



The University of Oxford Centre for Competition Law and Policy

The Competition Law & Policy Guest Lecture Programme - Paper (L) 01/05

A BRIEF OVERVIEW OF AMERICAN ANTITRUST LAW

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(On leave from the U.S. Federal Trade Commission)

I. Introduction and Overview

I am delighted to be here today. I am a Visiting Fellow at All Souls, on leave from my position as director of the antitrust policy office at the U.S. Federal Trade Commission. Today I will focus on key principles of the federal antitrust law of the United States. First I will highlight the three primary areas of antitrust enforcement – agreements among competitors, monopolization, and mergers. Next I will turn very briefly to three special topics – specifically, antitrust immunities and defenses; the role of state antitrust enforcement; and role of private

antitrust enforcement. In my next lecture, I will seek to compare American and European antitrust doctrine. Each lecture could be the focus of a year-long course. Accordingly, I will operate at a relatively high level of generality, to give you a “bird’s eye view” of each topic, with specific references chosen to highlight doctrinal developments of special significance. Before proceeding further, I should state that the views I will express in these two lectures are attributable solely to me, and should not be taken to represent the views of the Federal Trade Commission, any individual Commissioner, or any other U.S. government official. This standard disclaimer is required of U.S. government civil servants who make public pronouncements in areas that touch upon their official duties.

II. Basic American Antitrust Doctrine

American federal antitrust law has developed in common law style, through the accretion of judicial precedents over more than a century. The core provisions are found in the 1890 Sherman Act and the 1914 Clayton Act, which have been refined through amendment over time. The Justice Department (“DOJ”) has sole enforcement authority over the Sherman Act., which is directed against anticompetitive agreements and monopolization. DOJ may enforce the Sherman Act prohibitions through criminal or civil actions. DOJ and the Federal Trade Commission (FTC) jointly enforce the Clayton Act, the primary federal merger enforcement statute, which authorizes civil injunctions to prevent anticompetitive mergers. The courts have held that the FTC’s power to challenge “unfair methods of competition” under section 5 of the FTC Act¹

¹ 15 U.S.C. § 45.

(“Section 5”) also encompasses all Sherman Act violations. Moreover, the U.S. Supreme Court has indicated that the FTC Act’s section 5 authority extends beyond plain Sherman Act violations to encompass as well “incipient” violations of that Act – and actions that infringe the “spirit or policy” of the Sherman Act. See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). The FTC may enforce Section 5 through civil administrative proceedings.

I will devote the bulk of this lecture to surveying core Sherman Act and Clayton Act doctrine. I will only present a brief overview of other American antitrust topics, including antitrust exemptions, the role of state as opposed to federal antitrust enforcement, and private rights of action. There is an enormous literature on all of these matters; a good short introduction to them is the 2004 edition of *Antitrust Law and Economics in a Nutshell*, by Gellhorn, Kovacic, and Calkins, published by West Group.

The key Sherman Act provisions declare illegal: (1) “[e]very contract, combination, . . . or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations” (“Section 1”); and (2) acts by a person involving monopolization, attempted monopolization, or a combination or conspiracy to monopolize (“Section 2”). Section 1² is aimed at collective action, and Section 2³ at unilateral action. As we shall see, in recent years courts generally have stressed “economic efficiency” and, relatedly, “consumer welfare” as the goals that animate the Sherman Act, consistent with the view of the Sherman Act’s legislative

² 15 U.S.C. § 1.

³ 15 U.S.C. § 2.

history propounded by Robert Bork.⁴ Whether this “efficiency-based” explanation is correct or not is beyond the scope of this lecture. For those of you who are interested, there is a large scholarly literature that explores alternative theories of the Sherman Act, from both positive and normative perspectives.

A. Section 1 of the Sherman Act

Read literally, Section 1 of the Sherman Act would prohibit every contract or agreement. The U.S. Supreme Court has recognized, however, that “the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition,” because “[e]very agreement concerning trade, every regulation of trade, . . . restrains.”⁵ Consequently, the Supreme Court has interpreted Section 1 as prohibiting restraints that *unreasonably* restrict competition.⁶

One of the principal issues in the application of Section 1, apart from the determination of whether the conduct involves the requisite *agreement*, is the question of how to determine whether the agreement *unreasonably* restrains competition. Analytical methodologies for determining reasonableness have evolved over time.

⁴ See R. Bork, *The Antitrust Paradox*, at 61 (1978).

⁵ *Chicago Board of Trade v. United States*, 435 U.S. 679, 687-88 (1978).

Traditionally, courts addressed the issue by classifying restraints into one of two categories: (1) restraints that were conclusively presumed to be unreasonable and therefore *per se* illegal, and (2) restraints that were to be analyzed under a test called the “rule of reason.” (Courts later came to consider the rule of *per se* illegality to be a special case of the rule of reason.) The classification of a restraint into one of these two categories depended on the nature of the restraint.

Restraints were deemed to be *per se* illegal if they were considered to have, in the words of the Supreme Court in *Northern Pacific Railway*, a “pernicious effect on competition” and lacked “any redeeming virtue.”⁷ Such restraints were “conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”⁸

Among the practices that courts traditionally deemed to be *per se* unlawful were price fixing,⁹ division of markets,¹⁰ group boycotts,¹¹ and tying arrangements.¹²

⁶ *Standard Oil Co. v. United States*, 221 U.S. 1, 56 (1911).

⁷ *Northern Pacific Railway v. United States*, 356 U.S. 1, 5 (1958).

⁸ *Id.*

⁹ *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 210 (1940).

¹⁰ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff’d as modified*, 175 U.S. 211 (1899).

¹¹ *Fashion Originators’ Guild v. FTC*, 312 U.S. 457, 668 (1941).

¹² *International Salt Co. v. United States*, 332 U.S. 392 (1947).

Courts cited two benefits for the conclusive presumption of illegality: (1) it provides greater certainty as to the legal ramifications of the conduct, and (2) it avoids the necessity for a complicated and prolonged economic investigation to determine whether a particular restraint has unreasonably harmed competition – an inquiry which the Supreme Court has described as “so often wholly fruitless when undertaken.”¹³ However, these benefits were not sufficient reasons, by themselves, for classifying a restraint as *per se* illegal.¹⁴

The rule of reason was the presumptive standard, applicable to all horizontal restraints other than the few types considered to be *per se* illegal. In a classic formulation of the rule of reason test, which prevailed until the late 1970s, the U.S. Supreme Court stated that “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.”¹⁵ The rule of reason therefore recognizes that some restraints, on balance, may be procompetitive, even if they restrain competition in some respect.

The traditional approach tempted antitrust plaintiffs to engage in formalistic line-drawing and place form over substance, since the label one attached to a restraint could well determine the outcome. Thus, for example, plaintiffs had an incentive to label all price-related agreements

¹³ *Northern Pacific Railway v. United States*, 356 U.S. 1, 5 (1958).

¹⁴ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977).

¹⁵ *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

as price fixing, all membership restrictions in trade groups as group boycotts, and all conditional sales agreements as tying arrangements, so that they would be deemed *per se* illegal. This kind of formalistic analysis posed the risk of summarily condemning some practices that might generate significant efficiencies. (In fact, the Supreme Court would later come to hold that not all price-related restraints or boycotts are *per se* unlawful, and that the analysis of tying arrangements includes elements of a rule of reason analysis.) On the other hand, if a restraint did not fit into the “*per se*” box, the court became immersed in a full market analysis under the rule of reason.

In the *GTE Sylvania* case, decided in 1977, the Supreme Court rejected the formalistic approach and returned to the demanding standard of *Northern Pacific Railway*, in which restraints were considered to be *per se* illegal only if they had a pernicious effect on competition and lacked any redeeming virtue. In the words of the *Sylvania* Court, restraints had to be “manifestly anticompetitive” in order to be considered *per se* illegal.¹⁶ To make that determination, courts had to have enough experience with a restraint to assess the probability that anticompetitive consequences will result from a practice and the severity of those consequences, and balance those consequences against the restraint’s possible procompetitive consequences.¹⁷ In addition, since a *per se* rule requires courts to make broad generalizations about the anticompetitive nature of a restraint, they need enough experience with a restraint to make a

¹⁶ *GTE Sylvania*, 433 U.S. 36 at 49-50 (1977).

judgment that exceptions to the generalization are not sufficiently common or important to justify the time and expense necessary to identify them.¹⁸

The next significant development came just two years later, in the *Broadcast Music (BMI)* case,¹⁹ in which the Supreme Court modified the previous sharp distinction between the *per se* and rule of reason categories. While retaining the traditional *per se* category for so-called “naked” restraints that have no purpose other than to restrict competition, the Court adopted a more accommodating approach to restraints that may have some legitimate justification. The Court held that even restraints that appear on their surface to resemble those that traditionally have been considered *per se* illegal should be examined more thoroughly under the rule of reason, if the restraint was imposed in a context that suggests a purpose other than to restrain competition. The Court explained that it is important to determine “whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, . . . or instead one designed to ‘increase economic efficiency and render markets more, rather than less, competitive.’”²⁰ The Court thus made clear that the characterization of a restraint as either *per se* involves a two-step threshold inquiry: (1) is the restraint facially anticompetitive, and (2) is there a plausible efficiency justification?

¹⁷ *Id.* at 50 n.16.

¹⁸ *Id.*

¹⁹ *Broadcast Music Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

²⁰ *Id.* at 19-20 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

The Supreme Court’s analysis of the restraint at issue in that case – a blanket license to perform millions of music compositions copyrighted by thousands of composers – illustrates the Court’s sensitivity to the potential efficiency-enhancing character of some restraints. An agreement among composers to grant a blanket license inherently involves an agreement on price. Indeed, a lower appellate court had held that the blanket license was *per se* illegal price fixing. The Supreme Court, however, recognized that a blanket license is not a “naked restraint” with no purpose except stifling of competition. Rather, a blanket license facilitated lower-cost transactions between thousands of users and thousands of composers with millions of compositions. A blanket license also facilitated monitoring and enforcement against unauthorized copyright use. In short, a blanket license was much more efficient than thousands or millions of individual transactions between users and composers. The Supreme Court thus held the *per se* rule to be inapplicable.

The next step in the evolution was a refinement of the methodology for rule of reason analysis. Traditionally, a rule of reason analysis required a so-called “full blown” examination of the market – both potential anticompetitive effects and the claimed efficiency benefits, and a weighing of the two effects to determine whether the restraint, on balance, is anticompetitive. In a series of cases in the late 1970s and early 1980s, the Supreme Court developed an abbreviated form of rule of reason analysis – which came to be known as a “quick look” – for certain kinds of cases.²¹

²¹ See *National Soc. of Professional Engineers v. United States*, 435 U.S. 679 (1978); *National Collegiate Athletic Ass’n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984)

In essence, a quick look analysis truncates the examination of competitive effects when a “great likelihood of anticompetitive effects can easily be ascertained.”²² In the words of the Supreme Court, it is applicable when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”²³

Thus, for example, in the *NCAA* case, where the agreement restricted the number of college football games that could be televised and the restraint therefore had an obvious effect on price and output, it was not necessary to demonstrate that the collaborators had market power (a necessary foundation for raising price above competitive levels).²⁴

Likewise, in *Indiana Federation of Dentists*, anticompetitive effects were readily apparent where the restraint was “a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire.”²⁵

In *Detroit Auto Dealers*, the Federal Trade Commission had little difficulty concluding that an agreement among auto dealers to restrict their showroom hours was a significant restraint

(“*NCAA*”); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

²² *California Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999).

²³ *Id.*

²⁴ *See NCAA*, 468 U.S. 85.

on competition.²⁶ Relying in part on economic theory and common sense, the Commission held that the restraint on showroom hours effectively reduced output of a service – convenient shopping hours – and increased consumers’ cost of shopping for automobiles because they had to do during less convenient (and higher valued) hours.

The “quick look” line of cases further blurred the distinction between the *per se* and rule of reason categories, a point that the Supreme Court elaborated upon in the *California Dental* case. The Court noted that the “categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.”²⁷ The Court explained that “there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment,” and that what is required is an analysis that is appropriate for the case, considering the “circumstances, details, and logic of a restraint.”²⁸ The rule of reason thus encompasses a range of analyses – a continuum – differing in the level of detail necessary to understand the competitive effect of the restraint in question.

In *California Dental*, the Supreme Court concluded that the Federal Trade Commission

²⁵ *Indiana Federation of Dentists*, 476 U.S. at 459.

²⁶ *Detroit Auto Dealers Ass’n*, Dkt. 9189, 111 F.T.C. 417 (1989), *aff’d in part and remanded*, *In re Detroit Auto Dealers Ass’n, Inc.*, 955 F.2d 457 (6th Cir.), *cert. denied*, 506 U.S. 973 (1992), *on remand*, 119 F.T.C. 891 (1995) (modifying order), *remanded for reconsideration of remedy*, 84 F.3d 787 (6th Cir. 1996), *on remand*, 123 F.T.C. 1427 (1997) (consent order).

²⁷ *California Dental Ass’n*, 526 U.S. at 779.

and the intermediate appellate court had not conducted a sufficiently detailed examination of the restraint at issue in that case – provisions in a dental association’s code of ethics that were interpreted and applied in a manner that restricted both price and non-price advertising, purportedly for the purpose of avoiding false or deceptive advertising. The Supreme Court emphasized both the professional context of the restraint and the disparity between the information available to the professional and the patient, and held that the effects of such advertising were not “sufficiently verifiable in theory and in fact” to fall within the general rule that restraints on truthful and verifiable price and quality advertising are *prima facie* anticompetitive.

Although the Supreme Court in *California Dental* emphasized the flexible nature of rule of reason analysis, it did not provide a complete analytical framework for applying the rule of reason to fit the circumstances of a particular case. The Federal Trade Commission undertook the challenge of providing structure to the rule of reason analysis in our so-called “*Three Tenors*” case.²⁹

This case involved the parties to a joint venture formed to produce and market a new recording by three of the world’s foremost operatic singers, known as the Three Tenors. The restraint in question was not part of the joint venture itself, but rather a subsequent agreement to

²⁸ *Id.* at 781.

²⁹ *In re Polygram Holding, Inc.*, FTC Docket No. 9298, Decision & Order (July 24, 2003), 2003 WL 21770765 (F.T.C.).

restrict the marketing of previous Three Tenor recordings, whose marketing rights were separately owned by each of the joint venture partners and not part of the joint venture, to avoid siphoning off sales of the new recording. The Commission held the marketing restriction to be an unreasonable restraint of trade, applying an abbreviated rule of reason analysis.

The Commission outlined the following structured approach to a rule of reason analysis:

Step 1. Is the restraint “inherently suspect” – *i.e.*, the kind of restraint that is likely, absent an efficiency justification, to decrease competition?

A plaintiff may avoid full rule of reason analysis, including the pleading and proof of market power, if it demonstrates that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition.

Such conduct ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation. If the restraint is not inherently suspect, then the more detailed traditional rule of reason must be employed.

Step 2. Has the defendant advanced a legitimate justification for the practice?

If the challenged restrictions are of a sort that generally pose significant

competitive hazards and thus can be called inherently suspect, then the defendant can avoid summary condemnation only by advancing a legitimate justification for those practices.

If the defendant makes no effort to advance any competitive justification for its practices, then the practices may be condemned without further analysis. Such justifications may consist of plausible reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question; or they may consist of reasons why the practices are likely to have beneficial effects for consumers.

At this early stage of the analysis, the defendant need only articulate a legitimate justification, not prove them. The proffered justifications must be both cognizable under the antitrust laws and at least facially plausible.

The first element, cognizability, allows the deciding tribunal to reject proffered justifications that, as a matter of law, are incompatible with the goal of antitrust law to further competition. Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product quality, service, or innovation. Examples of justifications that are not compatible with the goal of antitrust law include claims to the effect that competition itself is

unreasonable or leads to socially undesirable results, or that defendants set prices at a reasonable level – a matter that is better left for the market to determine.

To be legitimate, a justification must plausibly create or improve competition. A justification is plausible if it cannot be rejected without extensive factual inquiry. The defendant, however, must do more than merely assert that its purported justification benefits consumers. Although the defendant need not produce detailed evidence at this stage, it must articulate the specific link between the challenged restraint and the purported justification to merit a more searching inquiry into whether the restraint may advance procompetitive goals, even though it facially appears of the type likely to suppress competition.

Step 3. If the defendant has advanced cognizable and plausible justifications, the plaintiff must address the justifications and make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition.

Such a showing still need not prove actual anticompetitive effects or entail the fullest market analysis. Depending upon the circumstances of the case and the degree to which antitrust tribunals have experience with restraints in particular markets, such a showing may or may not require evidence about the particular market at issue, but at a minimum must entail the identification of the theoretical basis for the alleged anticompetitive effects and a showing that the effects are

indeed likely to be anticompetitive.

Such a showing may, for example, be based on a more detailed analysis of economic learning about the likely competitive effects of a particular restraint, in markets with characteristics comparable to the one at issue. The plaintiff may also show that the proffered procompetitive effects could be achieved through means less restrictive of competition.

The defendant, of course, can introduce evidence to refute the plaintiff's arguments or to show that detailed evidence supports its proffered justification. Applying a flexible analysis tailored for the case, the tribunal at this stage must ascertain whether it can draw a confident conclusion about whether the principal tendency of the restraint is to restrict competition.

Step 4. If the plaintiff has adequately demonstrated that anticompetitive effects are likely, the defendant must substantiate the justifications it has advanced by producing factual evidence in support of its contentions.

The defendant's burden to respond will likely depend in individual cases upon the quality and amount of evidence that the plaintiff has produced to illuminate the competitive dangers of the defendant's conduct.

If the defendant meets that burden, it is entitled to a more detailed review under the full rule of reason.

Applying this structured framework, the Commission found the restraint in *Three Tenors* to be inherently suspect, and the proffered justification to be non-cognizable; the restraint therefore could be condemned without further analysis.

In sum, the analysis of horizontal restraints has evolved from a formalistic reliance on rigid categories to determine the analytical treatment, to a methodology that both recognizes the importance of efficiencies and tailors the analysis to the amount of detail needed to understand the competitive ramifications of the restraint.

B. Section 2 of the Sherman Act

Section 2 of the Sherman Act makes it unlawful to monopolize or attempt to monopolize trade or commerce.³⁰

Although Section 2 does not specify the elements of monopolization or attempted monopolization, it was made clear by the *Standard Oil* case in 1911 that Section 2 does not

³⁰ 15 U.S.C. § 2.

prohibit monopoly status in and of itself.³¹ Section 2 therefore focuses on *conduct* that amounts to monopolization or an attempt to monopolize.

Section 2 also does not make unlawful the charging of monopoly prices, as the Supreme Court recently explained:

“The possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.”³²

The identification of the kinds of conduct that violate Section 2 has been, and continues to be a difficult issue. Standards for identifying such conduct have evolved over time, with increasing sensitivity to efficiency justifications and the costs of incorrect enforcement decisions that may discourage innovative or other efficiency-enhancing conduct.

One source of difficulty is the fact that the behavior typically at issue in monopolization

³¹ *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911).

cases (often, unilateral conduct) can be very difficult to distinguish from the vigorous rivalry that antitrust law seeks to promote. One prominent antitrust scholar and jurist explained the difficulty in these terms: “Aggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers. Courts should prize and encourage it. Aggressive, exclusionary conduct is deleterious to consumers, and courts should condemn it. The big problem lies in this: competitive and exclusionary conduct look alike.”³³

The *Alcoa* decision by the U.S. Court of Appeals for the Second Circuit,³⁴ an influential case during the middle of the last century, illustrates the difficulty courts had in articulating a coherent legal standard.

The Second Circuit prefaced its discussion of legal standards by noting that the Sherman Act was prompted in part by suspicions of size, fears of the evils of monopoly, and a preference among some in Congress for an organization of industry based on small enterprise.³⁵ The court recognized that Congress intended Section 2 to focus on some undefined forms of undesirable conduct.³⁶ As explained in *Alcoa*, that notion was expressed by statements to the effect that size does not determine guilt; that there must be some “exclusion” of competitors; that the growth

³² *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 124 S.Ct. 872, 879 (2004).

³³ See, e.g., Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 Colum. Bus. L. Rev. 345 (2003)

³⁴ *United States v. Aluminum Company of America*, 148 U.S. 416 (1945) (“*Alcoa*”).

³⁵ See *id.* at 428-29.

must be something else than “natural” or “normal”; that there must be a “wrongful intent,” or some other specific intent; or that some “unduly” coercive means must be used.³⁷

The Second Circuit also recognized that a monopoly position may be the result of a single firm’s “superior skill, foresight and industry,”³⁸ and that “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.”³⁹ The Second Circuit, however, did not distill these notions into a coherent legal standard, and its disposition of the case before it would not today be repeated. The Aluminum Company of America was charged in that case was charged with maintaining a monopoly by repeatedly building new plants to preempt anticipated new entry. Internal expansion is today considered to be output-enhancing, and the *Alcoa* court in fact acknowledged that the company’s actions had stimulated demand. Nonetheless, the Second Circuit held that such conduct was exclusionary and violated Section 2. The court stated:

“Nothing compelled it [Alcoa] to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity

³⁶ *See id.* at 429.

³⁷ *Id.*

³⁸ *Id.* at 430.

³⁹ *Id.*

already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret ‘exclusion’ as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not ‘exclusionary.’ So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.⁴⁰

Thus, the court’s disposition of that case suggests that even “honestly industrial” conduct sometimes may be viewed as unlawful exclusion.

The next major development in Section 2 jurisprudence came in 1966, when the Supreme Court’s opinion in the *Grinnell* case attempted to articulate the contours of a Section 2 offense.⁴¹ The Court stated: “The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”⁴² This definition still stands,⁴³ but it left much unstated, since the term “willful” does little to help distinguish between competitively harmful and competitively efficient conduct.

⁴⁰ *Id.* at 431.

⁴¹ *United States v. Grinnell Corp.*, 384 US 563, 570-71 (1966).

⁴² *Id.* at 570-71.

⁴³ *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 124 S.Ct. 872, 878-79

Nearly 20 years later, in the *Aspen Skiing* case,⁴⁴ the Supreme Court provided content to the concept of unlawful exclusion that remains widely cited today. The case involved a monopolist’s refusal to deal with a rival. The Court explained in *Aspen* that the question whether conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on competitors. Rather, it is relevant to “consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.”⁴⁵ The Court further explained that “[i]f a firm has been ‘attempting to exclude rivals on some basis other than efficiency,’ it is fair to characterize its behavior as predatory.”⁴⁶ In this latter passage the Court cited a well-known antitrust treatise, which states: “Thus, ‘exclusionary’ comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.”⁴⁷

Aspen Skiing’s basic characterization of exclusionary or predatory conduct still prevails today. The specific issue involved in *Aspen Skiing* – the scope of a monopolist’s duty to deal with its rivals – remains controversial, but the law has changed little in 85 years. The Supreme Court held in the *Colgate* case in 1919 that, as a general matter, the Sherman Act “does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private

(2004) (quoting *Grinnell*).

⁴⁴ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

⁴⁵ *Id.* at 605 (emphasis added).

⁴⁶ *Id.* (emphasis added).

business, freely to exercise his own independent discretion as to parties with whom he will deal.”⁴⁸ The Court recently reaffirmed that position in *Verizon v. Trinko*.⁴⁹ *Aspen Skiing*, which found a monopolist’s refusal to deal to be exclusionary in the circumstances of that case, was described in *Verizon v. Trinko* as “at or near the boundary of § 2 liability.”⁵⁰ The Court’s decision in *Aspen Skiing* was found to turn on the defendant’s decision to cease participation in a voluntary, “*and thus presumably profitable*” cooperative venture, which “suggested a willingness to forsake short-term profits to achieve an anticompetitive end.”⁵¹ These circumstances were said to warrant a limited exception to the *Colgate* rule. The *Trinko* court also suggested that in devising antitrust rules, courts should be mindful of the risk presented by “false positives,” that is, antitrust challenges to conduct that is not actually anticompetitive. It remains to be seen what role this observation will play in guiding the Court’s future monopolization jurisprudence.

While the specific holding of *Aspen Skiing* remains controversial, its basic characterization of exclusionary or predatory conduct did much to sharpen the boundaries of conduct that might constitute unlawful exclusion. The debate, however, continues. Much of the recent debate has revolved around a so-called “profit sacrifice” test for exclusionary conduct, illustrated in part by the apparent short-term profit sacrifice incurred by the monopolist in *Aspen*

⁴⁷ See *id.* at 605 n.32, quoting 3 P. Areeda & D. Turner, *Antitrust Law* 78 (1978).

⁴⁸ *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

⁴⁹ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 124 S.Ct. 872 (2004)

⁵⁰ 124 S.Ct. at 879.

⁵¹ *Id.* at 879-80 (*italics in original*).

Skiing. The notion is that conduct by a monopolist that entails a deliberate sacrifice of profits is not economically rational unless the monopolist's design is to exclude competitors and recoup the losses by raising prices after their exit. Profit sacrifice therefore may be a signpost of exclusionary behavior. A paradigmatic example is predatory pricing, which is not a profitable strategy unless the firm is later able to recoup its losses through higher prices after competitors exit the market. The profit sacrifice test thus invites attention to "costly" forms of predation.

While profit sacrifice may be a useful indication of anticompetitive exclusion in some situations, it does not appear to be a universally applicable test for exclusionary conduct. The FTC, for example, recently has focused on some monopolization cases that allege the exclusion of competitors through abuse of a governmental process, which involves little or no profit sacrifice. As Judge Bork has noted, "[m]isuse of courts and governmental agencies is a particularly effective means of delaying or stifling competition."⁵²

An example is the FTC's *Unocal* case,⁵³ which alleges that the firm excluded competitors and monopolized a market for gasoline by abusing a governmental standard-setting process for gasoline that would meet environmental requirements; as a result of its conduct, Unocal's proprietary technology was incorporated into the standard without disclosure that Unocal intended to assert its intellectual property rights.

⁵² Robert H. Bork, *THE ANTITRUST PARADOX* 159 (1993).

The FTC's *Rambus* case is similar; it alleges that the firm sought to monopolize a market for technologies relating to computer memory chips through deceptive and misleading conduct during a private standard setting process; again, as a result of its conduct, Rambus' technology was incorporated into the standard without disclosure of its proprietary nature.⁵⁴

Other FTC cases allege monopolization of markets for pharmaceuticals by abusing a regulatory process to delay the entry of generic competitors.⁵⁵

Obtaining a patent by perpetrating fraud on the patent office is another example of abusive conduct that may constitute unlawful monopolization.⁵⁶

In sum, a potentially fruitful new avenue for monopolization cases involves abuses of government processes. As we shall see shortly, however, government immunities may limit the ability of public enforcers to pursue some of these cases.

C. Section 7 of the Clayton Act

⁵³ *Union Oil Company of California*, Dkt. 9305 (March 4, 2003) (Complaint).

⁵⁴ *Rambus Inc.*, FTC Dkt. 9302, Initial Decision (Feb. 17, 2004) (order dismissing complaint); appeal pending.

⁵⁵ *E.g., In re Biovail Corp.*, Dkt. No. C-4060 (Oct. 2, 2002) (consent order).

⁵⁶ *See Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *In the Matter of American Cyanamid Co.*, 72 F.T.C. 623, 684-85 (1967), *aff'd*, *Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968).

Let us now quickly examine the third key weapon in the American antitrust enforcement arsenal, Section 7 of the Clayton Act,⁵⁷ which prohibits the acquisition of share capital or assets, “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.”

Mergers are a significant dynamic force in the American economy. Mergers can lower costs and otherwise benefit consumers. Among other things, mergers provide a means for inefficient firms to exit the marketplace and for productive resources to come under the control of better management. In addition, mergers can enable firms rapidly to achieve scale economies, diversify product lines and geographic reach, acquire complementary resources, and respond to tax incentives. Each of these motives can be quite legitimate from a business standpoint – they advance such goals as enhancing shareholder value, reducing risk, and increasing competitiveness.

Mergers, however, can also be adverse to consumers’ interests. Consumer interests can be adversely affected if a merger creates or enhances market power. This can occur if the merger results in a single firm with enhanced market power or results in a group of firms with increased incentives and ability to exercise market power and raise prices to consumers. The FTC and the Department of Justice enforce statutes that prohibit mergers that may substantially lessen

⁵⁷ 15 U.S.C. § 18.

competition. The agencies also challenge consummated mergers that turn out to be anticompetitive.

Sound merger enforcement policy is a complex and evolving endeavor. Because mergers are often motivated by legitimate and socially desirable business interests – including efficiency gains – it is incumbent on antitrust enforcement officials to take great care in performing their competitive analysis of mergers and, in so doing, use the best analytical tools available to identify as accurately as possible those mergers that are likely to be harmful to consumers. Ideally, enforcement policy should consistently prevent anticompetitive acquisitions, while allowing those mergers to proceed that do not pose a risk to consumer welfare.

This is not an easy charge to satisfy, and I must concede that, historically, our own merger enforcement record in the U.S. has not always been up to this standard.

Specifically, I think that an honest commentary on American merger enforcement policy must admit that, until recent decades, that policy was far from enlightened. Indeed, during the 1960s and up to the early 1970s, U.S. merger enforcement policy was badly flawed. Amendments enacted in 1950 to the United States merger review statute, Section 7 of the Clayton Act,⁵⁸ gave the federal government new tools to challenge mergers, but the amendments did not give either courts or enforcement officials wisdom. Instead, the government relied on weak empirical work being published during that time period that found a positive correlation

⁵⁸ 15 U.S.C. § 18.

between industrial concentration and profits. That research, which has now been largely discredited, was amplified and relied upon by the government as justification for opposing horizontal mergers even in highly fragmented markets. The courts, lacking economic sophistication or guidance, found themselves powerless to come up with a theory to oppose these government actions. Indeed, the late U.S. Supreme Court Justice, Potter Stewart, was moved to say that the only thing consistent about the merger enforcement cases of that day was that the government always won.

This pattern of “automatic” government victories was broken, however, by the government’s 1974 defeat in *United States v. General Dynamics Corp.*⁵⁹ *General Dynamics* proved to be a very important harbinger of change. In *General Dynamics*, the Supreme Court upheld the merger of leading coal producers that increased the two firm concentration level in the relevant geographic markets to around 50%. Although the concentration level brought about by this merger was far higher than in any of the previous mergers struck down by the Court, the Court in *General Dynamics* significantly abandoned sole reliance on market share data. The Court stated that, although market shares are “the primary index of market power . . . only a further examination of the particular market – its structure, history and probably future – can provide the appropriate setting for judging the probably anticompetitive effect of the merger.”⁶⁰ With that pronouncement, the Court observed that, in this case, the acquired firm’s market share overstated its competitive position, since most of its coal reserves were tied up under long-term contracts. In other words, the acquired firm’s incapability of making new sales merited its being

⁵⁹ 415 U.S. 486 (1974).

discounted as a competitive factor in the market, notwithstanding the market shares based on current sales data.

Although the *General Dynamics* decision might have been read in narrow terms, the Supreme Court in subsequent cases reemphasized (in the context of downplaying market share statistics in bank merger cases based on the presence of other factors) that high market share numbers merely establish a rebuttable presumption of illegality – and that the government may lose if those numbers misrepresent the actual state of the market. Even more importantly, in my view, the *General Dynamics* decision demonstrated the broader need to look at the specific facts in each merger case before drawing conclusions about its likely competitive effects. In so doing, the decision foreshadowed the now well-understood and universally accepted view that mere “structure/performance” paradigms based on nothing more than historical market shares as proxies for competitive performance are fatally inadequate as a basis for sound merger policy. Instead, good merger analysis requires a far more sophisticated understanding of the affected markets – including, among other factors, the dynamics of those markets, the competitive positioning of each incumbent firm, the ability of firms to alter their positioning or make short term output responses to price changes, and the likelihood that new firms can and would enter markets in which mergers might have temporarily produced an adverse price effect. Sound analysis must also be informed by the proposed merger’s expected effects on productive efficiency, which in some cases may fully offset otherwise anticompetitive price effects.

⁶⁰ *General Dynamics*, 415 U.S. at 498, quoting *Brown Shoe Co. v. United States*, 370 U.S. at 322 n. 38 (1962).

Importantly, although federal merger enforcement officials did not immediately change their public statements of enforcement policy following the *General Dynamics* decision, they were forced to reassess their thinking. Merger policy had to be reshaped to account for the principles embodied in the *General Dynamics* case. Moreover, at the same time, new economic research was also casting doubt on the rationale of merger enforcement policy that targeted horizontal mergers even in unconcentrated markets. A major analytical break with the past was due.

That analytical breakthrough finally came in 1982, with the Justice Department's issuance of new Horizontal Merger Guidelines (originally released by the Justice Department, subsequently joined in by the FTC). For the first time, the Guidelines laid out a multi-step approach to evaluating mergers grounded in detailed economic analysis. Significantly, the substantial economic content of that approach gave economists "a seat at the table" along with the lawyers in the evaluation of proposed enforcement actions. Today no enforcement decision is made in the United States without a careful economic analysis of the proposed merger, typically performed by highly skilled economists within the agencies themselves.

Although the 1982 Guidelines were revised slightly in 1984, 1992, and 1997, in light of experience and new learning, their essential approach has been retained. Today, although I make no claim that U.S. federal merger enforcement has reached perfection, it is at least anchored in modern economic analysis and employs the best tools that professional economists have to offer.

To be sure, progress in applied microeconomics has not stopped; economics, like all science, always advances. Consequently, merger analysis and policy, in particular, must always be prepared to incorporate new thinking, and U.S. enforcers have attempted to do just that. Nonetheless, the refinements since 1982 in the U.S.'s approach to mergers have been largely at the margin. The core of American merger enforcement since the 1982 Guidelines has remained intact. That core, moreover, is now deeply rooted in an economically sophisticated antitrust bar and in the U.S. federal courts, with policy remaining generally consistent even as political leadership changes.⁶¹ Thus American merger policy is unlikely to return to its hopelessly flawed, pre-*General Dynamics* past. Given time limitations, I will not digress to discuss recent significant merger cases. A discussion of those cases can be found in major antitrust treatises, in law reviews, and in trade publications.

With that background, let me take just a moment or two to outline the key components of the Horizontal Merger Guidelines. The Guidelines are broken into five key sections, with each section setting out the specific steps that the enforcement agencies undertake in their merger reviews.⁶² I will elaborate on those steps in a moment. Before doing so, however, let me stress that the Guidelines' five sections are not treated as independent of one another. Indeed, the

⁶¹Former FTC Chairman Timothy J. Muris made this point in a major policy address. See *How History Informs Practice – Understanding the Development of Modern U.S. Competition Policy*, remarks of Timothy J. Muris, Chairman, Federal Trade Commission, before American Bar Association Fall Forum, Washington, D.C., November 19, 2003, available at <http://www.ftc.gov/speeches/muris/murisfallaba.pdf>. See also Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 *Antitrust L. J.* 105 (2002); *The Essential Stability of Merger Policy in the United States*, Prepared Remarks of Thomas B. Leary, Commissioner, Federal Trade Commission, Delivered at Guidelines for Merger Remedies: Prospects and Principles, Joint U.S./E.U. Conference, Paris, France, Jan. 17, 2002, available at <http://www.ftc.gov/speeches/leary/learyuseu.htm>.

analytical framework set out by the Guidelines is intended to be an integrated framework designed to generate a confident conclusion about the likely net competitive effects of a merger, taking into account all parameters relevant to the particular merger. That process requires an analysis that ties together and gives appropriate weight to each relevant parameter based on a detailed factual evaluation. At the end of the day, the only analysis that can lead to confident conclusions is an integrated analysis.

With that said, let me outline briefly the basic steps of a merger review carried out by the enforcement agencies. Under the Guidelines' framework, the first step in the merger analysis is to identify the product and geographic markets – properly bounded – implicated by the proposed merger. Economic tools are critical to market definition under the Guidelines. Relevant product and geographic markets are defined using a “hypothetical monopolist” paradigm which relies on economic analysis.⁶³ Having defined relevant markets, the reviewing agency assesses whether the merger would significantly increase concentration in any of those relevant markets. In this respect, the measure of concentration takes into account not only the market shares of the merging parties and other identified competitors, but also the pre and post-merger size distribution of the market participants. Importantly, consistent with the learning from the *General Dynamics* case, the agencies attempt to measure concentration by using the most

⁶² The Horizontal Merger Guidelines are set forth at <http://www.ftc.gov/bc/docs/horizmer.htm>.

⁶³ The procedures for carrying out product and geographic market definition (including special procedures to deal with price discrimination), and for identifying the firms that participate in the relevant market, are set forth in sections 1.1, 1.2, and 1.3 of the Guidelines. Any individual merger may involve one or many markets. Furthermore, for each product market identified, economic tools are applied to determine the scope of the corresponding geographic market. The geographic market may be local, regional, national, or global in scale, depending upon fact specific economic analysis.

appropriate metric. To be sure, sales are often used because they are appropriate to the task, but when sales are misleading in terms of understanding a firm's current competitive strength or forecasting its future competitive strength, the agencies will turn to other metrics, including shares of physical output, productive capacity, or access to output or capacity by dint of long term contractual relations.

Typically, if concentration in any relevant market is not significantly increased, the merger review can stop right there. By contrast, a significant increase in market concentration does not necessarily mean that the merger is going to be anticompetitive; rather, it simply means that the agencies will carry the review to the next step, which is to assess whether the proposed merger, given changes in market concentration and other significant market characteristics, raises concerns about potential adverse competitive effects. Anticompetitive concerns arise if a merger is likely to raise quality-adjusted price or restrict quality-adjusted output in a relevant market. Such harms may flow either from the facilitation of post-merger "coordinated interaction" among firms in a relevant market or through enhanced unilateral exercise of market power post-merger.

The third step – although again with the caveat that it is not independent of the second – is to evaluate whether entry conditions are such that were adverse competitive effects to occur, timely entry into the relevant market of a sufficient magnitude to counteract the adverse competitive effects would likely occur.

The next step – again not an analytically independent one – is to assess whether the merger would result in efficiency gains that could otherwise not reasonably be achieved and would offset adverse competitive effects. Finally, in circumstances where a party to the merger is likely to fail absent the merger, the agencies will assess the competitive impact of alternative, if any, employments of that party’s resources.

Each of these steps is grounded in applied microeconomics and requires detailed factual analysis that integrates all of the relevant factors. At the end of the day, we believe that the process yields sound assessments of the likely net competitive effects of a proposed merger. Enforcement decisions then can be made with confidence that consumer interests are being appropriately served.

As I stated, the framework of the Guidelines is now rooted in the mainstream of American antitrust policy. The American antitrust bar knows that, in representing clients to the agencies, it must be able to make its case within the Guidelines’ framework. Furthermore, although the Guidelines are not themselves statutory “law,”⁶⁴ American courts also find direction in the Guidelines in deciding litigated merger cases.⁶⁵ This is important, because general acceptance of the Guidelines’ framework has helped to provide overall clarity to the business community, as well as consistency, with regard to antitrust merger enforcement.

⁶⁴ They are guides to the exercise of agency statutory discretion in enforcing Section 7 of the Clayton Act.

Even with this widespread acceptance of the Guidelines, however, the federal antitrust agencies rightfully recognize that periodic reassessment of the Guidelines' efficacy is essential. For that reason, just this year – in February of 2004 – the FTC and the Justice Department jointly sponsored a Merger Guidelines Workshop for the specific purpose of soliciting the views of legal and economic scholars and active members of the U.S. antitrust bar on current merger policy. Questions of particular importance were whether the current version of the Guidelines continues to serve its function well, and whether modifications to the Guidelines are in order in the light of several years of real world experience working under them. The workshop permitted the FTC and the Justice Department to receive important input from many of the leading antitrust authorities in the United States. An economist from the European Commission's Directorate General of Competition also participated in the conference.

For those of you who are interested in more detail, a full transcript of the workshop is available on the FTC's web site.⁶⁶ You can also find there the written submissions and papers provided by the participants. It is impractical for me even to summarize here all of the technical detail covered during the three days of the workshop. One key theme, however, emerged – the overwhelming consensus of the participants was that the analytical framework set out in the

⁶⁵ For example, the U.S. Circuit Court for the District of Columbia Circuit cited the Horizontal Merger Guidelines extensively in reversing a district court's denial of the FTC's request for a preliminary injunction to enjoin a merger of leading baby food manufacturers. See *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

⁶⁶ It is available at <http://www.ftc.gov/bc/mergerenforce/index.html>. Other information pertaining to the workshop can also be found at this site.

Guidelines, overall, does a fine job in yielding the right policy results in individual cases.⁶⁷ Moreover, because the Guidelines are now so familiar, they serve their principal purpose – providing guidance to the business community and the antitrust bar – with great effect. This assessment, in my view, is a strong endorsement of the current thrust of enforcement policy under the Guidelines.

III. Antitrust Immunities

The existence of various antitrust immunities constrains the effectiveness of the U.S. antitrust laws. The most sweeping immunity, first articulated by the U.S. Supreme Court in *Parker v. Brown*,⁶⁸ is the “state action doctrine.” This doctrine shields certain anticompetitive conduct from federal antitrust scrutiny when the conduct is (1) in furtherance of a clearly articulated state policy and (2) actively supervised by the state. Because the state action doctrine rests on principles of federalism, the doctrine shields sovereign activities of the state itself, including the actions of a governor, a state legislature, or a state supreme court, providing they are acting in their sovereign capacities. In addition, the actions of lower level governmental entities, such as regulatory commissions and licensing boards, confer “state action” immunity on private actors when the actions of those entities are (1) in conformity with a “clearly articulated” state policy and (2) have been “actively supervised” by the state. This immunity encourages rent-seeking by

⁶⁷ Some participants, although supportive of the Guidelines’ approach, opined that certain Guidelines provisions could benefit from specified technical improvements.

⁶⁸ 317 U.S. 341 (1943). The *Parker* case involved a California regulatory scheme that blessed a state raisin growers’ cartel, which would easily have been condemned under the Sherman Act absent the Court’s finding that nothing in the Sherman Act sought to displace actions of state agents directed by a state legislature.

private actors, designed at obtaining anticompetitive state legislation that shields them from antitrust attack. One example is legislation that creates state “rate boards” that list tariffs and thereby sanction price fixing by supervised entities. Many other examples could be cited. The Federal Trade Commission has sought, through its own cases, through *amicus curiae* briefs, and through “advocacy filings” with state legislatures, to limit the scope of the state action doctrine. Moreover, a 2003 FTC staff report encouraged courts to “put teeth” in the “clear articulation” and “active supervision” requirements.⁶⁹ It remains to be seen whether the U.S. federal courts – courts that are respectful of federalism – will heed this sage advice.

Related to “state action” immunity is the “*Noerr-Pennington* doctrine,”⁷⁰ which shields from antitrust attack private “petitioning” that seeks governmental actions having an anticompetitive impact. This doctrine plainly encourages rent-seeking that will result in anticompetitive governmental actions conferring state action immunity. Actions covered by the *Noerr* defense may include, for example, lobbying campaigns aimed at securing passage of legislation that prohibits or constrains competition in a particular field; and lawsuits aimed at deterring entry of a potential competitor. Although a rather old Supreme Court decision suggested that petitioning that is a mere “sham” does not enjoy *Noerr* protection,⁷¹ the scope of this sham exception is less than clear. Relatively recently, the Supreme Court has seemingly

⁶⁹ Office of Policy Planning, Federal Trade Commission, *Report of the State Action Task Force* (September 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

⁷⁰ This doctrine derives from the Supreme Court’s holdings in *Eastern Railroad President’s Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961) and in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

⁷¹ See *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972).

limited the sham limitation in the context of a single stand-alone lawsuit, holding that such a lawsuit must be objectively and subjectively baseless in order to be deemed a sham.⁷² Mindful of *Noerr*'s severe anticompetitive potential, the Federal Trade Commission recently has sought through administrative litigation and advocacy (speeches and a staff report) to narrow application of the this doctrine. Specifically, the agency has argued for expansive exceptions to the *Noerr* doctrine based on sham conduct, on misrepresentations made in a non-political setting, and on activity involving a pattern of lawsuits brought without regard to the merits. It remains to be seen whether the federal courts will accept the Commission's advice and read these exceptions to *Noerr* broadly.

The state action and *Noerr* doctrine are general immunities. There are also over 20 sector-specific immunities, on which I will not dwell.⁷³ These include, for example, statutory provisions that allow members of agricultural cooperatives to engage in collective actions free from antitrust attack; that provide limited immunity for certain agreements between U.S. and foreign air carriers; that provide that exempt from the antitrust laws certain practices that are part of the "business of insurance" and that are regulated by state law; certain agreements and activities involving organized labor (there is also a nonstatutory labor antitrust exemption); certain arrangements by sports teams for the pooling of broadcast rights; major aspects of the "business of baseball"; and certain agreements among marine cargo carriers. Although the antitrust laws generally apply to regulated industries, such as aviation, railroads, energy, and

⁷² See *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993).

telecommunications, the precise interplay between antitrust and regulation in heavily regulated sectors is complex and beyond the scope of this lecture. As a gross generalization, however, one may say that as regulatory requirements are removed, the scope for the application of antitrust law to these sectors grows.

IV. State Antitrust Enforcement⁷⁴

Antitrust enforcement is not the sole domain of federal law. All fifty states, plus the District of Columbia, Puerto Rico, and the Virgin Islands, have state antitrust statutes, which may be enforced by state attorneys general and by private parties.⁷⁵ As a general proposition, these statutes are similar, although not identical to, the federal antitrust laws. One striking difference is that various states' laws have rejected the Supreme Court's holding in *Illinois Brick Co. v. Illinois*⁷⁶ that only direct purchasers, not indirect purchasers, may bring claims for damages under the federal antitrust laws. In those states that have enacted such "*Illinois Brick* repealer" clauses, antitrust defendants face the risk of multiple liability for anticompetitive overcharges. Defenders of "*Illinois Brick* repealer" argue that the threat of multiple liability enhances deterrence. Critics argue that such statutory clauses overdeter questionable conduct, keeping in

⁷³ For a good "black letter" discussion of sector specific immunities and regulated sectors, see ABA Section of Antitrust Law, II *Antitrust Law Developments* 1245-1431 (5th ed. 2002).

⁷⁴ For a good "black letter" summary of state antitrust enforcement, see ABA Section of Antitrust Law, I *Antitrust Law Developments* 803-834 (5th ed. 2002).

⁷⁵ The Supreme Court held in *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989), that federal laws generally do not preempt state antitrust laws.

⁷⁶ 431 U.S. 720 (1978).

mind the possibility that not all antitrust suits are well-founded. Some critics also complain that, at least in certain jurisdictions, state antitrust laws allow cases to go forward based on flawed or dated economic theories that focus on harm to competitors, not competition – cases that would have been summarily dismissed under federal law. It is difficult to assess the accuracy of this claim, however, because, to my knowledge, there has been no good empirical work that evaluates and compares outcomes under federal and state antitrust statutes.

State attorneys general also may bring actions under the federal antitrust laws. A state, its political subdivisions, and cities are considered “persons” for securing relief under the Clayton Act, which authorizes “persons” to sue for harm due to federal antitrust law violations. States may bring actions for damages incurred in their proprietary capacity as direct purchasers of goods or services. Typically those actions arise out of overcharges stemming from alleged price fixing conspiracies. States may also bring actions for injunctive relief when an alleged antitrust violation – for example, an anticompetitive merger – threatens damages to the state. States stand on the same footing as private parties in bringing such suits. Finally, states may bring federal antitrust actions in their “*parens patriae*” capacity to recover antitrust damages allegedly suffered by their citizens.

Not all commentators are enamored of state antitrust enforcement. Indeed, Judge Richard Posner, a prominent antitrust scholar, has likened state enforcers to “barnacles” on the antitrust ship of state. Some critics are concerned not only about duplicative enforcement, but also about the risk that state enforcers may be more often motivated by political opportunism than their

federal counterparts. The quality of state antitrust enforcement also has been questioned. Nevertheless, as a practical matter, state antitrust enforcement is firmly established. State antitrust enforcers regularly cooperate among themselves on major cases and on policy discussions through the National Association of Attorneys General. Moreover, federal enforcers frequently deal with their state counterparts and coordinate enforcement strategies and remedies in certain antitrust actions. For example, the Federal Trade Commission has worked with the states in securing relief for overcharged consumers in some pharmaceutical antitrust cases. In short, one can expect that state antitrust enforcement will remain an important feature of the American antitrust landscape for the foreseeable future.

V. Private Antitrust Enforcement⁷⁷

Both federal and state antitrust statutes allow for private antitrust enforcement. Section 4 of the Clayton Act permits “any [injured] person” to bring actions for treble damages for federal antitrust violations⁷⁸ and section 16 of the Clayton Act “[a]ny person . . . threatened [with] loss or damage by a violation of the [federal] antitrust laws” to obtain an injunction.⁷⁹ In bringing damages suits, private plaintiffs must show that an antitrust violation was the material cause of injury to their business or property. They must also show the existence of “antitrust injury,” or

⁷⁷ Private antitrust enforcement is nicely summarized in I *Antitrust Law Developments*, *supra* note 74, at 835-1029.

⁷⁸ 15 U.S.C. § 15(a). As discussed above, “states” also qualify as “persons” under the Clayton Act.

⁷⁹ 15 U.S.C. § 26. As discussed above, states may also invoke this statutory provision.

“injury of the type the antitrust laws were intended to prevent.”⁸⁰ The “antitrust injury” requirement is particularly significant; it requires that a plaintiff show that the complained of action was inimical to competition, not just to the private business interests of plaintiff. Multiple similarly situated antitrust plaintiffs also may bring a class action – for example, direct purchasers of goods that were overpriced due to a price fixing conspiracy. In order for a class action to proceed in federal court, members of the class have to satisfy requirements of (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy, imposed by Rule 23(a) of the Federal Rules of Civil Procedure. Private antitrust class actions often have proceeded as “follow-on cases” to federal antitrust prosecutions.

Private enforcement has long been a distinctive feature of American law. Critics of private antitrust litigation have focused on alleged abuses, particularly the use of unfounded private claims to “hold up” large firms and extract settlements, and the excessive costs of the litigation system – particularly class actions. Supporters of the system view critics’ complaints as overblown, and focus on the deterrent value of private litigation, given the limited enforcement resources available to public officials. The merits and flaws of private antitrust enforcement – among other topics – undoubtedly will be explored in a report to be issued by a congressionally established Antitrust Modernization Commission. That “blue ribbon” Commission is scheduled to release its report within a couple of years. Stay tuned.

VI. Conclusion

⁸⁰ See, e.g., *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990).

That concludes my “quick and dirty” overview of the American antitrust landscape. I have, of course, barely skimmed the surface of the topic, placing emphasis on the matters I judged of greatest substantive interest. I look forward to your questions and comments.