

### Third Supplement to Memorandum 2023-7

#### **Antitrust Law: Presentation**

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Professor Thomas Greene made a slide presentation to the Commission at the January 19, 2023 meeting, providing an overview of antitrust law. Professor Greene gave permission to reproduce his slides. They are attached.

Respectfully submitted,

Brian Hebert  
Executive Director



# Overview of Antitrust

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California Law Revision Commission

January 19, 2022



UC Law San Francisco

# Disclaimer

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*The views expressed are those of the presenter and do not necessarily represent the views of the U.S. Department of Justice.*



# Ancient and Common Law Roots

# Ancient Competition Laws: Examples

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*Lex Julia* (50 BCE):  
prohibitions against  
supply restraints

Constitution of the  
Emperor Zeno (483  
CE): prohibits trade  
combinations and  
monopolies



## Common Law Roots

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■ Suffer not thies ryche men to bye up all, to ingross and forestalle, and with theyre monopolye to kepe the market alone as they please. Sir Thomas More, *Utopia* (1516)





# Letters Patent

Elizabeth I authorizes *letters patent* for favorites creating monopolies in:

- Sweet wine
- Cloth
- Salt
- Iron
- Beer





# Case on Monopolies (King's Bench, 1603)

Sir Edward Coke's Commentaries:

- Monopolies “utterly void” as “against the common law”.
- Effects:
  - Increased prices
  - Reduced quality and choice
  - Reduced employment

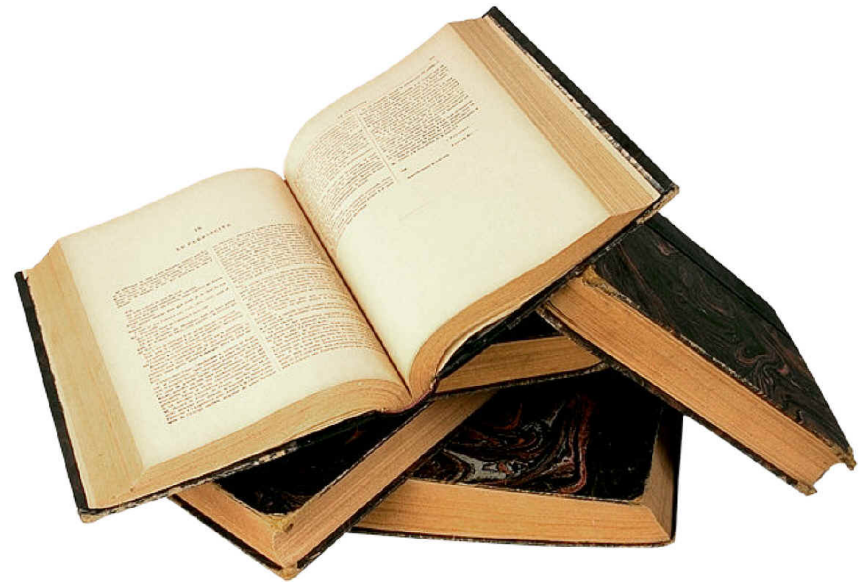


# Statute on Monopolies (1623)

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Due to “odium” of Royal grants, 1623 Act prohibited:

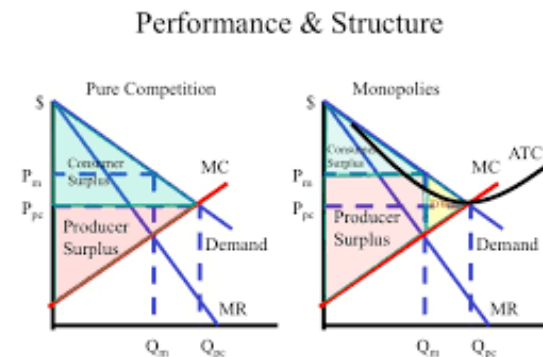
- All monopolies, *except*
  - Grants for the “true and first inventor” of any “new manufactures within the realm” for 14 years.



# Modern economics is remarkably consistent with the Case on Monopolies and the Statute on Monopolies

The exercise of market power will have two major effects:

- An increase in prices over competitive prices
- Deadweight loss from reduced allocative efficiency



# A Brief History of U.S. Antitrust Law



# Creation of “Trusts” Triggers Modern Antitrust Laws

- State laws starting in 1880's
- Federal Sherman Act in 1890 which outlaws:
  - Anticompetitive agreements (§ 1)
  - Single firm conduct by monopolies (§ 2)



# Critiques of Sherman Act Lead to Major Cases and New Statutes

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- *United States v. Standard Oil* (1911)
- But by 1914, frustration with the Sherman Act leads to:
  - Federal Trade Commission Act (1914)
    - Prohibits unfair trade practices
  - Clayton Act (1914)
    - Outlaws tying and exclusive dealing





# Depression leads to legislation to protect smaller competitors

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- State unfair trade laws limit
  - Secret rebates
  - Price discrimination
- Federal Robinson-Patman Act amends the Clayton Act to prohibit:
  - Price discrimination
  - Unequal allowances for advertising and other services



# AAG Thurman Arnold Revitalizes U.S. Antitrust at End of FDR Administration

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Major cases brought and won

Antitrust takes center stage as a protector of free markets and smaller competitors



# Post-war era brings new concerns and additional amendments to the Clayton Act

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- 1950's era amendments to Clayton Act proscribe all forms of mergers that may injure competition.
  - Incipency standard adopted
  - *Philadelphia National Bank* decided
- 1970's bring:
  - Changes to the Clayton Act providing for pre-merger review of transactions by DOJ and the Antitrust Division
  - Authorization of *parens patriae* actions brought by State AG's authorized.



# 1970's "Chicago School" Challenges Liberal Antitrust

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- Markets are self-correcting
- Judges have limited competence in making complex economic decisions
- Only one monopoly rent so vertical restraints are considered benign
- Large companies, on balance good for the economy
- "Good" antitrust limited to hardcore cartel behavior and challenges to mergers to monopoly
  - See generally Robert Bork, *The Antitrust Paradox* (1978)



# “Post-Chicago” School Questions Key Assumptions of Antitrust’s Conservatives

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- Exclusion is as important as collusion
- Concentration in oligopoly industries affects markets negatively
- Single monopoly rent theory only applies in rare cases
- Courts must consider business strategies, including efforts to raise rivals’ costs
  - *See generally*, Jonathan Baker, *The Antitrust Paradigm* (2019). See also W.E. Kovacic & C. Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ Perspectives 43, 55 (2000).

# Current scholars challenging Chicago School analyses as out-of-date

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- More recent analyses challenge Chicago jurisprudence as out-of-date, having not kept up with modern quantitative and game theory analyses of competition problems.
- Good example of this indictment can found in H. Hovenkamp & F.S. Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. Penn. L. Rev. 1843 (2020)

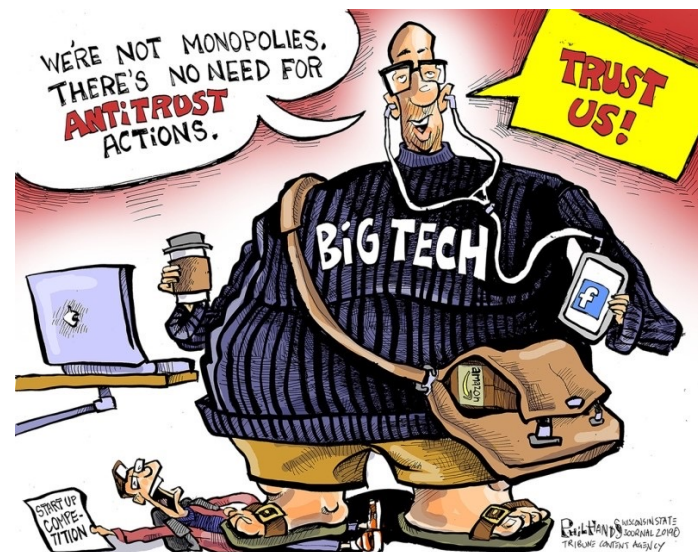


# Current Environment: Cases

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Cases recently brought by DOJ, FTC, State AG's and private plaintiffs against major platforms, including:

- Apple
- Facebook
- Google



# Current Environment: Legislation



Bipartisan bills to:

- Change burdens of proof
- Overturn Chicago School precedents
- Stop acquisitions by large tech companies
- Increase budgets of enforcement agencies



# Federal Antitrust at a Point of Inflection?

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- Many major cases reflect Chicago School principles and assumptions
- Much current scholarship is contrary to these assumptions
- However, Chicago School antitrust still dominant in federal courts
- All said, this is a doctrinally fluid time for antitrust law and antitrust practitioners

# California Antitrust Law

# California Common Law of Antitrust: Examples

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*Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 388-389 (1888)

- Cartel among lumber manufacturers in 4 Northern California counties
- Agreements to limit production and set common prices
- Held: Such contracts “among the contracts illegal under the common law, because opposed to public policy, were contracts in restraint of trade”

*Burdell v. Grandi*, 152 Cal. 376, 383 (1907)

- Property owner subdivided land in what became Point Reyes Station with proviso new owners could not sell liquor, protecting defendant’s monopoly on liquor.
- Held: Restrictive covenants not enforceable because were void as against public policy because purpose was to create a monopoly



# Cartwright Act, Cal. Bus. & Prof. Code §§ 16720-16727

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- Generally analogous to § 1 of the federal Sherman Act.
- Proscribes trusts which are “a combination of capital, skill or acts by two or more persons” for prohibited purposes, including:
  - To create or carry out restrictions in trade or commerce
  - To limit or reduce the production, or increase the price of merchandise or of any commodity
  - To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.
- The California Supreme Court has opined that the Cartwright Act is "broader in range and deeper in reach" than the Sherman Act ([In re Cipro Cases I & II, 61 Cal. 4th 116, 160 \(2015\)](#))
- In 1988, California Supreme Court determined that neither the Cartwright Act or the Unfair Competition Law applied to mergers. *California ex rel. Van de Kamp. V. Texaco*, 46 Cal.3d 1147 (1988). The UCL was subsequently amended to make clear applied to a single act of unfair competition, Stats. 1992, Ch. 430, § 3, p. 1707.
- Civil remedies include treble damages, fees, costs and injunctions; criminal remedies include prison and criminal fines





# Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200 et seq.

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- “[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1”
  - “Unlawful” has been interpreted to include acts or practices which are unlawful under state, federal or international law. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4<sup>th</sup> 1134 (2003) (Foreign Corrupt Practices Act)
  - “[U]nfair” is interpreted using a balancing test. *Cel-Tech Communications v. L.A. Cellular*, 20 Cal. 4<sup>th</sup> 163 (1999), but can cover incipient conduct
  - “[F]raudulent” uses reasonable consumer standard. *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App.4<sup>th</sup> 1235, 1256-57 (2009).
- Remedies include injunctions and may include restitution orders
- Powerful civil penalty provision for actions brought by the AG, DA’s and some city attorneys.



# Unfair Practices Act, Cal. Bus. & Prof. Code §§ 17000 et seq.

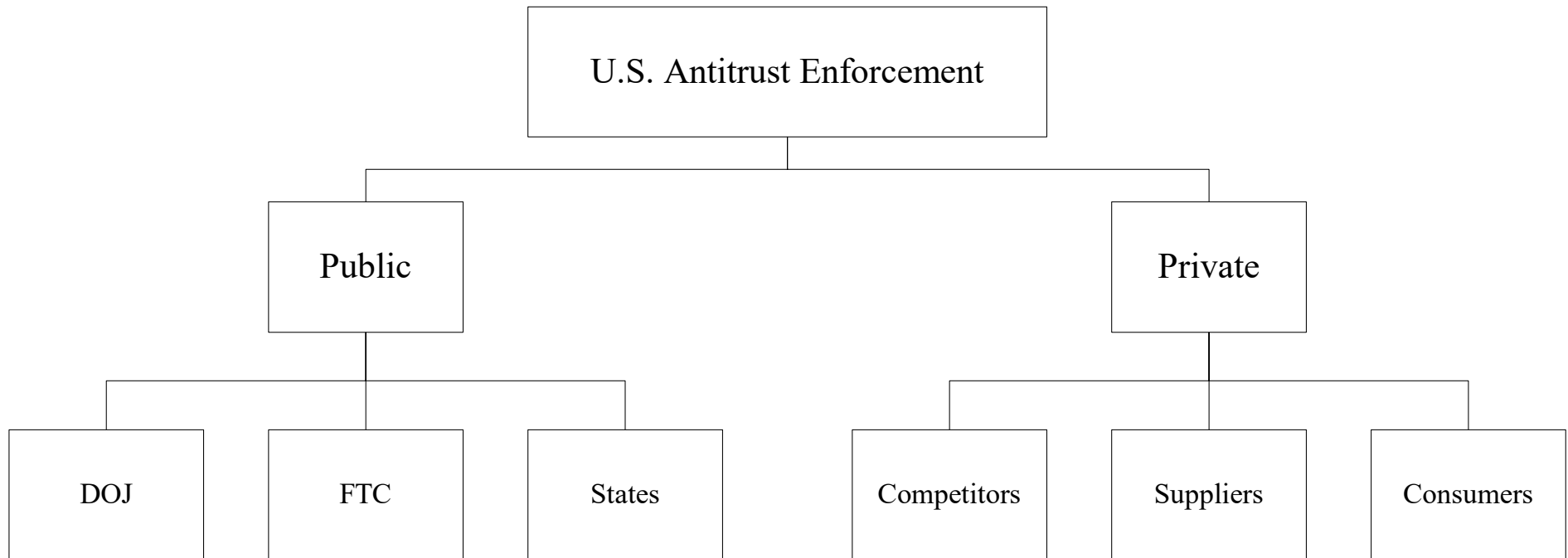
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- Broadly analogous to the federal Robinson-Patman Act.
- Proscribes:
  - Secret rebates
  - Below-cost sales
  - Loss leaders (Cal. Bus. & Prof. Code §§ 17041-17051)
- Treble damages and recovery of fees and costs authorized (Bus. & Prof. Code § 17082)



# The Antitrust Enforcers

# Key Concept: Multiple Sources of Enforcement



# Antitrust Division, U.S. Department of Justice

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*Civil and criminal authority to enforce the Sherman Act*

*Criminal powers include use of the FBI and grand juries; usually only used against “hardcore” cartels*

*Civil power include pre-filing Civil Investigative Demands*



# Federal Trade Commission

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- *Enforces the FTC Act's §5, which forbids "unfair" trade practices which includes, but is not limited to, Sherman or Clayton Act violations*
- *Can issue pre-filing investigative subpoenas*
- *Can bring cases in its own administrative court*
- *Can bring cases in federal district court*





# State Attorneys General

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Depending on state law, can bring criminal or civil antitrust actions under state law

Can bring civil actions under federal law for injunctive relief and/or treble damages

Can bring representative *parens patriae* damage actions on behalf of natural persons for treble damages

Can challenge mergers under the federal Clayton Act



## Private plaintiffs

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Can bring civil actions for damages or injunctive relief under federal or state law

Can recover treble damages, attorneys fees and some costs

Typically bring class actions to maximize potential impact



# Penalties and Procedures

# Federal Criminal Penalties

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*\$100 million if a corporation;*

*\$1 million if a person;*

*Imprisonment not to exceed ten years, or both*

*BUT per the Comprehensive Crime Control*

*Act, 18 U.S.C. §§ 3571-72, fines can increase to:*

- 2 x gain, or*
- 2 x loss, whichever is greater.*



# California Criminal Penalties

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*A felony, punishable by:*

- Up to 3 years in state prison

*Substantial fines:*

- Individual: \$250,000/violation
- Corporation: \$1 million/violation

OR

- Twice the loss or twice the gain, whichever is greater Cal. Bus. & Prof. Code §16755



# Federal and State Investigative Powers

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- Access to trained Investigators
- Civil investigative demands or investigative subpoenas
- Grand Juries
- Search warrants
- Surreptitious recordings



# Federal Corporate Leniency Program

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*1<sup>st</sup> in the door gets substantial benefits; 2<sup>nd</sup> in the door gets little or nothing.*

*Leniency Program participants face only single damages in follow-on state and federal civil cases*

*Creates a “prisoner’s dilemma” problem for lawbreakers*



# Civil Remedies (Federal and State)

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*Treble Damages*

*Injunctions*

*Attorneys Fees*

*Some Costs*

*PLUS*

- *Parens Patriae* Actions (State AG's)
- *Class Actions*
  - Note *Class Action Fairness Act (CAFA)*.





# Special Federal Procedural Requirements

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Pleading (*Twombly and Iqbal*)

Antitrust Standing (*Assoc. Gen'l Contractors*)

Antitrust Injury (*Brunswick*)

Direct Purchaser Limits (*Illinois Brick*)



# State Law Sometimes Better for Plaintiffs

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## *Direct Purchaser v. Indirect Purchaser*

- Federal: directs only
- Many States: direct and indirect purchaser actions allowed

## *More plaintiff-friendly law, e.g.*

- Vertical price fixing
- Tying
- Protection of smaller competitors
- Business torts



# International Antitrust

# Antitrust Law Is International

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*111 countries have antitrust laws*

*These include all of our major trading partners, including:*

- China
- Japan
- European Union
- Brazil
- Russia
- India



# European Union a Thought Leader

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- EU antitrust law significantly different from U.S. law, e.g.
  - Not particularly influenced by the Chicago School
  - Civil law-based so extensive written standards
  - Significant use of presumptions. For example, vertical price fixing by a firm with a minimum market share presumed to be unlawful and burden on defendant to demonstrate why practice should not be prohibited.
  - Abuse of dominance, analogous to U.S. monopolization, can be proved with a much lower showing of market share, typically 40%, as opposed to U.S. law requiring  $\approx$  60-65%

# Violations Requiring Agreement (Sherman Act, §1, Cartwright Act)

## 15 USC § 1

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*Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided. . .*



## § 16720. TRUST

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*A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:*

*(a) To create or carry out restrictions in trade or commerce.*

*(b) To limit or reduce the production or increase the price of merchandise or of any commodity. . .*





# Key Sherman §1 Concept: Plurality Requirement

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## *Takes two to tango*

- § 1 requires a “contract, combination in the form of trust or otherwise, or conspiracy” in restraint of trade

## *Agreements can be:*

- Horizontal or vertical
- Forced

*Express Agreement or Contract Not Required. Esco Corp v. U.S., 340 F. 2d 1000, 1007 (9th Cir. 1965) (“[a] knowing wink can mean more than words”)*

# Key Concept: Agreements Can Be Proved with Circumstantial Evidence

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## Meetings Plus:

Meetings or Exchanges of Information immediately Prior to Parallel Conduct

Actions contrary to individual economic interest

Any evidence of conduct that tends to exclude independent conduct



Failure to provide valid business reasons for conduct



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# Key Concept: Distinctions Between *Per Se* and Rule of Reason Offenses

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## Rule of Reason

- General rule
- Multi-staged balancing test

## Per Se

- Once basic elements met, no further requirements
- Limited to specific “hardcore” restraints

## Truncated Review (AKA “Quick Look”)

- A small number of cases decided under a hybrid test



# Taxonomy of § 1 Violations

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## *Per Se*

- Price fixing
- Horizontal market division
- Bid rigging

## *Structured Per Se (requires showing of market power)*

- Tying
  - California: more lenient standard

## *Mixed bag: Boycott*

## *Structured Rule of Reason*

- Vertical Price Fixing (RPM)
  - California: Still per se

## *Rule of Reason*

- Vertical non-price restraints
- Exclusive dealing
- All other § 1 restraints
  - Some matters can get truncated review

# Price Fixing

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*Agreement*

*Among horizontal competitors*

*Affecting price*



# Market Division

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*Agreement*

*Among Horizontal Competitors*

*To Divide or Allocate Markets*

- Many international conspiracies combine price fixing with market division (*Andreas*)



# Bid-Rigging

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■ *Agreement*

■ *Among Horizontal Competitors*

■ *Affecting the Bidding Process*



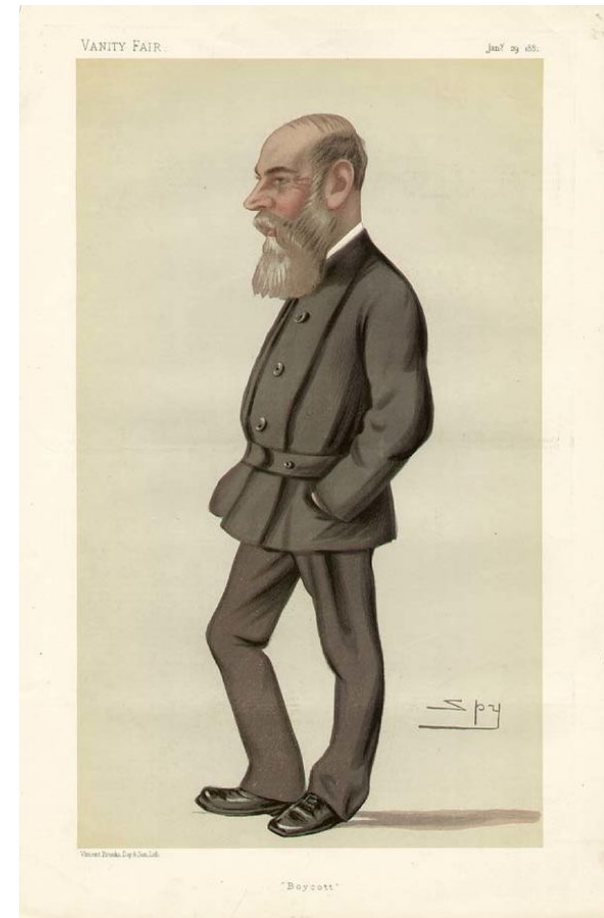
# BOYCOTT

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Agreement

Between Competitors  
or Suppliers

To Injure or Hobble a  
Competitor





## Vertical Restraints-Key Concept

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Assumption that exclusionary restraints may be pro-competitive by increasing inter-brand competition (Sony v. Toshiba) vs. intrabrand competition Best Buy v. Walmart on Sony TVs) so judged under rule of reason.

Same vertical restraints, if hatched by horizontal competitors, would be *per se* unlawful



# Non-Price Vertical Restraints: Rule of Reason Applied

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Vertically-imposed territorial allocations

Health care system limits on health insurers (*Carolinas Healthcare, Sutter Health*)

Anti-steering rules from Amex  
– 2-sided market analysis



# VERTICAL PRICE FIXING (A.K.A. Resale Price Maintenance)

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■ *Vertical Agreement (different from horizontal agreements)*

■ *To fix or maintain the price at which goods can be resold*

■ *Typically must show that specific price or price level set; contrast horizontal rule.*



# Vertical Price Fixing

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- Under SCOTUS decision in *Leegin Creative Leather v. PSKS*, RPM by small firms judged under structured rule of reason.
- But remains *per se* unlawful in California, and other states



# Tying

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## *Two Products*

- Are products in distinct markets?

## *Linkage (Basis for Finding an Agreement)*

- Can be implied

## *Economic Power in the Tying Product*

- ≈30% market share generally required. See *Jefferson Parish*, 466 U.S. 2 (1984).

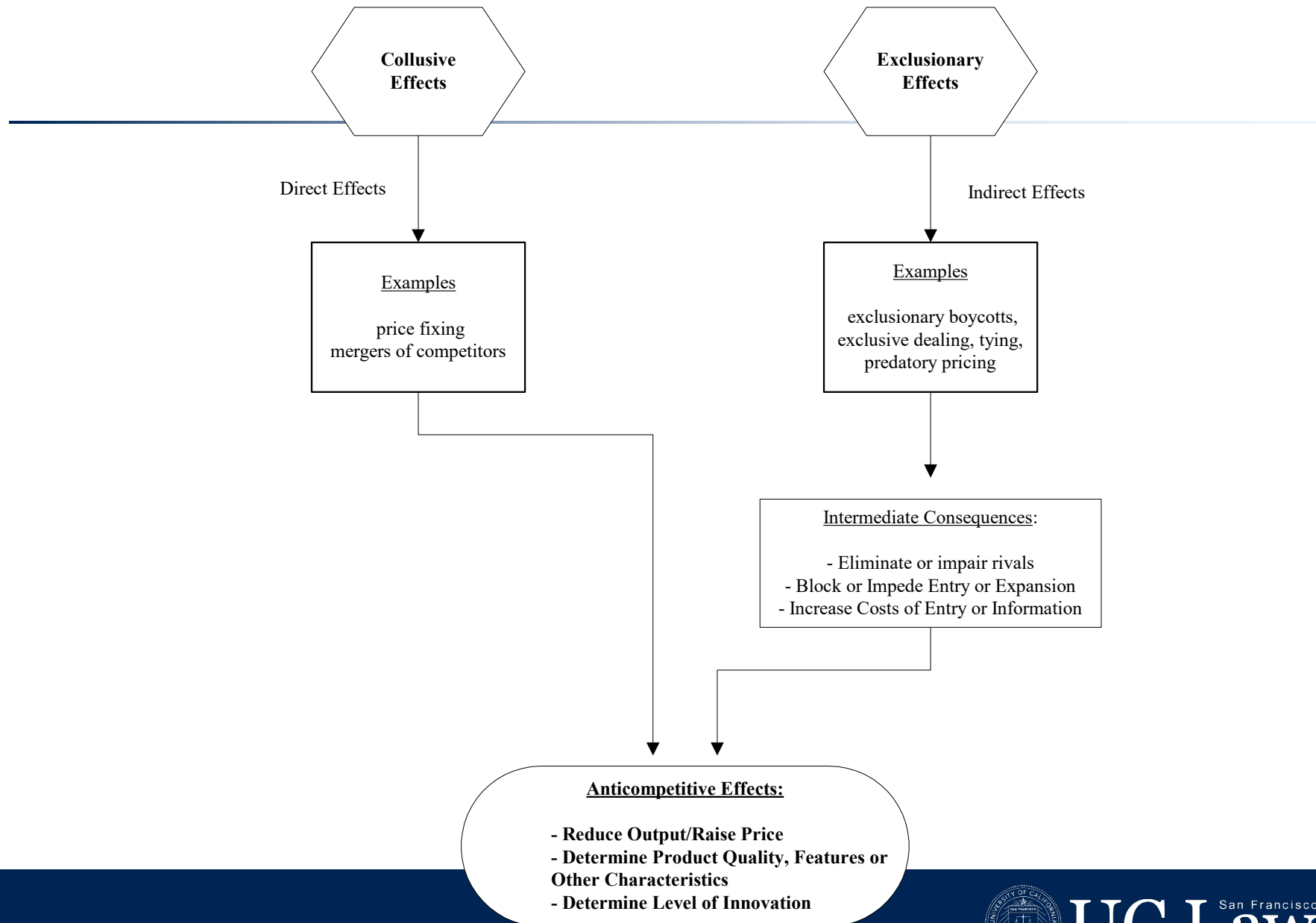
## *Not Insubstantial Sales of the Tied Products*

## *Injury*

- See also *Suburban Mobile Homes v. AM FAC*, 101 Cal.App.3d 532 (1980)



# Key Concept: Collusive & Exclusionary Practices Have Similar Economic Effects



# Exogenous Limits on Antitrust

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## ■ *Judge-made*

- State Action
- Act of State
- Noerr-Pennington

## ■ *Statutory, e.g.*

- Labor (also a common law variant)
- Agricultural Production
- Insurance
- Communications, Energy, Securities and Transportation
- **All exemptions are interpreted narrowly**



# Single Firm Violations (Sherman Act, §2)



## Sherman Act, §2

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*“Every person who shall monopolize, or attempt to monopolize or combine to monopolize or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...”*



# MONOPOLIZATION

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- (1) *Possession of monopoly power in the relevant market; and*
  
- (2) *Willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historical accident.*

*Kodak v. Image Technical Services, 504 U.S. 451, 481 (1992)*

# Key Concept: Measuring Market Power

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## Indirect Proof:

- Determine a relevant market consisting
  - Product Market
  - Geographic Market
  - Assess concentration

## Direct Proof:

- Ascertain evidence that defendant can or has:
  - Successfully excluded rivals
  - Sustained high prices or profits
- Same concepts in play for rule of reason, monopolization and merger control cases



# Improper Conduct

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- Illegal monopolization consists of acts that:
  - are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and
  - either (2a) do not benefit consumers at all, or are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits. P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 651a (5<sup>th</sup> ed. 2020) (“Monopolizing Conduct Defined”)
- “§2 is ‘directed to discrete situations’ in which the behavior of the monopoly power ‘threatens to defeat or forestall the corrective forces of competition.’” U.S. *Microsoft*, 87 F. Supp.2d at 37 (quoting *Eastman Kodak*, 504 U.S. at 488.)

# *United States v. Microsoft*

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## Microsoft

- Market share in PC O/S market exceeded 90%
- Illegally maintained monopoly by denying Netscape and Java access to most efficient channels of distribution.



# Merger Control (Clayton Act, §7)

# MERGERS

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*“No person. . . shall acquire, directly or indirectly, . . . another person . . . Where in any line of 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.”*

*15 U.S.C. § 18*



## Key Concept: Market Definition Is Critical

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### Market definition critical

- Must assess both product (what) and geographic (where) markets
- Submarkets and price discrimination markets cognizable

The definitional “frame” drives the concentration determination

“Lake Erie” defense





# Philadelphia National Bank (PNB) Presumption

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*Philadelphia National Bank (1963) interpreted then-new provisions of Clayton Act, §7, writing:*

- “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.” (Casebook at 687)



# Concentration Presumptions in State and Federal Guidelines

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## *HHI screens:*

- Less than 1500, unconcentrated, so OK
- Between 1500 & 2500 and change of 100 or more, potentially actionable
- Above 2500 and change of 50 or more, actionable
  - DOJ and FTC, *Horizontal Merger Guidelines* (2010), §5.3.



## Numbers Alone Insufficient: *General Dynamics*

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- *General Dynamics teaches that courts must take into account recent industry trends when assessing relevance of concentration measures.*
- Here, merged firm running out of reserves, so far less likely to dominate market



# Potential Effects

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## *Coordinated Effects (Guides, §7)*

- Increased concentration facilitates coordination (based on oligopoly theory)

## *Unilateral Effects (Guides, §6)*

- If merging firms are close substitutes, can have unilateral effects, e.g. BMW/Mercedes merger

*With sufficient data, economists can model effects of a merger*



# Efficiencies

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Not (Yet) Recognized by SCOTUS

Accepted in Merger Guidelines and by Federal Trial and Circuit Courts

Requirements

- Independently Ascertainable
- Merger Specific
- Burden on defendant



# Hart-Scott-Rodino Act

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- HSR Act creates a process for pre-merger review of proposed transactions over a set amount of commerce
- Initial filing requirement
  - Basic information about proposed merger
  - Decisional documents used by the two firms in the proposed merger
- Second Request
  - Used in minority of mergers
  - Dramatic increase in demands for documents
  - 2<sup>nd</sup> request period typically includes investigative depositions

# Laws and Cases Protecting Small Competitors

# Protecting the “Small Guy”

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Robinson-Patman Act

Analogous California Unfair Practices Act

Business Torts





Thank You; Questions?