Antitrust Litigation in Focus:

What Corporate Counsel Need to Know

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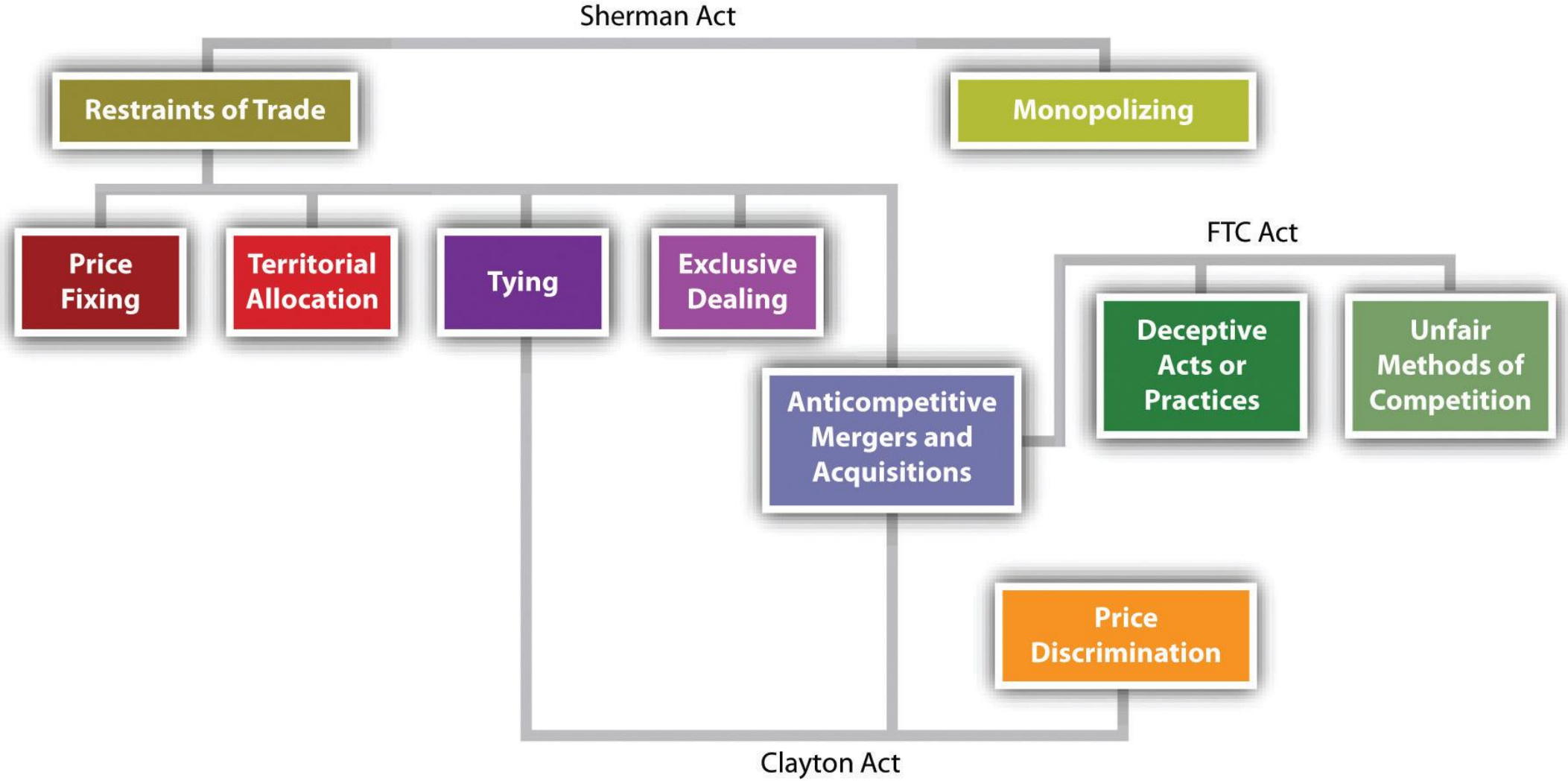
Agenda

- Key Antitrust Laws & Major Sources of Antitrust Litigation
- Trade Association Cases
- Platform Leveraging Cases
- Serving as In-House Counsel During Antitrust Trials
- Aftermarket Cases
- The Current Administration's Litigation & Enforcement Priorities

Key Antitrust Laws

- Sherman Act
  - Section 1 – prohibits agreements that unreasonably restrain trade
  - Section 2 – prohibits monopolization
- Clayton Act
  - Section 3 – prohibits conditioning sales on the buyer not dealing with competitors, where that may substantially lessen competition or tend to create a monopoly
  - Section 7 – prohibits mergers and acquisitions that may substantially lessen competition or tend to create a monopoly
- Federal Trade Commission Act
  - Section 5 – prohibits "unfair or deceptive acts or practices in or affecting commerce"
  - Interpreted to encompass Sherman and Clayton Act violations, and more
- State antitrust corollaries and unfair competition laws
  - Often follow federal antitrust laws, but there can be some variation

Key Antitrust Laws



Major Sources of Antitrust Litigation

Government

Competitors

Consumer Class Actions

Sources of Antitrust Litigation: Government

- Department of Justice Antitrust Division
  - Civil actions to enforce Sherman and Clayton Acts
  - Criminal prosecutions to enforce Sherman Act
- Federal Trade Commission Bureau of Competition
  - Administrative adjudications
  - Judicial enforcement
- State Attorneys General
  - Civil and criminal enforcement of state antitrust laws
  - Federal civil suits on behalf of their citizens

Sources of Antitrust Litigation: Competitors

- Companies may file suits for damages or injunctions if they have been directly injured by a violation of the Sherman or Clayton Act.
- The antitrust laws were enacted for "the protection of competition, not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).
- Plaintiffs must be either customers or market participants to have antitrust standing.
- Damages are trebled.
- In the current economy, almost every company is potentially both a defendant and a plaintiff in antitrust suits.

Sources of Antitrust Litigation: Class Actions

- Private individuals may sue for damages or injunctions if they have been directly injured by a violation of the Sherman or Clayton Act.
- Class members must be either customers or market participants.
- Treble damages and attorneys' fees.
- Class certification is a major hurdle—commonality is difficult.
- Massive damages exposure if a class is certified.

Major Categories of Current Antitrust Litigation

- Trade Association Cases
- Platform-Leveraging Cases
- Aftermarket Cases

Trade Association Cases: Introduction

- Many antitrust lawsuits today allege that trade associations or similar groups engaged in anticompetitive conduct, including in the realty, higher education, construction, agricultural product, and sports industries.
- Trade associations serve key functions: establishing safety standards, compiling industry-wide statistics, instituting best practices, lobbying, etc.
- But trade associations are often accused of collusion. By definition, they engage in collective action, and have meetings at which competitors gather.

> "A trade association by its nature involves collective action by competitors. Nonetheless, a trade association is not by its nature a 'walking conspiracy,' its every denial of some benefit amounting to an unreasonable restraint of trade. In particular, it has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function of trade associations."
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> *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 294 (5th Cir. 1988)

Trade Association Cases: Key Law

- These suits generally arise under Section 1 of the Sherman Act.

  "Every contract, combination in 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. § 1.

- Was there an **agreement**?
  - Formal or written agreement is not required, but must be more than mere parallel conduct.
  - Trade association actions—such as promulgating rules or standard—are often taken as evidence of an agreement among the association's members.
- Does the agreement **harm competition**?
  - Agreements deemed to be anticompetitive on their face are ***per se*** illegal.
    - E.g., price fixing, market allocation, bid rigging, group boycotts
  - Other agreements may be anticompetitive, but must be analyzed under the **rule of reason** to determine whether the agreement in fact suppresses competition.

Trade Association Cases: Rules vs. Guidelines

- Trade associations may impose mandatory rules upon members.
  - Mandatory rules raise the specter of collusion—such as rules that fix prices, require data-sharing, exclude competitors, or set up exclusive dealing arrangements.
  - Still, rules may serve fundamental regulatory purposes and be found to be procompetitive under the rule of reason—such as rules governing safety, quality control, ethics, etc.
- Trade associations often will provide guidelines and optionality.
  - Recommendations of this sort are less likely to result in successful lawsuits. Members maintain their independent decision-making ability.
  - So, there is less likely to be an agreement, and enough autonomy to not stifle competition.

Trade Association Cases: Collegiate Sports Examples

- College athletes have brought several cases challenging NCAA restrictions on athlete compensation and benefits.
- *NCAA v. Alston*, 594 U.S. 69 (2021)
  - Supreme Court affirmed that NCAA's restrictions on providing college athletes with non-cash compensation violated Section 1 of the Sherman Act, applying the rule of reason.
- *Choh v. Brown University* (D. Conn.)
  - Former Brown University basketball players brought a putative class action, alleging that the Ivy League's ban on athletic scholarships constituted unlawful price fixing, raising the price of education for college athletes. WilmerHale represented Penn.
  - The district court dismissed the case, holding that the Ivy League did not constitute a plausible relevant market in which competition could be harmed, because Ivy League schools also compete with schools like Stanford and Duke—which do offer athletic scholarships. This case is now being appealed.

Trade Association Cases: Algorithmic Pricing

- Both the government and class action lawyers are increasingly focusing on pricing algorithms used by many industries.
- Algorithmic pricing refers to automated decision-making software or other tools that set prices dynamically, based on pricing information, rules, and strategies.
- Plaintiffs argue that algorithmic pricing programs can be used to engage in anticompetitive conduct, such as price fixing or market allocation.
- Major issue in these cases is proving the existence of an actual agreement, not just independent decisions to utilize the algorithm.
  - Some state laws are considering treating participation in a pricing algorithm to conclusively establish an agreement among competitors.

Trade Association Cases: Algorithmic Pricing Examples

- *Duffy v. Yardi Systems* (W.D. Wash.)
  - Tenants filed class action alleging that multifamily apartment owners and property management software company conspired to inflate rental rates by using the same algorithmic pricing software, through which they shared nonpublic pricing information.
  - The district court declined to dismiss the case and held that allegations of price fixing by algorithm were subject to the *per se* rule. The case is ongoing.
- *In re RealPage, Inc., Rental Software Antitrust Litigation (No. II)* (MDL 371)
  - Tenants filed similar suits against RealPage—whose rent-recommendation software collects pricing data from competitors in order to set rental rates for landlords—and a large group of landlords. These have been consolidated into multidistrict litigation in Tennessee.
  - Plaintiffs have survived a motion to dismiss, but the court declined to apply the *per se* rule.
  - DOJ and state AGs have filed similar suits in North Carolina.

Trade Association Cases: Algorithmic Pricing Examples (cont.)

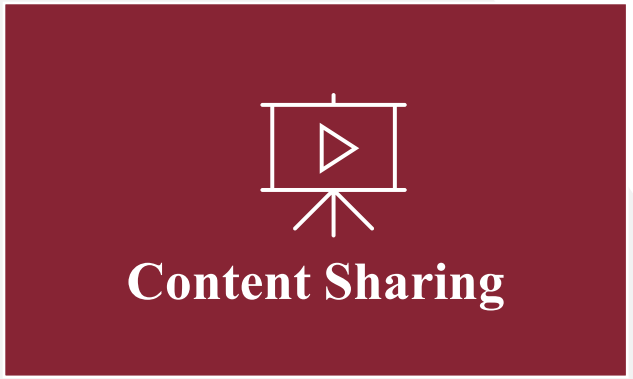
- *AXG Roofing LLC v. RB Global Inc.* (N.D. Ill.)
  - Renters of construction equipment recently filed a putative class action alleging that several large construction equipment rental companies conspired to fix prices by collectively sharing nonpublic inventory and pricing data with an analytics company that provides revenue-management software used to set industry benchmarks.
  - This case is ongoing.

Trade Association Cases: Avoiding Liability

- Avoid joining trade associations with rules impacting competition.
- Avoid discussing prices, costs, output levels, bids, etc. with other members of trade association.
- Be careful about data-sharing.
- Ensure standards set by association promote legitimate goals and do not exclude competitors.
- Where possible, influence trade association to institute optional guidelines rather than mandatory rules.
- Implement compliance programs:
  - Antitrust training, especially for trade association representatives and meeting attendees
  - Legal review of trade association agendas and minutes

Platform Leveraging Cases: Introduction

- A platform is a website, app, or other venue that serves as an intermediary for groups of users to interact with one another. For example:



Platform Leveraging Cases: Introduction

- Platform leveraging occurs when a firm uses its dominant position in one market to gain an advantage in a different market.
- Accusations of platform leveraging often arise when platforms both provide infrastructure and use their own platforms to serve end-users, competing with third-parties.
- Platform leveraging is a category that encompasses multiple legal theories of harm, where the conduct's competitive effects are felt in a different market from the one in which defendant is dominant. For example:
  - Self-preferencing
  - Tying
  - Refusals to deal

Platform Leveraging Cases: Key Law

- Sherman Act Section 2
  - No agreement requirement
  - Prohibits monopolization and attempted monopolization.
    - Monopoly power is the ability of one firm to control prices or exclude competition. Typically, > 70% market share implies monopoly power, while 50% - 70% is a gray area.
    - Whether a firm has monopoly power depends on the definition of the relevant market.
    - If monopoly power exists, courts ask whether the firm has willfully acquired it by engaging in exclusionary conduct—e.g., predatory pricing, unjustified refusals to deal, loyalty or bundled discounts, exclusive dealing.
- State unfair competition laws—e.g., California UCL
- Clayton Act Section 3
  - Prohibits tying and exclusive dealing that may substantially lessen competition.

Platform Leveraging Cases: Key Law

- In general, firms are free to choose the parties with whom they do business.
- But that right is not unqualified. A monopolist may violate antitrust law by **refusing to deal**, where that refusal helps maintain the monopoly use the firm's monopoly in one market to attempt to monopolize another market (leveraging).

> "[A] company engages in prohibited, anticompetitive conduct when (1) it unilaterally terminates a voluntary and profitable course of dealing; (2) the only conceivable rationale or purpose is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition; and (3) the refusal to deal involves products that the defendant already sells in the existing market to other similarly situated customers."
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> *FTC v. Qualcomm Inc.*, 969 F.3d 974, 994 (9th Cir. 2020) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)).

- A related concept is the **essential facilities** doctrine.
  - A firm in control of a facility essential to competitors may be required provide reasonable access to that facility where denying access reduces competition in a downstream market. The viability of this doctrine is very uncertain after *Verizon v. Trinko*, 540 U.S. 398 (2004).

Platform Leveraging Cases: Examples

- *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001)
  - Court held that Microsoft used its monopoly in the operating system market to attempt to monopolize the browser market.
- *FTC v. Amazon* (W.D. Wash)
  - The FTC and many state Attorneys General sued Amazon, alleging (among other things) that Amazon leverages its power in both the "online superstore" and "online marketplace services" market to expand power in the other market, using several exclusionary tactics. This case is ongoing.

    "Amazon's anti-discounting conduct leverages both its first-party Retail and its third-party Marketplace business units to suppress competition. Amazon's first-party anti-discounting algorithm disciplines rivals from undercutting Amazon's prices, and Amazon punishes third-party sellers for offering lower prices on other platforms. Without the ability to attract either shoppers or sellers through lower prices, rivals are unable to gain a critical mass of customers and meaningfully compete against Amazon."

    Second Amended Complaint, *FTC v. Amazon*, 23-cv-1495 (W.D. Wash Oct. 31, 2024).

Platform Leveraging Adjacent Cases

- *Duke Energy Carolinas v. NTE Carolinas II LLC*, 111 F. 4th 337 (4th Cir. 2024)
  - NTE, a Florida-based power company with operations in the Carolinas, sued Duke Energy, alleging that Duke had monopoly over the wholesale power market in the Carolinas, and maintained that power through conduct that excluded NTE from the market.
  - Among other conduct, NTE alleged that Duke unlawfully terminated NTE's interconnection agreement, which had allowed NTE to access Duke's transmission lines.
  - The district court held that none of Duke's individual actions was an antitrust violation under the relevant tests for refusals to deal, predatory pricing, etc.
  - But the Fourth Circuit reversed, holding that the alleged course of anticompetitive conduct must be considered holistically.
  - Duke filed a cert petition in the U.S. Supreme Court, which just last week called for the views of the Solicitor General.

Serving as In-House Counsel for Antitrust Trials

Q&A with Eric Meiring, Meta

- Managing outside counsel
- Managing executives' time
- Handling confidentiality
- Substantive responsibilities
- Logistics

Aftermarket Cases: Introduction

- An aftermarket is a derivate market for goods or components that must be purchased for the effective use of a primary good. The goods are "after" market because they are typically bought after the purchase of the primary good by people who already own the primary good.
  - For example, the purchase of a Xerox photocopier generates aftermarkets for repair services, replacement parts, paper, ink cartridges, etc.
- Accusations of antitrust violations often arise when the seller of the primary good also participates and has significant control in the aftermarket.
- Plaintiffs typically argue that the defendant uses its control over the primary market (or foremarket) to exclude competition and raise prices in the aftermarket.
- The term "right to repair" is often used in relation to aftermarket cases.

Aftermarket Cases: Key Law

- Sherman Act Section 1
  - Prohibits agreements that unreasonably restrain trade.
  - Tying claims are common.
- Sherman Act Section 2
  - Prohibits monopolization and attempted monopolization.
- State laws—e.g., California Cartwright Act, California UCL

Aftermarket Cases: Examples

- *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992)
  - Independent service organizations alleged that Kodak, which manufactured and sold photocopiers, along with service and replacement parts, limited independent servicers' access to replacement parts and engaged in other conduct that excluded competition, increased prices, and forced unwilling consumption of Kodak's parts and services in the aftermarket.
  - Kodak argued that it could not have sufficient market power in the aftermarkets because it did not have significant market power in the primary market for photocopiers. The Supreme Court rejected this argument, reasoning that once customers had committed to a particular brand (Kodak) by having purchased a copier, they were "locked in" and no longer had a realistic alternative to Kodak repair parts and servicing.
  - Courts have subsequently held that, to show that consumers are effectively "locked in" to a single-brand aftermarket, plaintiffs must show that consumers were generally unaware of the aftermarket restrictions when they purchased the primary product and that the costs of switching products is high.

Aftermarket Cases: Examples

- *In re Deere & Company Repair Service Antitrust Litigation* (MDL 3030)
  - Farmers have sued John Deere under Sections 1 and 2 of the Sherman Act, alleging that Deere deliberately designed its tractors so that diagnosis and completion of a repair often requires software tools and resources that Deere keeps under tight lock—allowing Deere to charge supracompetitive prices for repairs.
  - Deere argued that there could not be a single-brand aftermarket because consumers knew about the aftermarket restrictions when they purchased Deere's tractors, and thus were not "locked in." DOJ filed an amicus brief arguing that a lack of "deception or surprise" in the primary market was not dispositive.
  - The Northern District of Illinois denied Deere's motion for judgment on the pleadings, holding that Deere had misrepresented its repair policies by suggesting that purchasers could repair their own tractors when, in reality, they could not. The case is ongoing.
  - The FTC and state AGs recently filed a similar suit.

Aftermarket Cases: Takeaways

- The John Deere case will likely encourage more single-brand aftermarket claims—at least for now.
- Expansion of the "right to repair" could also occur through legislation. States are increasingly passing new and more expansive right to repair laws.
- While manufacturers could previously avoid risk by (1) not automatically voiding warranties based on use of an unauthorized part or service, and (2) disclosing any aftermarket restrictions, there is now a higher risk of litigation and enforcement even if those rules are followed.

The Current Administration's Litigation & Enforcement Priorities

Q&A

Questions?

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