Cartels and Other Competitor Relationships

Saul P. Morgenstern
KAYE SCHOLER LLP

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Core Principles

- Promote and preserve competition; Why?
  - Promote innovation
  - Provide more choices
  - Lower prices and greater *value* for consumers
- Protect "competition" not "competitors"
  - In any "competition" there are winners and losers among rivals
  - Law assumes that, in "fair" competition, the more efficient, innovative and effective competitors will win
    - Will deliver the best "value"
    - Will attract the most customers
- The law steps in when that process is disrupted

Section 1 of the Sherman Act

What is an Unlawful Restraint of Trade?

- "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." 15 U.S.C.A. § 1
- Cannot be read literally because **every** agreement restrains trade to some degree. *Standard Oil Co. v. U.S.*, 221 U.S. 1 (1911)
- Only **unreasonable** restraints violate Section 1
  - "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Board of Trade of City of Chicago v. U.S.*, 246 U.S. 231, 238 (1918) (Brandeis, J)

Tests for Determining What is Unreasonable

- **Per Se Rule**: The restraint at issue is of a type that the court presumes inhibits competition and is therefore condemned without an exhaustive market analysis
- **Rule of Reason**: Court weighs various factors to determine whether the restraint, in the words of Justice Brandeis, "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition"

Per Se Rule

- Applying a Per Se Rule is appropriate only after the courts have had considerable experience with the type of restraint at issue
- **Per Se Rule is limited to manifestly anticompetitive restraints that would always, or almost always, tend to restrict competition or decrease output**
  - Horizontal Price-Fixing. *U.S. v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *U.S. v. Trenton Potteries Co.*, 273 U.S. 392 (1927)
  - Horizontal Market Division. *U.S. v. Topco Associates, Inc.*, 405 U.S. 596 (1972)
  - Certain Tying Arrangements. *Broad. Music, Inc. v. Columbia Broad. Sys.*, Inc., 441 U.S. 1 (1979)
  - Certain Boycotts. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)
  - **NOT** Resale Price Maintenance. *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877 (2007)

Rule of Reason

- "[M]ost antitrust claims are analyzed under a 'rule of reason.'" *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)
- Does the agreement, when viewed in its total context, advance or impede competition?
  - Factors necessary for the analysis include:
    - Defendant's market power
    - Information about the relevant business
    - The history, nature, and effect of the restraint
  - Does the agreement create something of value to consumers and markets that counterbalances the effect of any restraint(s) in the agreement?
- Cannot argue that competition itself is unreasonable under the circumstances. *Nat'l Society of Prof Engineers v. U.S.*, 435 U.S. 679, 696 (1978)

"Order of Battle" in a Rule of Reason Case

- Courts of appeal have largely adopted a three-step burden-shifting analysis when considering Rule of Reason cases:
  - Step 1. Plaintiff must present evidence that the alleged restraint has had, or is likely to have, a substantially adverse effect on competition
  - Step 2. If Step 1 is satisfied, then the Defendant must show the alleged restraint has pro-competitive effects
  - Step 3. If Step 2 is satisfied, then the Plaintiff must show that the alleged restraint is not reasonably necessary to produce the identified pro-competitive effects and that such effects could be produced through less restrictive means

Which Approach?

- Shrinking Universe of the Per Se Rule
  - "[T]he category of agreements to be analyzed under a per se analysis has been shrinking . . ." In re *Southeastern Milk Antitrust Litigation*, No.2:07-CV-188, 2012 U.S. Dist. LEXIS 44221, at *34 (E.D. Tenn. March 27, 2012), *rev'd on other grounds*, 739 F.3d 262 (6th Cir. 2014)
  - Reflects concern that the rule's inflexibility hampers pro-competitive development. E.g., *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967)
  - Modern law rejects earlier decisions' economic rationales. E.g., *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877, 900 (2007)
- Retreat reflects concern that the Per Se Rule yields too many "false positives" in complex cases/markets
- But the Per Se Rule is still used in a significant, if limited, subset of cases
  - In re *Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) "[A]n admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs."

Horizontal Restraints Overview

- Agreement between two or more competitors at the same level of distribution
- Per Se Unlawful Horizontal Agreements
  - Price-Fixing
  - Bid-Rigging
  - Customer or Market Allocation
  - Some Group Boycotts of Customers or Suppliers/Concerted Refusals to Deal
- Horizontal Agreements Analyzed Under the Rule of Reason – Agreements that may produce consumer value
  - Joint Ventures
  - Standard Setting
  - Litigation Settlements
  - Restraints Ancillary to Otherwise Lawful Agreements

The Separate Economic Entity Requirement

- Section 1 does not govern the conduct of a single enterprise. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984)
  - "[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a **single enterprise** for the purposes of § 1 . . . A parent and its wholly owned subsidiary have **a complete unity of interest**." *Id.* at 771
  - Therefore, a parent and its wholly owned subsidiary are "incapable of conspiring with each other for the purposes of § 1 of the Sherman Act." *Id.* at 777
- *Copperweld* leaves open some important questions:
  - What happens when a subsidiary is not "wholly-owned"?
  - Is a Joint Venture a "single economic unit" with a "complete unity of interest"?
    - What about the relationship among the JV and its "parents"?

Ancillary Restraints

- A restraint "ancillary to" or within an otherwise lawful agreement
- Is the restraint reasonably necessary to achieve some pro-competitive purpose. *U.S. v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898)
  - The pro-competitive effect must be connected to the restraint
    - This is distinct from the "least restrictive alternative" inquiry used in the Rule of Reason. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 119 (1984)
  - Cannot be so broad that it suppresses competition without creating offsetting efficiencies
- A restraint of trade can be ancillary only to the extent that it increases the profitability or output of the enterprise. *Nat'l Soc. of Prof'l Engineers v. U. S.*, 435 U.S. 679, 689 (1978)

Commonly Recognized Horizontal Agreements

Price-Fixing by Competitors ("Horizontal")

- "Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition." *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940)
- The court does not inquire into the "reasonableness" of prices set by an agreement as any price-fixing has the tendency to reduce competition. *U.S. v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927)
- Competitors who agree to fix prices violate the Sherman Act even if they lack the ability to follow through on the scheme. *U.S. v. MMR Corp. (LA)*, 907 F.2d 489, 497 (5th Cir. 1990)

Bid-Rigging

- Can take a variety of forms
  - Bid Rotation. *U.S. v. Brighton Bldg.*, 598 F.2d 1101, 1103 (7th Cir. 1979)
  - Bonus Scheme. *U.S. v. Addyston Pipe*, 85 F. 271, 273-78 (6th Cir. 1898)
  - Refusals to Bid. *U.S. v. MMR Corp.*, 907 F.2d 489, 492 (5th Cir. 1990)
  - Common Estimator. *U.S. v. Cont'l Group*, 603 F.2d 444, 448 (3d Cir. 1979)
  - Sham Bidding. *U.S. v. Reicher*, 983 F.2d 168, 169 (10th Cir. 1992)
- Joint Bidding can be permissible, but not always
  - Firms must indicate at the outset their intent to submit a joint bid, or it must be clear from the circumstances. 12 Herbert Hovenkamp, ANTITRUST LAW, § 2005d (2d ed 2005)
  - Permissible if allows individual actors to participate in bidding jointly where they could not have participated individually. *See Love v. Basque Cartel*, 873 F. Supp. 563 (D. Wyo. 1995)
  - Not permissible if it is effectively one firm bidding while the other refrains. Hovenkamp, at § 2005d; *see, e.g.*, Complaint at ¶ 17 and Final Judgment at 2, *U.S. v. SG Interests I*, 12-cv-00395 (RPM) (D. Colo. Feb. 15, 2012)

Customer or Market Allocation

- "[A]greement between competitors . . . to allocate territories in order to minimize competition . . . are naked restraints of trade with no purpose except stifling of competition." *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (citing *U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972))
  - It is unlawful for competitors to agree among themselves to allocate territories, customers, or product markets. *Topco*, 405 U.S. at 612 (customer allocation); *U.S. v. Sealy, Inc.*, 388 U.S. 350, 352 (1967) (territorial and product market allocation)
  - Such agreements are unlawful regardless of whether the agreement involves price-fixing. *Topco*, 405 U.S. at 609 n.9
- Vertical allocations of dealer territories, however, are not per se unlawful; such arrangements are evaluated under the Rule of Reason. *White Motor Co. v. U.S.*, 372 U.S. 253, 261 (1963)

Joint Ventures

- Joint ventures are subject to Rule of Reason analysis. *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006)
  - Joint ventures "can result in economies of scale and integrations of complementary capacities that reduce costs, facilitate innovation, eliminate duplication of effort and assets, and share risks that no individual member would be willing to undertake alone, thereby 'promot[ing] rather than hinder[ing] competition.'" *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1335 (Fed. Cir. 2010)
- Relevant considerations in the Rule of Reason analysis include:
  - Purpose of the joint venture; scope and duration of the joint venture
  - Industry structure and relative competitive positions of the participants
  - Efficiencies and other purported justifications

  (Holmes, ANTITRUST LAW HANDBOOK § 2:22 (Nov. 2011).)

Joint Ventures and the Single Entity Doctrine

- Joint ventures create a unity of economic interest
  - When "persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market." *Texaco Inc. v. Dagher*, 547 U.S. 1, 6 (2006) (citation omitted)
- But combining certain activities may not be justified. *American Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010)
  - NFL teams combined licensing in a single joint entity, which then granted an exclusive license to Reebok
  - Challenge by rejected competing licensee dismissed on the grounds that the licensing venture was a single economic entity under *Copperweld*
  - Supreme Court reversed: "The relevant inquiry, therefore, is whether there is a 'contract, combination . . . or conspiracy' amongst 'separate economic actors pursuing separate economic interests,' such that the agreement 'deprives the marketplace of independent centers of decisionmaking,' and therefore of 'diversity of entrepreneurial interests.'" *Id.* at 2212 (citations omitted)

Standard-Setting

- "[P]rivate standard-setting by associations comprising firms with horizontal and vertical business relations is permitted . . . under the antitrust laws only on the understanding that [such standard-setting] will be conducted in a nonpartisan manner offering procompetitive benefits." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506-07 (1988)
- Pro-Competitive Advantages of Private Standard-Setting. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308-09 (3d Cir. 2007)
  - Lowers costs for consumers when switching between products
  - Increases compatibility of products, thereby facilitating information sharing among consumers
  - Spreads research costs among competitors
  - Reduces risks for upstream market participants to invest in products

Group Boycotts

- Initially, group boycotts were considered per se unlawful. *E. States Retail Lumber Dealers' Ass'n v. U.S.*, 234 U.S. 600 (1914)
- Per Se Rule typically still applied in the following circumstances:
  - Where the boycott cuts off access to supply, facility or market necessary to enable the boycotted firm to compete
  - Where defendants possessed market power
  - Generally not justified by plausible arguments that the boycott intended to enhance overall efficiency
    - *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295-96 (1985); *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986); *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 434-35 (1990)
- Certain group boycott claims are evaluated under the Rule of Reason. *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 295-96 (trade group expelled a member; not per se unlawful)

Horizontal Profit Sharing

- Agreements among horizontal competitors to share profits or revenues have traditionally been considered per se unlawful. *See, e.g., Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969)
- Some courts have recently applied the Rule of Reason where circumstances warrant it. *See, e.g., California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118 (9th Cir. 2011)
  - 9th Circuit, sitting en banc, refused to apply Per Se Rule to revenue sharing agreement among supermarkets in greater Los Angeles
  - Three factors indicating agreement did not inhibit competition:
    - Agreement was of temporary, but indefinite duration
    - Participants did not constitute the entire market
    - Purpose of agreement was to protect against strikes

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Recent Developments in Cartel Enforcement and Horizontal Restraint Litigation

First Extradition to the U.S. DoJ Marine Hose Investigation

- The U.S. DoJ Antitrust Division is conducting an ongoing investigation into price-fixing, bid-rigging, and market allocation in the market for marine hoses (flexible rubber hoses used to transfer oil between tankers and storage facilities)
  - Five companies and nine individuals have pleaded guilty to date
  - First – EVER– extradition of an individual on antitrust charges in April 2014
    - Romano Pisciotti, Italian citizen passing through Germany, where he was apprehended
    - He pleaded guilty and was sentenced to spend 2 years in prison and pay a $50,000 fine
    - He will receive credit for 9 months he was held in Germany pending extradition

DoJ Auto Parts Investigation

- The largest criminal antitrust investigation to date
  - Investigation encompasses many different auto parts – engine/drivetrain parts, controls systems, etc.
  - All Japanese companies that sell these parts auto makers located all around the world, which then install them into cars exported and sold in the U.S.
  - The DoJ has uncovered price-fixing and bid-rigging taking place throughout the industry
- 35 companies and 29 executives have pleaded, or agreed to plead, guilty
- Total fines exceed $2.5 billion
- Likely that these numbers will increase – the investigation continues
- Private civil class actions pending in the U.S. District Court, Eastern District of Michigan before Judge Marianne O. Battani

Financial Services and "Benchmark" Investigations

- Recently, the Antitrust Division has collaborated with other divisions and agencies in investigating and bringing enforcement actions in the financial services sector
  - As a part of the LIBOR investigation, the DoJ has obtained more than $411 million from Lloyds Banking Group and Rabobank on wire fraud charges
  - The DoJ is also investigating banks for conspiring to manipulate the foreign exchange rates ("FOREX")
  - Both are global investigations
  - Not all cases yield antitrust charges – but antitrust is an important enforcement tool
- Since 2009, the Antitrust Division has obtained or assisted in in obtaining more than $1.3 billion in fines and penalties, and 109 convictions, in the financial services industry

Associations: NCAA – Background

- NCAA rule against athletes receiving licensing revenue for commercial use of their names, images and likenesses (NILs) challenged
  - Court determined that the rule unreasonably restrained trade. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F.Supp.3d 955 (N.D. Cal. 2014)
  - Decided under the Rule of Reason – Why?
  - Analysis
    - Market: Colleges with elite athletic programs, not all colleges with athletic programs
      - Product was the "unique bundle of goods and services" offered to recruits in exchange for their performance and waiver of NILS revenue
      - Schools conspired to fix price of the product as either monopolists or monopsonists
      - Without NCAA rules, schools would have competed by offering different packages
    - Market: Group licensing submarkets (videogames, live telecasts, re-broadcasts)
      - Plaintiffs failed to identify harm to competition in these markets.
      - No evidence that athletes would compete to sell group licenses

O'Bannon – Decision

- Found NCAA's procompetitive justifications did not outweigh anticompetitive effects:
  - Preserving amateurism in college sports
  - Promoting competitive balance among NCAA teams
  - Integration of academics and athletics
  - Ability to generate greater output in relevant markets
- Current enjoins NCAA from enforcing rules that prohibit schools from offering recruits share of licensing revenue, but leaves open possibilities:
  - Schools may hold licensing revenue in trust until after the student graduates
  - Schools may cap the licensing revenue at a few thousand dollars per year
- Appealed to the 9th Circuit (argued March 17, 2015)
  - NCAA relied on Supreme Court dictum in decision that ended its monopoly on TV contracts:
    - "In order to preserve the character and quality of the [NCAA's] 'product,' athletes must not be paid" *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 102 (1984)

Horizontal or Vertical: Is it Always Clear?

Blurred Line Between Vertical and Horizontal: Customer-Induced 'Conspiracies'

- Can occurs when competitors enter into similar (or identical) individual vertical agreements with the same party at a different level of the supply chain
  - Is it the result of common unilateral responses to a common economic stimulus?
  - Or is it the result of an overt of tacit agreement among the competitors?
- Rare phenomenon – few examples
  - Film distribution: *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) (customer-incited common action by eight motion picture distributors deemed conspiracy to fix minimum admission prices)
  - Toy Retailing: *Toys "R" Us v. FTC*, 221 F.3rd 928 (7th Cir. 2000)(Affirming FTC finding as unlawful series of agreements requiring manufacturers to offer warehouse clubs products configured differently from those sold to Toys "R" Us, to restrict competition at retail level)
  - Electronic Books: *U.S. v. Apple, Inc.*, 952 F.Supp.2d 638 (SDNY 2013)(five publishers' shift to agency distribution in response to Apple proposed terms deemed unlawful agreement)

Blurred Line Between Vertical and Horizontal: Red Flags

- Communications among competitors regarding the proposed agreement
  - Most lawful vertical agreements involve no communications among competitors
  - *See, e.g., Toys "R" Us, Inc. v. FTC*, ("TRU") 221 F.3d 928, 936 (7th Cir. 2000) (existence of "direct evidence of communications" among competitors suggested that a horizontal agreement existed.); *See also Ebooks*, 952 F.Supp.2d at n.59
- Agreement runs counter to independent self-interest
  - In *TRU*, toy manufacturers had previously tried to increase number of retail outlets with which they dealt; suspect when they then took steps to work with TRU only
- Customer gives assurances that supplier's competitors will act similarly
- The agreement causes an abrupt shift from past practice
  - In *Ebooks*, 5 of 6 major publishers switched from wholesale to agency model overnight
- Mere parallel conduct, without more, is not enough; but what constitutes "more" is highly subjective

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Allegedly Collusive Patent Litigation Settlements

ANDA Settlements

- Manufacturers of generic pharmaceuticals can seek FDA approval for generic copies of patented drugs under the Hatch-Waxman Act by filing a "Paragraph IV certification"
  - Certify that generic product does not infringe or that patents are invalid or unenforceable
  - Certification is an act of infringement that permits patent-holder to sue
    - Suit triggers 30 month stay of FDA approval
    - First generic gets six month exclusivity as reward for investing in approval process
- Settlements can draw antitrust scrutiny where the patent-holder pays the generic challenger, unlike the usual patent case where the infringer pays the patent holder damages for infringement (or in settlement of infringement claims)
  - Called "pay for delay" by challenges – a phrase that assumes the answer to the fundamental question

The Supreme Court Speaks: *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013)

- Solvay Pharmaceuticals, manufacturer of AndroGel, settle with three generics.
  - Each agreed to
    - Entry date 9 years into future, but before patent expiration and
    - To assist Solvay in marketing Androgel in the interim
  - Solvay paid each generic millions annually
- Eleventh Circuit rejected challenge because "exclusion" was within scope of the patent; Third Circuit held opposite
- Supreme Court rejected both approaches: Such agreements are potentially but not presumptively unlawful and must be analyzed under the Rule of Reason
  - Settlement within patent term is not immune from antitrust scrutiny
  - Accepted the possibility that a "large, unjustified payment" would be an indicator that entry was delayed not by the patent right but by the payment

What Now in Light of *Actavis*? More Questions Than Answers

- Is the analysis contemplated practically administrable?
  - Can a settlement be evaluated without considering the parties' relative positions?
- How does it work?
  - Most courts find *Actavis* requires a three-step analysis:
    - 1) finding the existence of a reverse payment;
    - 2) determining whether the reverse payment is large and unjustified;
    - 3) applying the rule of reason analysis
  - Minority view (*King Drug Co. of Florence v. Cephalon, Inc.*, No. 2:06-CV-1797, 2015 WL 356913, at *11 (E.D. Pa. Jan. 28, 2015)):
    - Plaintiff only needs to show that the reverse payment is large
    - Burden then shifts to defendant to show that it is justified
- What do "large," "justified," and "payment" even mean?

No Definitive Guidance on What Constitutes Payment Under *Actavis*

- **Narrow View of "Payment":**
  - *See, e.g., In re Lamictal Direct Purchaser Antitrust Litig.*, 18 F. Supp. 3d 560, 567-568 (D.N.J. 2014)
    - No-AG agreement does not constitute a reverse payment because it "conferred substantial financial benefit" upon the generic manufacture
    - "the Supreme Court considered a reverse payment to involve an exchange of money."
    - Appealed to the 3rd Circuit (argued November 19, 2014), decision pending.
- **Broader View (majority):**
  - *See, e.g., In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 392 (D. Mass. 2013)
    - "Nowhere in *Actavis* did the Supreme Court explicitly require some sort of monetary transaction to take place for an agreement . . . to constitute a reverse payment."

No Definitive Guidance on What Constitutes Payment Under *Actavis*

- **Middle Ground – Whether the Non-Cash Payment Can Be Reliably Quantified As "Large"**:
  - *In re Lipitor Antitrust Litig.*, 46 F. Supp. 3d 523, 543 (D.N.J. 2014)
    - "[It] is true that *Actavis* never indicated that a reverse payment had to be a cash payment; but it is also true that *Actavis* emphasized cash payments."
    - Thus, in applying *Actavis*, "the non-monetary payment must be converted to a reliable estimate of its monetary value so that it may be analyzed against the *Actavis* factors such as whether it is 'large' once the subtraction of legal fees and other services provided by generics occurs."
  - *See also In re Effexor Antitrust Litig.*, No. 11-5479, 2014 WL 4988410, at *20 (D.N.J. Oct. 6, 2014).
    - Appealed to the 3rd Circuit (appeal filed January 23, 2015).
  - Both *Lipitor* and *Effexor* were decided by Judge Peter Sheridan in D.N.J.

Uncertainty Remains

- *Actavis* involved cash payment
- FTC and private plaintiffs argue that a payment can be other "value"
  - Agreements not to launch "authorized generic" product
  - Settlement of other disputes between the companies
  - Contemporaneous supply agreements or other commercial arrangements
- Defendants, and *Actavis* itself, point out that "value" always flows both ways in settlement
  - Second guessing every settlement will have an *in terrorem* effect on settlement of Hatch-Waxman cases
  - If Congress intended for Hatch-Waxman cases never to be settled but instead always yield a verdict on the patents, it should say so
- *Actavis* left a number of important issues to the lower courts to sort out; as a result, parties attempting to settle such litigation face considerable uncertainty

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Other Types of Competitor Conduct

Information Sharing

- Exchanging commercially sensitive info with an actual or potential competitor
- Because it may lead to an inference of an illegal agreement, it is strongly discouraged, except under certain limited circumstances:
  - Where a third party organization combines it with information independently obtained from competitors and publishes it in an aggregate, industry-wide form not specific to or identifying individual competitors
  - To a carefully limited "clean team" for the purpose of negotiating an otherwise lawful business transaction
- Commercially sensitive information includes
  - Pricing, including discounts, rebates and credit terms
  - Sales volumes and revenues
  - Costs or profit margins
  - Dealings with specific customers, authors or suppliers
  - Future business plans or strategies
  - Any other information that you would normally consider confidential and that a competitor could not readily obtain from public sources

"No Poaching" Cases

- Companies that might otherwise compete for employees agree not to do so
  - Lawful in very limited circumstances (i.e., in the context of certain lawful joint ventures or similar collaborations)
  - More generally – high exposure risk
- In the recent past, a number of entertainment and high tech companies have found themselves targeted for government and private enforcement
  - Targets included eBay, Adobe, Apple, Google, Intel, Intuit, Lucasfilms, Pixar
  - Cases led to
    - Consent decrees requiring the companies to change their practices
    - Private class actions on behalf of allegedly affected employees: In March 2015, a N.D. Cal. court approved a $415 million settlement in the class action involving Apple, Google, and others

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Trade Associations

Trade Associations Present Special Risks

- Trade Associations: Organizations of competitors, satisfy the "joint action" requirement of Sherman Act § 1
- Most Trade Association action is pro-competitive, socially and commercially beneficial and lawful – for example
  - Development of safety standards, interoperability standards, etc.
  - Benchmarking and lawful information sharing programs
  - Public policy advocacy
- Can be found unlawful if they unreasonably restrain trade – for example
  - Exchange current price information may violate Section 1 of the Sherman Act, if the exchange of information has the effect of causing prices to consumers to rise, even if there is no formal agreement on what to charge
- Meetings also present "opportunity" to conspire outside of the official activities
  - Proper training of employees who attend trade association meeting is essential

Trade Associations: Conduct at Meetings and Events

- Competitor-Competitor contacts at Trade Associations can present risks:
  - Trade Associations often provide an opportunity for competitors to meet
  - Trade Associations can be used by firms as a forum for orchestrating illegal conduct
  - Innocent participation in, or contacts with competitors at, a Trade Association meeting easily can be misconstrued and used against the company
- Real-world example:
  - At pharmaceutical industry meeting, competitors discuss the effects of pressure from managed care organizations
  - Some time later, all branded companies refuse US retailer requests for discounts/rebates made available to managed care and hospital buyers (consistent with historical practice)
  - Retail pharmacies and their customers file class actions alleging per se illegal agreement under Sherman Act Section 1.
    - An important allegation is that Trade Association meetings were cover for reaching an agreement to deny discounts to retailers
    - Case survives motions to dismiss and years of litigation followed before defendants win at trial

State Actions, Exemptions and Immunities

State Actions, Exemptions and Immunities

- The State Action doctrine immunizes certain actions of state and local government from the antitrust laws. *Parker v. Brown*, 317 U.S. 341, 351 (1943)
- Under the State Action doctrine, private actions may be immune from antitrust scrutiny if state regulation has manifested the following two things (*CA Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)):
  - A "clearly articulated" policy that is specifically intended to exempt the private action from antitrust laws
  - "Active supervision" and control over the exempt private entity
- Regulations that leave no room for private discretion may warrant state action immunity

Clear Articulation: *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013)

- FTC sought to enjoin the acquisition of a hospital by the county hospital authority, a sub-state government entity
- Lower court dismissed, holding that under the state action doctrine, the actions of the county hospital authority were immune from the antitrust laws
- Supreme Court
  - Reversed, holding that "Respondents' claim for state-action immunity fails because there is no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership"
  - For a sub-state entity to be protected by state action immunity, the entity must show that the state "clearly articulated and affirmatively expressed a policy to allow hospital authorities to make acquisitions that substantially lessen competition"

Active Supervision: *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101 (2015)

- North Carolina State Board of Dental Examiners attempted to block nondentists from offering cosmetic teeth-whitening services
  - North Carolina's Dental Practice Act established that the Board is "the agency of the state for the regulation of the practice of dentistry"
  - The Act is silent on whether teeth whitening falls under the practice of dentistry
  - Eight out of ten board members were dentists that offered teeth-whitening services
  - Board issued cease-and-desist letters to nondentists threatening criminal liability, rather than taking actions that would have triggered oversight by state officials (i.e., by establishing a formal rule or regulation)
  - Board's threats successfully pushed nondentists out of the N.C. market for teeth-whitening, despite little evidence of possible harm to consumers

Active Supervision: *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101 (2015)

- FTC brought suit, alleging Board's actions were anticompetitive
- Lower courts found no immunity because the Board was not actively supervised
- The Supreme Court affirmed the lower courts' rulings
  - Some actors, such as municipalities, are exempt from active supervision requirements because they are protected by electoral safeguards and there is little danger of interference from private interests *Hallie v. Eau Claire*, 471 U.S. 34, 45 (1985)
  - Even though N.C. law classified the Board as a state agency, it was still considered a nonsovereign actor for the purposes of antitrust laws because the Board, like a private trade association, was a self-regulating body controlled by active market participants with private interests

Active Supervision: *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101 (2015)

- The Supreme Court determined that active state supervision requires that a state supervisor:
  - Review the substance of the anticompetitive decision, not merely procedures followed to produce it
  - Have the power to veto or modify particular decisions to ensure that they accord with state policy
  - Not itself be an active market participant
- The guiding principle is whether the review mechanisms "provide realistic assurance that a nonsovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual self interest" (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988))

Active Supervision: *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101 (2015)

- The Takeaway:
  - State professional boards, like private trade associations, are subject to antitrust scrutiny
  - States may need to revisit the supervision they impose on state professional boards
  - States may need to change the composition of boards so that they are not controlled by "active market participants"
- Unresolved Issues:
  - What is an "active market participant?"
  - What is a "controlling number?"
  - What is the required connection between a board member's commercial interests and the policy at issue?

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Enforcement in the United States

Sources of Antitrust Enforcement and Litigation

- U.S. Department of Justice
  - Criminal
  - Civil
- Federal Trade Commission
  - Civil
- Private parties injured by the violation
  - Treble damages available
- State governments
  - To recover for their own losses as customers
  - To recover on behalf of citizens *parens patriae*

State Government Enforcement

- State Attorneys General can:
  - Conduct investigations and commence lawsuits
    - To recover for their own losses as customers
    - To recover on behalf of citizens *parens patriae*
  - Join with federal counterparts in investigations and litigation
  - Intervene in private damages actions
  - Coordinate enforcement efforts with other State AGs through the National Association of Attorneys General

FTC Enforcement

- FTC may bring only civil claims for antitrust violations
- *Endo Health Solutions, Inc.*, F.T.C. File No. 131 0225 (Mar. 19, 2014)
  - Two pharmaceutical companies agreed to settlement resolving FTC charges that acquisition would be anticompetitive
  - Under the settlement, companies agreed to relinquish their rights to market and distribute four generic multivitamin fluoride drops and would also sell three other generic drugs in development
- *Mylan Inc.*, F.T.C. File No. 131 0112 (Dec. 12, 2013)
  - Pharmaceutical companies agreed to divest 11 generic injectable drugs as a condition of allowing a proposed acquisition to move forward
  - Divestment of drugs was required because the companies were part of a limited number of current or likely future competitors in each of the 11 markets

FTC Enforcement: Disgorgement As A Remedy

- Disgorgement is an equitable remedy: Requires to return of "ill-gotten" gains
- In July 2012, the FTC withdrew its Policy Statement on Monetary Equitable Remedies in Competition Cases
  - The Policy Statement outlined a framework for determining when the FTC would seek equitable monetary remedies, such as disgorgement
  - Instead, the FTC issued a statement that it would rely upon "existing law"
- On April 20, 2015, Cardinal Health agreed to disgorge $26.8 million for allegedly monopolizing the radiopharmacy market around the country
  - Commission voted 3-2 in favor of issuing the complaint and settlement.
  - First case in which disgorgement has been awarded (though not sought) since July 2012
  - Second-highest disgorgement remedy in FTC history
  - Two dissenting commissioners took issue with the decision to pursue disgorgement and the lack of guidance for practitioners

Private Enforcement

- Private damages actions
  - Treble damages, plus attorneys' fees
  - May be brought by any party injured by reason of an antitrust violation
    - Direct buyers of product
    - Indirect buyers under parallel state laws
- Often filed on heels of guilty plea or other public disclosure of cartel activity

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Enforcement in the European Union

EC Enforcement

- The European Commission (EC) has the authority to impose fines up to 10% of a company's global annual revenue
- The EC does not have authority to impose criminal sanctions, but EU Member States have (roughly half of the EU Members States do impose criminalize sanctions)
  - *Akzo Nobel NV v. Comm'n of the Eur. Cmtys.*, (Sept. 10, 2009) There is a rebuttable presumption that the actions of a wholly owned subsidiary will be attributed to the parent, and therefore the parent will be subject to fines
  - *Koninklijke Grolsch NV v. Comm'n*, (Gen. Ct. Sept 15, 2011) In order for this presumption to apply, however, the EC must state the reasons which led it to determine the parent was responsible for the alleged activity

EC Enforcement (Applicable law)

- Two main provisions of the **Treaty on the Functioning of the European Union (TFEU)** deal with the market behavior of companies
  - **Article 101 TFEU** prohibits **agreements between companies which restrict competition**, unless they produce substantial benefits to customers and consumers
  - **Article 102 TFEU** outlaws **abuses by dominant companies**
- These fundamental rules and prohibitions are **further clarified by several legal texts** adopted by the Council or the European Commission
  - The European Commission is empowered by the TFEU to apply these rules and has a number of investigative powers to that end (e.g. inspection at business and non-business premises, written requests for information, etc.). The main rules on procedures are set out in **Council Regulation (EC) 1/2003**
- Note that at national level behavior purely affecting competition **within one of the 28 EU Member States** is similarly prohibited and enforced by the National Competition Authorities

EC Enforcement (Procedural Steps)

- Since **2004** the EC shares the task of **enforcing the competition rules** in the TFEU with the National Competition Authorities of the Member States and with the national courts
- Under **Article 265 TFEU** it is possible to bring an action against the EC where, in infringement of the Treaty, it has failed to act
- Under **Article 263 TFEU** it is possible to bring an action to have various 'acts' of the EC annuled. Formal decisions of the EC applying Articles 101 and 102 TFEU of course can be challenged
- Relevant **EU-Courts**:
  - General Court of the European Union (Luxembourg)
  - Court of Justice of the European Union (Luxembourg)

EC Enforcement Developments 2014-2015

- March 2015: Commission carried out an unannounced inspection in the bioethanol sector
- February 2015: Commission fined broker ICAP €14.9 million for participating in several cartels in the yen interest rate derivatives sector
- December 2014: Commission fined five envelope producers for €19.4 million in cartel settlement
- October 2014: Commission fined four major banks €32.3 million and JPMorgan €61.6 million for participating in Swiss franc interest rate derivatives related cartels
- September 2014: Commission fined smart chip producers €138 million for participation in a cartel
- June 2014: Commission fined three producers of canned mushrooms €32 million in cartel settlement
- March 2014: Commission fines producers of car and truck bearings €953 million in cartel settlement

Substantial EC Fines Over Five Years

- Automotive Bearings: In 2014, EC fined two European companies and four Japanese companies more than €953 million for operating a cartel in the market for car and truck bearings.
- Microsoft: In 2013, EC fined Microsoft €561 million for failing to provide customers meaningful choice between web browsers, as per the terms of a 2009 settlement agreement
- Cathode Ray Tubes: In 2012, EC fined seven groups of companies €1.47 billion for participation in two cartels which allocated customers and restricted production in cathode ray tubes
- Air Cargo: In 2010, EC fined eleven air cargo carriers €799 million for price fixing conspiracy

Multinational Enforcement Overview

- Effective and growing coordination among international enforcers
- U.S. investigations
  - Usually proceed by grand jury subpoena or by Civil Investigative Demand
  - FBI can conduct surveillance and obtain evidence by search warrant
- EC investigators and Member State competition authorities can conduct "dawn raids" – unannounced visits to obtain evidence – and do so with greater frequency than do US authorities
- Other developed countries have similar mechanisms
- Enforcers coordinate simultaneous raids

Multinational Enforcement Examples

- March 2014: EC authorities carried out unannounced inspections of unnamed companies in several members states that make automotive exhaust systems
- September 2012: Japanese antitrust regulators raided the offices of the five biggest car carrying shipping lines in coordination with inspections by the FTC and EC
- October 3, 2011: EC officials conducted simultaneous "dawn raids" and document seizures at Gazprom offices and affiliates across Europe
- March 1, 2011: EC officials conduct dawn raids at he premises of several European publishing houses
- May 3, 2007: Dawn raids on marine hose producers conducted simultaneously by DoJ, EC and UK Office of Fair Trading
  - The day before, eight executives from France, Italy, Japan and the UK were arrested in their hotel rooms in Houston, Texas, where they were attending an industry conference and cartel meeting

Offices Worldwide