substate entity is acting pursuant to state policy that clearly articulates the ability to be anticompetitive, it has antitrust immunity. *FTC v Phoebe Putney*
        - In *Phoebe Putney,* the Georgia had passed a state constitutional amendment which created hospital authorities with the ability to acquire, purchase, and least hospitals. One hospital approached the authority with a purchase and lease back plan of a competing hospital for $1 / year
        - SOTOMAYOR indicates that the substate entity might have had immunity through clear articulation. TEST for clear-articulation standard. Either
            - express authorization or
            - when otherwise-unlawful restraint on competition is a foreseeable result
        - FTC wins in this case because there was no clear articulation. The constitutional amendment was meant to promote access to healthcare, not end-run antitrust law
- Is the allegation being made against a state-controlled agency with limited supervision and / or whom is not functionally subject to the political process?
    - Here things get complicated. Following *NC State Board of Dental Examiners v FTC*, the exemption from the state MUST:
        - 1) be clearly articulated in statute
        - 2) the entity be subject to active state supervision
    - What constitutes state supervision is fuzzy. In this case, what was deficient is that the supervisor (i.e. the state) was not subjecting the entity's actions to oversight and veto
    - TWO PART TEST
        - clearly articulated and affirmatively expressed as state policy, and
        - the state actively supervises the policy.
            - These apply when there is an intermediary between the state and the consumer (e.g. board, municipality).
            - Note that in *Haley*, municipal actors don't need to satisfy the second step (active supervision) because there is a political process associated with it.
        - FTC wins because of the incentive structure of the board. The board includes market participants and was not being subject to sufficient oversight (either through review or through the political process)

First Amendment Protections

- There's a clear dovetail here between first amendment protections and *Columbia v Omni Outdoor*.
    - Recall that in *Omni*, the accusation was that there was conspiracy between the city and market actors. However, the approval of billboard locations was sanctioned by state statute.
    - Thus, there is no general antitrust conspiracy exception, people can petition the government as they see fit. If there is a corruption issue, that should be tried under public corruption statutes, not antitrust.

- *Noerr-Pennington* does NOT allow you to consider INTENT. We only get into intent with abuse of the courts etc.
- Bear in mind, the rub for one of these cases will be either a i) speech vs exclusionary conduct issue or ii) a sham litigation issue.
- Did a firm petition for government action in some way (such as a marketing campaign)?
  - Competitors do not violate the Sherman Act by using public relations style tactics. *Eastern RR v Noeer Motor Freight.* – This is called *Noerr Doctrine*
    - In *Eastern RR*, there were dueling marketing campaigns between railroads and long-haul truckers. Eventually the RR campaign resulted in pro-truck legislation being vetoed by the PA governor. Accusation is conspiracy.
    - BLACK writes that there is i) a constitutionally protected right to petition the government, and ii) firms also have those rights even if the motivation behind the petition is to attack a competing industry
    - Only a true sham, in which a political campaign is used to mask intentional interference in the business of a competitor, warrants Sherman Act regulation.
- Is defendant part of a group that traditionally has antitrust immunity?
  - Classic examples: Labor (Clayton and Norris-LaGuardia), Baseball, groups regulated by an administrative body (e.g. the SEC). Agricultural Cooperatives (Capper-Volstead Act), some Business of Insurance firms (McCarran-Ferguson Act), newspaper preservation act (failing newspaper mergers), medical peer review proceedings (Health Care Quality Improvements Act), those under the defense production act, etc.
    - For standard operations, these group have an exemption.
  - Unions that participate in anticompetitive agreements with NON-LABOR parties are not exempt. *United Mine Workers v Pennington*
    - In *Pennington,* there is what amounts to collusion between the UMW (union) and a bunch of individual mines about wages, hours, and other stuff (private firms).
    - The issue is not about intra-union behavior, it is about agreements between unions and employers. Congress did intend to eliminate wage competition through negotiation. But it did NOT intend to do so across employers
    - Thus, unions forfeit exemption by agreeing with one group of employers to impose a set wage sale against other bargaining units. An employer may not conspire to end competitors
  - This expands *Noerr Doctrine* to *Noerr-Pennington* Doctrine. There's no penalty for petitioning the Secretary of Labor, but if you start coordinating with other agents, you lose immunity
- Does a monopoly competitor have antitrust immunity if it exploits the right to access the courts?
  - Things get fuzzy in here. In short, a monopolist can't exploit its access to the courts in order to stymie competition / maintain monopoly. *California Motor Transit v Trucking Unlimited.*
    - In *California Motor Transit*, a new competitor (Unlimited) is filing to get operating rights and CMT just keeps filing suit after suit. The goal is to bleed Unlimited out.
    - The right to petition the legislature generally extends to the judiciary as well, but if a competitor uses the right to petition as a sham or pretext with the actual purpose of destroying competition, the competitor is not protected by *Noerr* immunity.
    - Thus, California Motor has the right to petition the govt, but if a jury found that it misused the judicial system to eliminate competitors, it will be liable.
- Are the set of plaintiffs a group of competitors trying to stop an action via coordinated suit?
  - This is perfectly fine. *Professional Real Estate Investors v Columbia Pictures.* PRE was a hotel chain that permitted guests to rent films for their private rooms. Columbia pictures (et al) filed suit alleging this infringed copyright. The et al of the filing is completely fine.
- How do we determine if the filing is a sham?
  - THOMAS gives us a test that is not a test in *Professional Real Estate Investors v Columbia Pictures.* Hooray for tests that create confusion and lack specificity. Two prongs:

        - First, a court must determine whether there is an objective basis for the challenged litigation. If an objective observer can conclude that the litigation has a reasonable chance of producing a favorable outcome, then the litigation is not sham
        - Second, if the litigation is objectively meritless, a court may consider the subjective intent of the litigants to determine if the lawsuit is a pretextual attempt to harm a competitor.
    - While this test is useless, its important because if the litigation is objectively meritless, INTENT can then be considered.
    - Returning to *PRE*, the suit was objectively reasonable, and Summary Judgement is granted for *Columbia*. Don't rent movies to your guests I guess.
- Do trade associations, or other groups which lack governmental authority, receive *Noerr* Immunity?
    - No, groups that lack governmental authority / public accountability do not receive *Noerr* Immunity. *Allied Tube Conduit v Indian Head*.
        - In Allied Tube, you have a professional association (the NFPA) which issues safety standards that are widely adopted by state and local government. The NFPA is controlled by market participants
        - Indian Head wants to sell plastic electrical conduits and the NFPA wont change the guidelines to include plastic. Suit filed. Indian Head wins because a non-governmental entity that is outside the political process (and not subject to oversight) is implementing a set of standards that have an anticompetitive effect.

Civil Remedies

- Types of Remedies.
    - Pre-merger, we are usually focusing on injunction.
    - Post-merger we are thinking about restitution, divestiture, consent decrees, and treble damages
    - Agencies typically don't seek disgorgement restitution. Disgorgement is sacrificing illegally gotten profits.
    - AMG Capital is going to be the big case in here.
- The Tunney Act
    - The Tunney Act requires DOJ to give public notice of any settlements on an antitrust matter to a judge. This sunshine procedure came down after Nixon, who was doing a lot of quid pro quo antitrust enforcement
    - The FTC does not have this requirement.
- Difference between disgorgement and restitution
    - Disgorgement – amount that you profited off other people (even if you didn't do harm to them). This can be broader. To claim disgorgement, plaintiff must show the following:
        - Disgorgement is an equitable remedy, not an independent cause of action;
        - In order for a plaintiff to claim disgorgement for the defendant's action, the defendant must have caused the plaintiff's damages; and
        - Only in exceptional circumstances is disgorgement available for a breach of contract.
            - See *Atlantic Lottery Corp v Babstock*
    - Restitution – based on the harm that was done to a person by a conscious wrongdoer
- How do we access treble damages? (Section 4 of Clayton)
    - Treble triples the damages
    - Three elements for treble damages. *J Truett Payne v Chrysler Motors*
        - An antitrust violation
        - A cognizable injury attributable to the violation,
        - The amount of damages sustained

    - In *Payne,* Chrysler was paying bonuses to dealers based on exceeding quotas. The complaint was that Payne's quotas were set much higher, and impossible to meet, setting off an impossible treadmill of costs. (Clayton Sec 2 complaint, which goes with Robinson Patman)
- How do we calculate damages?
    - Unlike standard property complaints, plaintiff can establish the amount of damages by estimating sales it could have made absent the antitrust violation. *Conwood Co v US Tobacco*
        - Requiring specific proof would likely result in no violators paying anything
        - In *Conwood*, defendant was using exclusionary tactics. That's fun. What critical is that the plaintiff's expert takes a belt and suspenders approach to showing damages (first differences, growth comparisons across footnote and non-foothold states, yardstick tests, etc. to provide a range).
    - Thus, calculations can be blunt, but they must be thoughtful and deliberate. Don't just have someone running regressions in the background, corroborate the states with a narrative and factual insight (grounded theory style)
    - Note that this does not apply to disgorgement claims.
- What is the statutory authority by which plaintiff is demanding disgorgement / monetary relief?
    - Monetary relief can absolutely be demanded under Sherman or Clayton!
    - *AMG Capital* centers on the use of 13(b) of the FTC act. This expressly empowers the FTC to seek injunctive relief in federal district court. It does not permit monetary relief.
        - In *AMG Capital*, the FTC was going after payday lenders for deceptive practices. The issue is that they went directly through Article III courts via 13(b).
        - What the FTC is supposed to do (BREYER) to seek disgorgement is file suit under Section 5 or Section 19. But the FTC needs to go through the FTC's ALJ, then the commissioners, and then things can get appealed to an Article III court.
        - This all adds time, but them's the rules.
- Criminal Remedies
    - Keep in mind that there is a sentencing guideline. A court can increase the offense level of Sherman violators based on the volume of commerce affected and the role the defendant played *United States v Giraudo*

Section 8 (Clayton) – Interlocking Directorates

- Section 8 prevents someone from simultaneously serving on the board of competing corporations. Two elements:
    - Size
        - One of the merging firms has net sales or assets of $100mm or more and the other firm has assets or sales of $10mm or more (manufacturing)
            - If the smaller firm is not a manufacturer it must has assets of $10mm or more
    - The corporations are competitors and none of the following apply
        - The competitive sales of either are less than $1mm annually
        - The competitive sales of either are less than 2% of total sales
        - The competitive sales of BOTH are less than 4% of total sales
- Important caveats
    - Market concentration and market shares are irrelevant
    - There is a banking exception, a common carrier exception, and a trust exception
    - This applies to horizontal competitors. It does not apply to vertical interlocks
    - Technically, this only applies to corporations (can't file against unincorporated entities)
        - Whether it applies to LLC is undecided
    - There are exceptions for small firms
- Open question: Does this mean literally the same person, or does it mean a representative?

    - This is a big deal in the private equity context where someone from Sequoia sits on the boards of Coke and Pepsi. There's an argument that it could be either.
    - DOJ is going to say that its representation. Not necessarily the same person
- There is a grace period of one year to remedy this if it is highlighted.
    - The reason is that these things can just pop up unbeknownst of the violators. Private equity is investing and that investee divests or changes position in the market. Thus, it can happen in legitimate ways
- What is the penalty?
    - Penalty is removal from the board. So, the risk is pretty modest
    - They are usually discovered through premerger notification (HSR filing)
    - But like everything, DOJ is ramping this up
- When you're advising clients
    - The real risk that the client will focus on is Section 1 risk. Section 8 is an early strategy to prevent Section 1 issues from coming up. Might not be criminal, might even be simple. But Section 8 is a potential red flag for a potential Section 1 violation
    - Investigation might uncover coordination even without agreement

Robinson Patman

- The Robinson-Patman Act background
    - Federal law intended to prevent price discrimination. The law prevents distributors from charging different prices to various retailers. The act only applies to interstate trade and contains a specific exemption for "cooperative associations."
        - It is illegal for a seller to "discriminate in price between different purchased of commodities of like grade and quality … where the effect of such discrimination may substantially lessen competition or tend to create a monopoly"
    - Cooperatives can be thought of as co-ops. Formally, "an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically-controlled enterprise"
- What constitutes price discrimination broadly?
    - This only means a price difference. *FTC v Anheuser Busch*
    - As a result, the statute condemns differential pricing rather than price discrimination in the market. This is why it would not apply to secondary price discrimination in the market (e.g. self-selection into auto insurance packages)
- Is the accused party a co-op?
    - If so, RPA does not apply
- Statutory conditions for liability
    - discrimination in price;
    - on at least two consummated sales;
    - from the same seller;
    - to two different purchasers;
    - sales must cross state lines;
    - sales must be contemporaneous;
    - of "commodities" of like grade and quality;
    - sold for "use, consumption, or resale" within the United States; and
    - the effect may be "substantially to lessen competition or tend to create a monopoly in any line of commerce."
        - "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."
- Is the alleged violation covered by RPA?

- Commerce Requirement – RPA applies to any transaction that affects interstate commerce. This generally means that at least one sale happened across state lines.
- Sale of Commodities
  - The statute applies to the sale of goods. Not to leases or offers to sell – *Export Liquor Sales v Ammex Warehouse.*
  - The statute does not apply to services. (see statutory language re: commodities)
- Like grade and quality requirement - this generally means a commodity where there is one high price and one low price. So, if the products are different you don't meet this prong. But if the products are the same and the only difference in marketing, you will meet the prong. *FTC v Borden Co*
- Competitive injury requirement – to meet a secondary line violation (see below) a purchaser must be forced to pay a higher price and could subsequently not afford to compete with others in the market.
  - This means that the harmed competitor must actually compete with the favored competitor. *Volvo Trucks. Lewis v Philip Morris.*
  - This doesn't mean the sale must actually have harmed competition. *Reeder-Simcoe v Volvo Trucks.*
  - There is a minimum threshold for harm. Not a one off (persistent difference over time). Courts have held that a loss of 3% of customers or 1% of transactions don't meet this threshold. *Cash & Henderson Drugs v Johnson & Johnson*
- Direct Discrimination
  - Direct discrimination is selling at two different prices.
  - Indirect discrimination is the discriminatory pricing of services associated with a sale (e.g., heterogeneous terms, stocking, etc). This is condemned by the statute but is generally ok if it is available to all customers. But if it isn't functionally available to all customers (e.g. only a sliver can afford it), it will be condemned. *Morton's Salt*
    - Defendant must also perform these services. *Texaco v Hasbrouck*

- Is the violation a primary line violation or a secondary line violation? *Brooke Group;*
  - Primary line violation is going to be predation. It will be harm to a competitor. We would deal with these claims using the standard approach to a Section 2 violation for predation
  - Secondary line violations are charging different prices to customers. Requires:
    - Defendant-seller to sell the product to customers at two different prices AND
    - Those two buyers compete with each other.
      - This would not include a strategically lowered price to win a bid or something. Example, gas firm lowering prices in a one off to win a contract
- Is the defendant a buyer or seller of products? *Brooke Group* and the *Statutory Language*
  - Doesn't matter. Penalty is the same.
  - The law prevents persons from KNOWINGLY INDUCING OR RECEIVING. Goes up and down the value chain
  - RPA APPLIES TO BOTH BUYERS AND SELLERS (*Brooke Group*)
    - The Court has also softened the bar for buyers though. We are really talking about high pressure buyers (e.g. Walmart)
    - Basically, the seller also has to be in violation for the buyer claim to be brought. If, for example, a buyer lies about an outside bid, and the seller meets it the seller wont be in violation, and thus the buyer wont be in violation. *Great Atlantic & Pacific Tea Co v FTC*
    - Note that the lie must be believable. If its an inherently suspect price then there will liability. If *Falls City v Vanco Beverage*
- Affirmative defenses for an RPA violation

- Cost justification – the cost of servicing the client directly affects the price they must charge. This is a really high bar. It needs to be extremely detailed. Not slap dash or an estimate. *United States v Borden*
  - Good faith in meeting competition – If we are meeting a competitor's bid in order to consummate the sale then heterogeneous prices are permissible. *FTC v AE Staley Mfg Co*
    - Note from above. A lie and good faith must be believable. If it's an inherently suspect price, then there will liability. *Falls City v Vanco Beverage*
- Robinson-Patman can be publicly or privately enforced
  - NOTE: Plaintiff does not need to prove harm to competition for an RPA claim. *Morton's Salt*. You can simply harm a market participant up or down the value chain.
- Has plaintiff demonstrated that it is in actual competition with the alleged favored competitor?
  - If not, RPA does not apply. *Volvo Trucks v Reeder-Simco*
    - In *Volvo,* the firm pulled discounts for one dealer but not others (extremely well counseled firm). Volvo claims Reeder was not in competition with the other seller
    - Without showing plaintiff is in actual competition with the favored competitor for the same customer, the plaintiff cannot prove the competitive injury
    - To prove competitive injury, the plaintiff can show: a diversion of sales to, or a significant price reduction for, a favored competitor at the expense of a disfavored competitor. This must be shown over time (not a one off)
  - Key is that evidence must show there is a favored competitor who are competing for the same customer. This might be different if the dealers were in the same geographies. Might be different if Volvo was setting prices.
  - Maybe the court is saying that this doesn't apply to auctions, but this isn't explicit.
- Is there a quantity discount that is available to all customers?
  - If it is not available to all customers, you're pretty much DOA.
  - If it is available to all customers, they still might violate RPA. *FTC v Morton's Salt*
    - In *Morton's Salt*, the firm had quantity discounts, but the discounts were essentially only available to a select set of super large firms. Morton's argues that they are available to everyone and there were efficiency gains from large shipments.
    - The hook is that Morton's failed to show that the discounts were the same size and scope of the efficiency gains. Thus, defendant must show the full discount is attributable to cost savings.
- Is there a marketing or labeling issue?
  - If you are selling the same underlying product (e.g., branded product v store brand) sales at different prices are an RPA violation. *FTC v Borden Company.*
    - In *Borden*, the firm sells evaporated milk under a national brand and private brands. These brands are chemically identical. It sells the private brand for less.
    - the statute only applies "to sales of commodities of "like grade, quality and brand.""
    - Page 1098 – "it's not for the courts to say there is an exception for brands, that's for congress, so the courts should look at the injury and cost justification"
  - Hook: if you are selling the product for different prices, they better be different products
- Is the seller offering a discount based on efficiencies in distribution?
  - If so, the seller must BENEFIT from the distribution efficiencies. *Texaco v Hansbrouck.*
    - In *Texaco*, the firm was selling to distributors and retailers. The price for the distributors was lower, even though it was not more efficient to sell to them
  - Section 2(a) of Robinson-Patman forbids sellers from offering different prices on the same goods to different purchasers.
  - There are two affirmative defenses to liability under § 2(a):
    - (1) if a seller, in good faith, offers a purchaser a lower price to meet the price of the seller's competitors; or

        - (2) if a seller is justified in giving a purchaser a lower price because the purchaser somehow lowers the seller's costs.
    - To win under 2, the discount must be tied to an actual cost saying. Not just preference.
- Damages
    - Old interpretation was automatic damages: price difference * quantity sold.
    - The current standard is that plaintiff is only entitled to are damages equal to the harm caused by decreased competition in the market. *J Truett Payne v Chrysler Motors*
        - See above in Civil Remedies.

Case Law

Potential Competition

United States v Marine Bancorp (1974)

- PARTIES
    - United States – Country who knows the sun does not set on bankers in the west
    - MB – Clandestine Bank with the goal of getting that good Spokane dollar
- FACTS
    - This is a POTENTIAL COMPETITION case
    - Spokane was a highly concentrated banking market (42%, 37%, 19%)
    - Defendant, second largest bank in WA State, was precluded from entering Spokane due to state law and could not hold more than 25% stock in another bank
    - They thus bought Washington Trust, the number tree bank. Suit filed under Clayton 7
    - Governments argument was that defendant could potentially deconcentrate the market through a foothold acquisition which would ease entry
    - Two arguments
        - Perceived potential competition: Argument NBC is already influencing Spokane even though it isn't there. So theres a threat of entry (even though state law prevents it). Thus, an acquisition dilutes the market.
        - Actual Competition Doctrine: Spokane's potential entry into markets post merger
            - Falls away and not used
- PROCEDURAL HISTORY
    - District Court dismisses → Cert
- ISSUE
    - Must courts take into account industry regulations which restrain entry in a line of commerce (banks in this case) when applying potential competition doctrine? YES!!
- HOLDING
    - A merger does not violate § 7 of Clayton Act eliminating potential competition if the acquiring firm could not enter the market independently or through a foothold acquisition.
- REASONING
    - The potential-competition theory says a merger may violate antitrust laws if the market at issue is
        - highly concentrated,
        - if the acquiring company could enter the market as an independent competitor or by a foothold acquisition,
        - and if the acquiring company's potential to enter the market influenced the current competitors to act in some procompetitive manner.
            - HERE, They cannot possibly enter because of local banking rules, so they cannot possibly be perceived as a potential competitior
    - Government contends that NBC could have entered the Spokane banking market as an independent competitor or through a foothold acquisition.

- Under state law, NBC could not open a Spokane branch as an independent competitor, and its parent company, MB, cannot hold more than 25% of stock of another bank.
- Thus, NBC could only acquire Washington Trust Bank or two other banks, and neither of the alternative banks would provide NBC with alternative benefits.
- Thus, there is no feasible way for NBC to enter the Spokane banking market without acquiring Washington Trust
- Due to the nature of bank regulation, it can be assumed that the other banks operating in Spokane were aware that NBC had limited means of entry, making it unlikely that the potential for its entry had any procompetitive impact on the market.
- Because the government fails to satisfy the requirements for the potential-competition theory, namely establishing that NBC had an alternate method of entering the target market, no violation of § 7 of the Clayton Act occurred

- TAKEAWAY
  - This is the defining potential competition case
  - Couple with "entrants"

Vertical Restraints

<u>*Continental TV v GTE Sylvania (1977)*</u>

- PARTIES
  - Continental – Angry TV salespeople in San Francisco
  - Sylvania – TV makers who need more sales.
- FACTS
  - In antitrust, a horizontal restraint is per se illegal. A vertical restraint is subject to rule of reason. Here, we are considering vertical restraints between manufacturers and retailers which bans a retailer from selling in certain locations is per se or rule of reason
  - Sylvania makes and sells TVs. Continental was a retailer who sold Sylvania TVs in San Fran
  - Sylvania stops selling to wholesalers and started selling to small retailers to be resold under a franchise agreements. This only permitted sale in authorized locations
    - This should reduce competition between retailers was the logic
  - They subsequently offer a franchise agreement to a new shop one mile from Continental
  - Continental objects but Sylvania plows ahead. Continental begins to shift away to Phillips. The relationship deteriorates and slims their credit. Continental stops paying. Then stops
  - Sylvania sues to recover goods. Continental claims a violation of Sherman 1
    - Argument, unreasonable restraint of trade
  - Jury is instructed that a vertical restraint is a per se violation
- PROCEDURAL HISTORY
  - Jury finds for continental → appeal of jury instruction (appellate court says they are not per se violations, upheld under rule of reason) → Cert
- ISSUE
  - Do we assess vertical restraints under rule of reason or per se violation?
- HOLDING
  - Vertical restraints challenged as antitrust violations should be assessed under the rule-of-reason analysis.
- REASONING
  - Rule of reason
  - *United States v. Schwinn* (1967), SCOTUS holds that a per se antitrust violation occurs when a manufacturer sells a product to a distributer subject to customer or location restrictions on the product's resale. We are clearly here.
  - However, a vertical restraint, such as a restraint on location for a manufacturer's own products, generally reduces intrabrand competition in order to increase interbrand competition

    - Thus, the per se standard set forth in Schwinn is inappropriate for vertical restraints and is overruled. Vertical restraints are capable of both pro-competitive and anticompetitive effect
    - Court of appeals is affirmed
- TAKEAWAY
    - Vertical restraints (non price based) are assessed under rule of reason (market share, pro and anticompetitive effects)
    - Underscores that Interbrand competition is the critical antitrust concern
    - This was a seismic shift. It introduces two critical distinctions
        - 1) abandoned. Because *Dr Miles* was undisturbed, the court draws a distinction between vertical intrabrand non price restraints being subject to rule of reason
        - 2) It also draws a distinction between vertical and horizontal non price restraints. Vertical restrictions are rule of reason. Horizontal are per se unlawful (*Topco*)
            - TOPCO – horizontal restraints (location time) which reduce interbrand competition are per se unlawful

Leegin Creative Leather v PSKS, Inc (2007)

- PARTIES
    - Leegin – We are into leather. Pricey pricey leather
    - PSKS – Kay's Kloset owner who wants you to get into leather on the cheap
- FACTS
    - Manufacturers often sell to retailers who resell at whatever prices. Here we are exploring minimum resale prices.
    - Leegin makes women leather products under the brand Brighton. They wanted to be a high-end brand and refused to sell to retailers below minimum prices. The rationale was increased cash flow associated with being high-end.
    - Kay's Kloset is selling below the minimum and refuses to stop. Leegin cuts them off
    - Suit ensues under *Dr Miles*, vertical minimum price restrictions are a per se violation. Leegin argues that this is silly because minimum prices can have procompetitive effects
        - State of the law is that pricing agreements are unlawful
- PROCEDURAL HISTORY
    - District rules for Kay → Affirmed → Cert
- ISSUE
    - Can we set a minimum price for a good in a vertical restraint?
- HOLDING
    - An agreement between a manufacturer and a distributor on the minimum price that the distributor can charge for goods is not a per se antitrust violation.
- REASONING
    - KENNEDY - An agreement between a manufacturer and a distributor on the minimum price that the distributor can charge for goods is not a per se antitrust violation
    - Sherman only prohibits unreasonable trade restraints.
    - This is tested under rule of reason, so the restraint is balanced against pro and anti-competitive effects
    - resale-price limitations can foster competition among retailers of the same brand by encouraging retailers to compete on elements other than price that will benefit the consumer, such as customer service
    - Leegin describes three factors that should be considered
        - Scope of the minimum resale price management in the market
        - Source of the restraint (supplier or dealer)
        - Market power of the supplier and dealer
            - The idea is to recognize that cartels might try this

    - *Dr Miles* is overturned. Reversed and remanded
- TAKEAWAY
    - I guess you can set minimum prices for YOUR product

<u>*E&L Consulting v Doman Industries (2006)*</u>

- PARTIES
    - E&L – Lumber sellers who were once in competition, but got cut out
    - Doman – Simple lumber monopolist who only wants one seller
- FACTS
    - SECOND CIRCUIT
    - E&L had a lumber distribution agreement with Doman Industries. Doman had a 95% market share in the lumber production market in various states
    - Under the agreement, Doman supplied labor to E&L and E&L sold it. Taking a commission
    - Doman also had an agreement with Sherwood Lumber (defendant), which was also bought and sold. Doman prohibits E&L from selling in Sherwoods service area.
    - Doman eventually kills the E&L deal and makes Sherwood the exclusive distributor
    - E&L files suit under section 1
- PROCEDURAL HISTORY
    - The district court dismisses the complaint. We are under appeal in the SECOND CIRCUIT
- ISSUE
    - Does a manufacturer with monopoly share violate Sherman 1 by appointing an exclusive distributor without showing actual adverse effect on market competition?
- HOLDING
    - No. A manufacturer with a monopoly share of the relevant market does not violate antitrust laws by appointing an exclusive distributor, unless there is a showing of actual adverse effect on market-wide competition.
- REASONING
    - There is a presumption that an exclusive distributor agreement is legal
    - This is rebuttable if it can be shown that there is an anticompetitive effect on the market
    - This is generally ok because if there is already a monopoly, there's likely no harm in creating a secondary downstream monopoly
        - This is the opposite of a double marginalization argument ← ME!
    - Because Doman already has a monopoly, and controls lumber output, the exclusive downstream deal with Sherwood doesn't benefit them (might benefit Sherman though)
    - E&L needs to present sufficient evidence of an actual adverse effect on competition
- TAKEAWAY
    - How do we square this with *Aspen Ski?* I guess because the lumber company isn't selling directly to consumers. If it did that, as a monopolist, we could be in Sherman II land

Two Sided Markets

<u>*Ohio v. American Express, 138 S. Ct. 2274 (2018)*</u>

- PARTIES
    - Ohio – State that just needs to stop… with everything
    - American Express – Good natured credit card company who only caters to the wealthy.
- FACTS
    - Section 1 of the Sherman Act only prohibits unreasonable restraints of trade. In this case we are considering steering customers away from competing vendors
    - AMEX and their travel-related services provide credit cards to consumers. When an AMEX customer buys something with an AMEX card, AMEX processes the transaction and charges a fee

- Merchants wanting to accept AMEX sign an agreement with anti-steering provisions. This prevents merchants from discouraging the use of AMEX at point of sale
  - In 2010, Ohio et al sue AMEX claiming this violates Sherman 1
- PROCEDURAL HISTORY
  - District Court finds for the US (and Ohio) – Credit card transactions should be treated as 2 transactions for antitrust rules. 1 for the merchant. 1 for the customer. → Amex loses → 2nd circuit reverses saying that the credit card market is one market. → CERT
- ISSUE
  - Do contracts that prohibit steering customers to competing vendors violate Sherman 1?
    - Not necessarily
- HOLDING
  - Contracts the prohibit steering customers away to competing vendors do not necessarily violate Sherman 1
- REASONING
  - Two types of trade restraints are unreasonable under the antitrust laws. Horizontal restraints between competitors are unreasonable per se, as they virtually always decrease output or restrict competition.
  - Other types (i.e. vertical or other non-horizontal) require a three step rule of reason
    - Complainant must show the restraint has substantial anticompetitive effects
    - If shown, burden shifts to show procompetitive effects
    - Burden then shifts back to complainant to show the restraint is not the least restrictive means
  - The first step of the rule of reason analysis for a two-sided market requires showing that the restraint increased the cost of the service offered above competitive levels, reduced the volume of transactions, or otherwise stifled competition in that market.
    - This is a two sided market because Sales rely on two simultaneous transactions, with more pronounced indirect network effects and pricing interconnected with demand. However, the market sells one service: transactions
      - Complainants fail to show this prong
  - the antisteering provisions are not inherently anticompetitive and work simply to ensure the customer a seamless transaction. Most importantly, the provisions do not prevent other credit-card companies from offering lower fees or promoting acceptance at more merchants.
- TAKEAWAY
  - You cannot consider the sides of the market independently, you need to consider them together. The harm has to be overall.
  - "only platforms can compete with other platforms" – THOMAS

Section 2 and Mergers

<u>*United States v Microsoft (2001)*</u>

- PARTIES
  - United States – Country easily spooked by technology, and browsers
  - Microsoft – Bill Gates finally being the big bad man Fox News says he is
- FACTS
  - Microsoft is a leading OS seller. In the 1990s, it bundled its web browser with the OS. OEMs could only buy windows with Internet Explorer on them.
  - It clearly has market power in OS, but does not have a monopoly on internet browsers
  - US bring suit arguing that the bundling is a restraint of trade.
- PROCEDURAL HISTORY
  - District court determines this is a per se violation and restricts MS conduct
  - Immediately after, interviews with the trial judge appear in the press, it's not a good look

- o We are now at the DC Circuit
- HOLDING
  - o Tying arrangements involving software-platform products should be judged under the rule of reason. Microsoft engaged in an illegal tie.
- REASONING
  - o If a seller possesses market power in the market for the tying product and only sells the tying product alongside the tied product, a buyer desiring the tying product is forced to also purchase the tied product. Market power exists if a seller can force a buyer to behave in a way that the buyer would not behave in a competitive market.
  - o Generally, if a seller is determined to have market power in the market for the tying product, the tying arrangement is considered to be a per se violation of antitrust law.
  - o To establish the existence of a tying arrangement, plaintiff must show that the defendant is tying together the sale of two products and not selling a single product.
  - o But, not all tying arrangements are anticompetitive, as the bundling of products can offset restraint of trade by creating efficiencies for sellers and reducing transaction costs
  - o Thus, a defendant accused of an unlawful tying may present evidence of efficiencies or other business justifications in order to refute the alleged anticompetitive effects.
  - o Microsoft's bundling of the Windows operating systems and IT is a per se violation
    - ▪ But the district court failed to consider the special circumstances surrounding technologically integrated products. The efficiencies claimed by Microsoft are achieved through the integration of Microsoft's software
  - o This type of integration appears to be a regular practice in the market for software platforms, even among firms that lack market power. Although this practice is pervasive in the market, the competitive effects of technological integration are not an area of familiarity for judicial tribunes. As a result, subjecting the arrangement to a per se analysis is inappropriate.
  - o In other words, there is simply not enough information regarding either the competitive benefits or the potential trade restraints resulting from technological integration to subject the entire class of actions to a per se analysis.
  - o Thus, the arrangement should be assessed under the more discerning rule of reason, with proper inquiry into the actual anticompetitive effects and efficiencies created by Microsoft's challenged bundling policy.

State Action Immunity

<u>*Parker v Brown (1943)*</u>

- PARTIES
  - o Parker – Soulless bureaucrat who reviles a free-market economy and hates Josh Wright
  - o Brown – Farmer who grows raisins, because they are also brown, as is his name.
- FACTS
  - o In 1933, CA institutes the California Agricultural Prorate Act to prevent agricultural waste in a post great depression world. The act established programs that maintained minimum price levels and restricted competition between growers (HOORAY WICKARD)
    - ▪ It also created a commission which created marketing programs for commodities
  - o The Zone 1 cmte starts a marketing program for raisin. Under it, Raisin producers had to deliver their raisins to a receiving station. The station essentially managed half the world crop
    - ▪ They were classified as standard, substandard, or inferior
    - ▪ Commission includes govt appointed persons and legislatively confirmed persons
  - o The excess raisins went into a surplus pool. The rest went into a price stabilization pool
- PROCEDURAL HISTORY
  - o Court finds for Brown → Direct Appeal to SCOTUS
- ISSUE
  - o Are actions by state governments immune from antitrust liability? YES!

- HOLDING
    - Under the state-action doctrine, actions by state governments are immune from antitrust liability under the Sherman Act.
- REASONING
    - The text and legislative history of Sherman indicate it was not a regulation of govt.
    - CAPA is a duly enacted law by the CA legislature.
    - Exceptions
        - States cannot grant citizens exemption from Sherman
        - States cannot restrict federal enforcement
        - The fact that private citizens participate in the program does not mean it is subject to antitrust enforcement, because the program constitutes state action
    - NOTE: This could be pre-empted by a federal law. KEEP FEDERAL PREEMPTION IN MIND. What's critical is that here is that this is state conduct through the legislative process
    - The LEGISTLATURE or COURTS can be covered by state action doctrine.

Columbia v Omni Outdoor (1991)

- PARTIES
    - Columbia – billboard business in Columbia, SC who wants to hide those pines
    - Omni Outdoor – upstart billboard business who's gonna show them what's what!
- FACTS
    - In 1981, Omni enters the SC market and starts putting up billboards. At the time, Columbia has a 95% market share. Competition escalates. In 1982, the city restricts WHERE billboards can be put. And that's just bananas because Columbia has all the good slots!
    - Omni brings suit arguing violation of Sherman. Argument is that there is a conspiracy with anticompetitive intent that is not entitled to protections
- PROCEDURAL HISTORY
    - Jury returns verdict for Omni and awards damages → District court overturns → Appellate court reinstates → Cert
- ISSUE
    - Is the state-action doctrine immunizing conduct from antitrust liability subject to a conspiracy exception? NO!
- HOLDING
    - There is no conspiracy exception for state action doctrine.
- REASONING
    - SCALIA writes, to qualify for immunity under the state-action doctrine, a defendant must be acting pursuant to a state policy authorizing anticompetitive conduct.
        - Policy does not need to expressly authorize the anticompetitive conduct
    - The city is acting pursuant to SC statute that authorized municipalities to regulate the location, dimensions, and apportionment of billboards. Thus, the city was immunized
    - Omni argues that the city is also liable due to a conspiracy exception
        - Under a conspiracy exception, if a govt is believed to be colluding with a private actor to produce anticompetitive effects, the state-action doctrine does not apply. This is not valid law and is an incorrect assertion
    - It would be impossible to separate an unlawful conspiracy from the inevitability that government officials will pass laws that benefit some private actors.
    - Antitrust laws are designed to promote free competition and prevent anticompetitive conduct and are not intended to combat unlawful political activity.

Credit Suisse v Billing (2007)

- PARTIES

- Credit Suisse – Corrupt Swiss bankers with their gold, chocolate, and other Swiss things
- Billing – Group of investors that alleges the bankers are creating unfair rules during the IPO

- FACTS
    - Investors in a bunch of IPOs bring suit against Credit Suisse et al. Allegation is that the banks collaborated with other banks to create restrictive conditions on buyers
    - How is Credit Suisse limited sales to investors in this case?
        - (1) to buy additional shares of that security later at escalating prices ("laddering"),
        - (2) to pay unusually high commissions on subsequent security purchases from the underwriters, or
        - (3) to purchase from the underwriters other less desirable securities ("tying").
    - Claim is that the pooling arrangements and coordination of the underwriters is anticompetitive. It leads to higher prices to investors
- PROCEDURAL HISTORY
    - District Court for the Swiss → Appellate overturn → Cert
- ISSUE
    - Can federal antitrust law be applied to conduct surrounding IPOs? NO!!!
- HOLDING
    - Congress' creation of the SEC implicitly exempted regulated securities industries from antitrust lawsuits.
- REASONING
    - The SEC already regulates conduct surrounding initial public offerings, and there is a high probability of undesired consequences if judges who are unfamiliar with such transactions must rule on those transactions. Thus, this is inappropriate.
    - IPOs involve different nuances , which are often idiosyncratic. Judges don't know this shit.
    - By permitting judges who are not familiar with securities law to rule on issues involving IPOs, undesired consequences may result.
    - Therefore, it is inappropriate to apply federal antitrust laws to initial public offerings.
    - Billing fails to state a cause of action in this matter. The Second Circuit is reversed.
- TAKEAWAY
    - THOMAS is mad…. Again
    - TEST FOR THIS IMMUNITY FROM BREYER
        - Plain repugnancy to the antitrust provisions. Considerations are:
            - (1) the existence of regulatory authority under the law to supervise the activities in question;
            - (2) evidence that the responsible regulatory entities exercise that authority; and
            - (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct.
            - (4) the conflict resulted in an effect within the market
        - In prior decisions, the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate

FTC v Phoebe Putney (2012)

- PARTIES
    - FTC – Those meddlers who just keep meddling! This time with healthcare!
    - Phoebe – Innocent hospital administrators who wanted to play monopoly.
- FACTS
    - This is a medical mergers case. Phoebe (Memorial) and Palmyra are the only two hospitals in Dougherty County GA. 86% market share. In 2010, they plan to merge (takeover)

- State constitutional amendment has a provision to increase access to affordable care. Under this, substate govt entities could establish local hospital authorities with the ability to acquire, purchase, and lease hospitals to provide acute cate.
    - Memorial goes to the hospital authority with a proposed plan to purchase and lease back for $1.00 per year. Authority agrees, monopoly is created. FTC files suit
- PROCEDURAL HISTORY
    - District Court finds for Authority and PPHS → Cert
- ISSUE
    - Is a substate entity entitled to antitrust immunity under state-action doctrine if the entity acts pursuant to articulated state policy authorizing a foreseeable anticompetitive activity? YES!
- HOLDING
    - A substate entity only receives antitrust immunity under state action doctrine if it acts pursuant to state policy that clearly articulates the authority to be anticompetitive
- REASONING
    - SOTOMAYOR writes that states' have sovereign rights to regulate economies, the state-action doctrine immunizes state action from antitrust liability. Municipalities (substate political) entities are subject to closer scrutiny because the state-action doctrine does not directly apply to such entities.
    - To qualify for immunity, substate actors must show that their anticompetitive actions are authorized under a clearly articulated state policy.
    - The clear-articulation standard is met either through
        - express authorization or
        - when otherwise-unlawful restraint on competition is a foreseeable result of policy.
    - FTC wins because this was not a clear articulation granting anticompetitive abilities

NC State Board of Dental Examiners v FTC (2014)

- PARTIES
    - Board – Dentists with an axe to grind, but not on the teeth
    - FTC – harrowing people who want white white teeth for cheap cheap cheap
- FACTS
    - State action immunity doctrine says some state authorities are immune. Here we are dealing with state regulatory boards, and specifically boards with private market actors
    - NC Board of Dental examiners regulates dentists in NC. Statutory agency. Under the dental practice act, it could create and enforce a licensing system. 8 members. 6 must be dentists
    - In the 2000s, non dentists started offering teeth whitening. They got cease and desists
        - The six dentists are APPOINTED BY DENTISTS. They aren't appointed by the governor or someone else who is politically accountable
- PROCEDURAL HISTORY
    - Admin Law Judge for FTC → Affirmed by Appeals → Cert
- ISSUE
    - Is the action of a state agency controlled by active market participants exempt from antitrust liability if:
        - i) this is not clearly articulated by governing statute, and
        - Ii) the state does not actively supervise the action? NO!!
- HOLDING
    - Action of a state agency controlled by active market participants is exempt from Sherman Act regulation under the state-action doctrine if the action is clearly articulated and affirmatively expressed as state policy, and the state actively supervises the policy.
- REASONING

- Action of a state agency controlled by active market participants is exempt from Sherman Act regulation under the state-action doctrine if the action is:
  - clearly articulated and affirmatively expressed as state policy, and
  - the state actively supervises the policy.
- TWO PART TEST
  - clearly articulated and affirmatively expressed as state policy, and
  - the state actively supervises the policy.
    - These apply when there is an intermediary between the state and the consumer (e.g. board, municipality).
    - Note that in *Haley*, municipal actors don't need to satisfy the second step (active supervision) because there is a political process associated with it.
  - This doesn't fly here because of the incentive structure of the board. The board includes market participants.
- What constitutes active supervision:
  - What is deficient is that the supervisor is not subjecting the substance to review. There's no review and veto action by a state actor when extending their authority
- The issue is when we are getting Further away from a sovereign actor. State → municipal → board with market participants
- The question is whether oversight promotes active oversight in the achievement of the states stated goals.
- Supervision doesn't mean you're supervising against anticompetitive outcomes. Sure, you can foreclose actors from the market, but it needs oversight about line drawing. In these cases, we're not sure who to point the finger at

First Amendment Protections

Eastern R.R. Presidents Conference v. Noeer Motor Freight, Inc. (1961)

- PARTIES
  - Eastern RR Pres – Old school train men who would ride the rails of Cornelius Vanderbilt
  - Noeer Motor Freight – Defendant whose got a big old convoy, running through the night
- FACTS
  - For a long time there was little competition to railroads for long haul freight. But post WWII trucking began to be a thing. Smokey and the Bandit rise
  - 24 railroads and their presidents ran a marketing campaign to encourage state legislators to adopt laws that were detrimental to trucking. (e.g. damage to roads, hazards, etc)
  - Truckers get all worked up. They counter market pushing their own pro-truck agenda
  - Both use "third party marketing:" who planned out seemingly spontaneous statements
  - After the RR campaign caused some pro truck legislation to be vetoed by the PA governor, a suit is filed in the Eastern district of PA. Allegation is conspiracy.
- PROCEDURAL HISTORY
  - District finds the RRs are in violation of Sherman, but truckers are not → affirmed → Cert
- ISSUE
  - Do business competitors violate the Sherman Act by mounting a public-relations campaign aimed at petitioning for governmental action? NO!!!
- HOLDING
  - Competitors do not violate Sherman by using public relations tactics to petition the govt.
- REASONING
  - BLACK - The Sherman Act is a law regulating business activity. Publicity campaigns are not that. Publicity campaigns are broadly political activity
  - As there is a constitutionally protected right to petition the government, the firms have rights, even if the motivation behind the petition is to attack a competing industry.

        - Self-interested parties are permitted to make their voices heard.
    - Even if reputational damage occurs as a result of political activism, any damage that is merely incidental to the protected political action is not unlawful. Sherman cannot stop that
    - Only a true sham, in which a political campaign is used to mask intentional interference in the business relations of a competitor, warrants Sherman Act regulation.
- TAKEAWAY – Noerr Doctrine

United Mine Workers v. Pennington (1965)

- PARTIES
    - Mine Workers – Manly men covered in soot. With the black lung. No mermen allowed
    - Pennington – Some guy who doesn't like them unionist mine workers (Sec Labor).
- FACTS
    - Mine workers (UMW) Retirement Fund file suit against Phillips Brother coal for payment
    - At issue is that before the 1950s, there was a lot of controversy about wages, hours, and union funds. Phillips asserts that the parties hyped overproduction and drove the smaller mines out of business by not controlling hours, etc. Collusion between union and a bunch of the individual mines
    - The net of this is that UMW could demand higher wages as productivity increased, regardless of how technologically advanced the mine was
- PROCEDURAL HISTORY
    - Jury for Phillips → Award set aside → Appeals Affirmed → Cert
- ISSUE
    - Are unions that participate in anticompetitive agreements or arrangements with non-labor parties exempt from antitrust laws? NO
- HOLDING
    - Unions that participate in anticompetitive agreements or arrangements with non-labor parties are not exempt from antitrust laws.
- REASONING
    - WHITE opinion - Clayton and Norris-LaGuardia exempt a lot of labor union activities from antitrust law. Neither explicitly deals with agreements between unions and employers
    - If a union participates with a group of businesses with the power to stymie competition, that conduct is not exempt (e.g. fixing coal prices or colluding in bidding arrangements).
    - Thus, unions forfeit exemption by agreeing with one group of employers to impose a set wage sale against other bargaining units. An employer may not conspire to end competitors.
    - The union shares liability if it joins that conspiracy, even if its goal is securing better wages.
    - Nothing in labor policy allows the union and one employer group to bargain about other bargaining units' wages, hours, and working conditions, or standardize them an industry
- TAKEAWAY
    - This relates to Noerr doctrine because the Mine Workers were petitioning Pennington, who at the time was the secretary of labor. So there's no penalty for petitioning the Secretary of Labor, but if you start coordinating with other agents, you lose immunity

California Motor Transp. Co. v. Trucking Unlimited (1972)

- PARTIES
    - Trucking Unlimited – The bad boy upstarts of California Trucking
    - California Motor Transp Co – The bad boy incumbents of California Trucking
- FACTS
    - We are in the world of California highway carriers. It's no holds barred. Unlimited filed applications with numerous regulatory agencies to get operating rights
    - California motor opposes them at every turn, forcing Unlimited into costly administrative and judicial proceedings. The goal is to bleed them out

- Unlimited files suit under Section 4 of Clayton (damages). Accusation is monopolization of the market for the transportation of goods in California

- PROCEDURAL HISTORY
  - District court dismisses (failure to state cause of action) → Appeals reverses → Cert
- ISSUE
  - Will a party to an antitrust suit be protected by its First Amendment right to petition the government if it exploits that right to deny access to the court? NO
- HOLDING
  - Parties can avail themselves of the court, just like they can petition the legislature (Noerr) and they can petition the executive (Pennington). But a party to an antitrust suit will not receive First Amendment protections if it exploited that right
- REASONING
  - In *Eastern Railroad* SCOTUS holds that business competitors are immune from antitrust liability if they petition for legislative changes. This generally extends to the judiciary as well
  - If a competitor uses the right to petition as a sham or pretext with the actual purpose of destroying or weakening competition, the competitor is not protected by *Noerr* immunity.
  - Abuse of the judicial system is regularly met with sanctions and, in cases involving alleged antitrust violations, may result in antitrust liability
- TAKEAWAY
  - The court is zeroing in on this case on the sham exception in *Pennington*
  - Pennington and Noerr don't allow you to consider intent. This is also not about the outcome, it is the process. The process is creating the harm.
  - "misrepresentations in the political arena do not extend to misrepresentations in the adjudicatory setting"

<u>Prof'l Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc, (1993)</u>

- PARTIES
  - Professional Real Estate (PRE) – Hotel chain that's probably renting porn…
  - Columbia Pictures – Group of movie moguls who want them to knock that off
- FACTS
  - PRE has a resort in California that permits guests to rent films for their private rooms
  - Columbia Pictures and a bunch of other studios file suit alleging this infringed copyright
  - PRE counterclaims that the studio's actions of coordinated suit violates antitrust law through a concerted action, and the studios were not entitled to *Noerr* immunity. Lawsuit is pretense
- PROCEDURAL HISTORY
  - District Court grants summary for PRE → on remand summary judgement for Columbia → Appeals affirms → Cert
- ISSUE
  - May a group of competitors bring litigation without losing antitrust immunity under the *Noerr* doctrine? YES!!!
- HOLDING
  - A group of competitors can bring litigation without losing immunity under *Noerr* unless the litigation is objectively without merit.
- REASONING
  - *Noerr* doctrine carved out immunity from antitrust liability for legitimate attempts to petition for government action. Noerr doctrine includes coordinated litigation brought by a group of competitors (*Trucking Unlimited*).
  - The exception to Noerr immunity is for sham activities that have the sole purpose of harming competition under the pretense of compelling government action or using the court
  - THOMAS GIVES US A TWO PART TEST THAT IS NOT A TEST!

        - First, a court must determine whether there is an objective basis for the challenged litigation. If an objective observer can conclude that the litigation has a reasonable chance of producing a favorable outcome, then the litigation is not sham
        - Second, If the litigation is objectively meritless, a court may consider the subjective intent of the litigants to determine if the lawsuit is a pretextual attempt to harm a competitor.
- TAKEAWAY
    - What is sort of clear is "objectively baseless". What's critical is that we can consider intent in prong two of the test

Allied Tube Conduit Company v Indian Head (1998)

- PARTIES
    - Allied Tube – Conduit should be made of STEEL
    - Indian Head – Meh, plastic too. Electrons will get there
- FACTS
    - The National Fire Protection Administration is a private group with public and private members. The NFPA publishes the National Electrical Code – i.e. safety standards
    - Code was widely used and often adopted by state and local government. It covered electrical conduits, and other things, which were historically made of steel
    - Indian Head starts selling plastic conduit, and requests a (denied) change in the code
- PROCEDURAL HISTORY
    - District Court Holds for Allied → Reversed on appeal → Cert
- ISSUE
    - Do you get *Noerr* if there is a group lacking governmental authority or public accountability, such as a trade association like the NFPA? NO!
- HOLDING
    - An anticompetitive restraint of trade orchestrated by a group lacking official governmental authority, or subject to the political process, is not entitled to the immunity under *Noerr*.
- REASONING
    - BRENNAN - An anticompetitive restraint of trade orchestrated by a group lacking official governmental authority or public accountability is not entitled to the antitrust immunity
    - From *Noerr*, only anticompetitive restraints from private actions can trigger antitrust liability.
    - This restraint on trade arose from the decision to exclude Indian Head's product from the Code. The proper context for analysis is the standard-setting process of a private association.
    - As the Association has no official government authority, and the standard-setting process is carried out by members who have a financial incentive to restrain trade, no *Noerr* immunity

Civil Remedies

United States v Giraudo (2018)

- PARTIES
    - America – Once again undermining the dreams of conspirators who went big
    - Giraudo and Cullinane – bid riggers running foreclosure auctions hard in Californee
- FACTS
    - Giraudo and Cullinane are part of a bid-rigging conspiracy related to foreclosure auctions
    - In it, the conspirators would not bid against each other for foreclosed properties
    - Giraudo was the boss, and called the shots on who was in, resolving and trouble. Ya see!
    - Cullinane was the real estate manager. Estimated profits ~$36 million.
    - Both plead guilty to criminal violations of Sherman 1. During sentencing Giraudo's offense level was 18 and Cullinane's was 17. This got upped due to sentencing enhancement

- This is in spite of a reduction in the offense levels by three levels because of guilty pleas
    - Giraudo and Cullinane object, arguing that the sentencing enhancements should not have been applied, and that their offense levels should have been nine.
- PROCEDURAL HISTORY
    - Well, they pled guilty, so here we are…
- ISSUE
    - Under US Sentencing Guidelines, can a court increase the offense level of a defendant who violated the Sherman Act based on the volume of commerce the defendant affected, the role the defendant played, and whether the defendant's actions involved bid rigging? YES!!!
- HOLDING
    - A court may increase the offense level of a defendant who violated the Sherman Act based on the volume of commerce the defendant affected and the role they played
- REASONING (BREYER's BROTHER)
    - The sentencing guidelines establish a uniform system of sentencing for criminal defendants
    - The guidelines are not binding, and a trial court has discretion in determining a sentence.
    - In cases Sherman Act cases, the base offense level is 12, and sentences can be reduced by 3 levels if a defendant pleads guilty.
    - The guidelines also provide enhancements based on the volume of commerce the violation affected, the role that the defendant played in the violation, and whether the violation involved bid rigging.
    - In calculating the volume of commerce affected, a court may consider the total amount of commerce affected by all members of a partnership.
    - The determined offense levels properly include sentence reductions for guilty pleas, and enhancements for the specifics of their violations.

J Truett Payne Co v Chrysler Motors (1981)

- PARTIES
    - Payne – Petitioner who brings the Payne, but kind of sucks at selling cars
    - Chrysler – auto manufacturer who gets bailed out more often than banks
- FACTS
    - Payne, a former automobile dealer, brought suit against Chrysler alleging their "sales incentive" programs violated the price discrimination prohibition of §2 (Clayton Act)
    - In the program, Chrysler paid a bonus to dealers if they exceeded quotas, as set by Chrysler, of cars to be sold at retail or purchased. Payne alleged that Chrysler set his quotas higher than his competitors, and they were impossible to meet, thus driving up costs
- PROCEDURAL HISTORY
    - Jury returned a verdict for Payne (~$111k), District Court trebled → reversed on appeal
- HOLDING
    - To obtain an award of treble damages under §4 of the Clayton Act, a plaintiff must establish:
        - (1) the antitrust violation,
        - (2) a cognizable injury attributable to the violation, and
        - (3) the amount of damages sustained.
    - Plaintiff can establish the amount of damages by estimating sales it could have made absent the defendant's antitrust violation. Unlike injury to a person or property, damages to a business resulting from an antitrust violation are often impossible to calculate exactly.
    - In the antitrust context, requiring a plaintiff to provide specific proof of damages could unfairly result in the defendant not having to pay any damages.

Conwood Co v United States Tobacco (2002)

- PARTIES

- Conwood – Little tobacco, trying to mess it up for everyone anew!
  - US Tobacco – Big tobacco, messing it up for everyone again
- FACTS
  - Conwood and US Tobacco Company both make snuff, a form of smokeless tobacco.
  - Conwood had a 13.5% market share. USTC had a 77%
  - Conwood sues alleging predation that excluded Conwood from the market in certain areas.
  - At trial, USTC conceded that it had a monopoly of the relevant market but denied exclusion
  - Conwood argued that if it had not been subject to USTC's illegal exclusionary tactics, Conwood would have had a 22 to 25 percent market share. Conwood's case relied on the expert testimony. The stats basically showed that
    - in states where Conwood had a foothold market share was between 15 and 20 percent, and they experienced higher market share over time.
    - Using a first difference, evidence showed growth rates in foothold and non-foothold states in the periods before and after USTC's exclusionary conduct began.
    - Yardstick test to compare Conwood's growth rates in the snuff market to its growth rates in the loose-leaf tobacco market, in which USTC did not participate.
  - Results supported Conwood's contention that, if not for USTC's exclusionary tactics, Conwood would have had a larger share of the snuff market.
  - Expert estimated Conwood's damages at between $313 and $488 million.
- PROCEDURAL HISTORY
  - The jury found USTC guilty and awarded $350 million in damages.
  - Under Clayton, the award was tripled to $1.05 billion.
  - USTC appealed, arguing that the trial court incorrectly relied on expert testimony.
- ISSUE
  - Can an antitrust plaintiff be awarded damages based on an estimate of sales it could have made absent the defendant's antitrust violation? YES!!!
- REASONING
  - A plaintiff can use expert testimony to estimate damages.
  - An estimation of damages is appropriate because antitrust damages are often impossible to calculate exactly. The employed methods (regression analyses, yardstick tests, and before-and-after tests are valid scientific methods an expert witness can use_
  - In this case, the trial court did not abuse its discretion in admitting and permitting the jury to rely on expert testimony. The expert properly and scientifically tested the testimony of the Conwood executives with appropriate statistical tools.
  - USTC also did not present any reason why the trial court should have excluded expert testimony, which validated Conwood's estimate of sales it could have
  - In sum, there was sufficient evidence on which the jury could base the award of damages.
  - The judgment of the trial court is affirmed.
- TAKEAWAY
  - It's a massive recovery. There is lots of evidence presented (belt and suspenders approach)
  - Basically, the court also says that these things can be blunt, but also must be scientifically grounded. Plus, the jury came to the conclusion about damages
  - What's important is that you cant just have some guy running regressions, you need to corroborate the narrative with factual insight of what happened on the ground

AMG Capital Mgmt LLC v FTC (2021)

- PARTIES
  - AMG Capital – Scummy loan sharks run buy a man named Tucker, so you know he sucks
  - FTC – Faceless ghouls doing the right thing by going after someone everyone hates
- FACTS
  - This case is about payday loans (AMG's business model), which the FTC deemed deceptive

        - Auto-renewal provisions and other fees were jumbled in garbage. Small print. Etc. You couldn't just bulk pay off the loan
    - FTC takes them to court asking for injunction AND disgorgement
- PROCEDURAL HISTORY
    - District Ct enjoins Tucker and orders him to disgorge profits → Appeals affirms → Cert
- ISSUE
    - Does Section 13(b) of the FTC Act authorize the FTC to demand monetary relief? NO!!
- HOLDING
    - While monetary relief can be claimed under Sherman of Clayton, the FTC Act does not permit for demanding equitable monetary relief from courts under 13(b).
    - This forestalls consumers from gaining monetary relief under Section 5(a) of the FTC Act
- REASONING
    - Unanimous BREYER opinion, the use of a permanent injunction does not permit the court to award equitable monetary relief as restitution.
    - The act was meant to enforce prohibitions on "unfair or deceptive acts or practices" through administrative proceedings. Section 13(b) authorizes the FTC to push permanent injunctions.
    - When interpreted within the structure of the Act, the practice of using Section 13(b) to seek monetary relief bypassed the intended remedy (injunction). Indeed other statutory authority - Section 19 – provide a path to monetary relief. 13(b) has no monetary remedy
    - Magic hook, the Court notes that the FTC may obtain monetary relief under Section 19 using its administrative authorities. And while 13(b) can be brought concomitantly, it is only for injunctive remedies.
- TAKEAWAY
    - So they could have done disgorgement under their own internal procedures
    - FTC points to section 19 saying that its ok, and the 9th circuit had agreed that injunction could include disgorgement
    - BREYER basically makes the point that no one thought that there would be damages under 13(b), and the FTC has been increasingly using it. So, its not new, but intensifying
        - The FTC also withdrew its disgorgement statement, which had made pretty clear lines under which it would be used
        - The disgorgement is under section 5 and section 19, and not in Section 13. Thus, the FTC has to use section 19.
        - FTC argues that injunction means more than just an injunction. Restitution and disgorgement is part of implementing injunctive relief
        - Response is, because its explicit elsewhere, you cant use it here by lowering the bar for implementation under a section 13 claim
    - So, an FTC can get disgorgement, but needs to go through the ALJ via Section 3, and then the commissioners. Then things can get appealed to Article III
    - Difference between disgorgement and restitution
        - Disgorgement – amount that you profited off other people (even if you didn't do harm to them). This can be broader.
        - Restitution – based on the harm that was done to a person (conscious wrongdoer)

Robinson-Patman Act

Volvo Trucks North America v Reeder-Simco (2006)

- PARTIES
    - Volvo – They make safe cars that are boring to look at. And Trucks
    - Reeder-Simco – Norman Reedus's less attractive auto dealer cousin
- FACTS

- Volvo sells heavy duty trucks at wholesale to dealers through a bidding process. These dealers generally had exclusive territories. But it (Volvo) realized it had over extended and was trying to reduce its dealer network
    - RS is a dealer which was in a huff for not getting a discount it usually got, even though a rival dealer did get it. RS brings suit under the Robinson-Patman Act
    - At trial, RS shows the discounts it received on bids against non-Volvo dealers (others got better), as well as unsuccessful bids and losses in head to head comparisons.
- PROCEDURAL HISTORY
    - Trial court finds for RS → 8th Circuit Affirms → Cert
- ISSUE
    - Under Robinson-Patman, does a plaintiff need to demonstrate that it is in actual competition with the alleged favored competitor? YES!!!
- HOLDING
    - To bring suit under Robinson-Patman, plaintiff must demonstrate actual competition with the allegedly favored competitor.
- REASONING
    - Recovery under Robinson-Patman requires plaintiff to prove, among other things, that it suffered a competitive injury.
    - To prove competitive injury, the plaintiff can show: a diversion of sales to, or a significant price reduction for, a favored competitor at the expense of a disfavored competitor. This must be shown over time (not a one off)
    - Without showing plaintiff is in actual competition with the favored competitor for the ***same customer***, the plaintiff cannot prove the competitive injury
- TAKEAWAY
    - Evidence must show there is a favored competitor competing for the same customer
        - Might be different if the dealers were in the same geographies.
        - Might be different if Volvo was setting prices.
    - Maybe the court is saying that this doesn't apply to auctions (reading between the lines)
    - Bottom of 1144 – they are doing a pivot to "hurting competition"
        - Class reads this as softening the presumption. Moving away from possibility to probability

FTC v. Morton Salt (1948)

- PARTIES
    - FTC – Salty bureaucrats like you've never seen
    - Morton's – Salty salt sellers, who are ready to table this motion
- FACTS
    - Morton sells salt based on a quantity discount system. More you buy the cheaper
    - Only five firms were large enough to get the super big discount, they in turn sell for less
    - FTC launches suit, arguing that quantity-discount pricing violates Robinson Patman
        - Argument, just because it is available doesn't mean everyone can get it. This is clear cut favoritism to larger groups
- PROCEDURAL HISTORY
    - Run through FTC → Appellate Court for Morton's → Cert
- ISSUE
    - Are quantity discounts unlawful under Robinson Patman even if universally available? YES!!
- HOLDING
    - Under Robinson-Patman, a discount based on quantity *may* constitute illegal price discrimination even if it is universally available.
        - Hook, the discount must relate to cost savings, not to favor larger customers

- TAKEAWAY: You can harm a COMPETITOR under RPA. You don't need to prove harm to competition.
- REASONING
  - Robinson-Patman's prohibition on anticompetitive price discrimination was also meant to protect small businesses that could not buy in bulk.
  - A seller offering quantity discounts has the burden of showing that the quantity discount is fully attributable to cost savings, not merely to favor large buyers
    - A quantity discount that is not directly related to cost savings is price discrimination.
    - Price discrimination is unlawful if there is a reasonable probability that the discount will substantially lessen competition.
  - Morton's quantity discount is technically available to anyone, but few can take advantage of it and this stymies competition against the largest buyers
- TAKEAWAY
  - The competition injury is satisfied by showing disparate pricing which is not related to underlying costs.

FTC v. Borden Company (1966)

- PARTIES
  - FTC – These guys just never stop with the antitrust do they?
  - Borden – Company that is milking it for all things are worth
- FACTS
  - Borden produces evaporated milk under their own nationally advertised brand, but also sells under private brands owned by their customers. These are physically and chemically identical
    - Generics are sold for lower price than branded content
  - The FTC files suit, claiming that as the private and national brands were of "like grade and quality", price differences were discriminatory under the Robinson-Patman Act
- PROCEDURAL HISTORY
  - Cease and desist order after FTC process → Reversed by 5th Circuit → Cert
- HOLDING
  - Labels do not differentiate products for the purpose of determining grade or quality under § 2 (a) of the Robinson-Patman, even though one label may have customer appeal and command a higher price in the market.
- REASONING
  - All of this hinges on the fact that brand was considered and not included in the statute. Comes straight from the legislative history.
  - The statute does not indicate brand value can be differentiate grade and quality though, so the statute only applies "to sales of commodities of "like grade, quality and brand.""
  - If two products, physically identical but differently branded, are to be deemed of different grade because the seller regularly and successfully markets some quantity of both at different prices, the seller could, as far as § 2 (a) is concerned, make either product available to some customers and deny it to others, however discriminatory this might be to competition
- TAKEAWAY
  - You need to show variation in perception of grade and quality to get around this,
  - Just having a different brand isn't enough, if grade and quality are the same, its an RPA
  - Page 1098 – "its not for the courts to say there is an exception for brands, that's for congress, so the courts should look at the injury and cost justification"

Texaco v. Hansbrouck (1990)

- PARTIES
  - Texaco – A large petrol provider that is actually not an offshoot of Standard Oil (who knew)

- Hasbrouck – collection of retailers who need that standard standard oil
- FACTS
    - Texaco sells gasoline to independent retailers in Spokane at retail prices. It sold at discounted prices to distributors. The distributors sold both to retailers and consumers (at a lower cost)
    - In the 1970s, the distributors dramatically increased their sales while the retailers faltered
    - Twelve independent retailers banned together and sue under 2(a) of Robinson Patman
    - Texaco claimed the discounts were justified because the distributors were wholesalers.
- PROCEDURAL HISTORY
    - Jury finds for plaintiff → overturned → again for plaintiff → appellate confirms → Cert
- ISSUE
    - Under Robinson-Patman, can a seller price discriminate for a wholesaler even if that wholesaler does not benefit the distribution system? NO
- HOLDING
    - The Robinson-Patman Act does not permit sellers to engage in price discrimination by giving some buyers functional discounts if the buyers do not benefit the seller's distribution
- REASONING
    - Section 2(a) of Robinson-Patman forbids sellers from offering different prices on the same goods to different purchasers.
    - There are two affirmative defenses to liability under § 2(a):
        - (1) if a seller, in good faith, offers a purchaser a lower price to meet the price of the seller's competitors; or
        - (2) if a seller is justified in giving a purchaser a lower price because the purchaser somehow lowers the seller's costs.
    - Two doesn't fly because the wholesalers didn't actually lower Texaco's costs. As Texaco does not experience any savings when it sells to distributors, it is not justified in charging the distributors lower prices
- TAKEAWAY
    - Functional discounts must be tied to some cost savings the buyer affords the seller
    - They must be TIED TO AN ACTUAL COST SAVINGS. You cant just say "you get a discount because you're a preferred buyer" It has to be cost justified