Antitrust Insights Seminar

Antitrust in 2019 and Beyond: Expect the Unexpected

Proskauer

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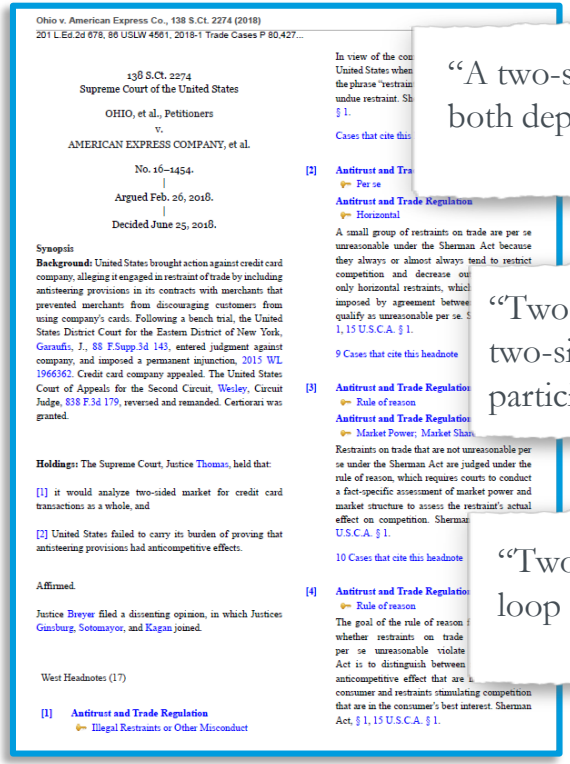
Platforms are Everywhere

The Supreme Court's *Amex* Decision Now Requires Definition of a Single "Dual-Sided Platform Market."



Ohio v. American Express Co., 138 S.Ct. 2274 (2018)
201 L.Ed.2d 678, 86 USLW 4561, 2018-1 Trade Cases P 80,427...

138 S.Ct. 2274
Supreme Court of the United States

OHIO, et al., Petitioners
v.
AMERICAN EXPRESS COMPANY, et al.

No. 16–1454.
|
Argued Feb. 26, 2018.
|
Decided June 25, 2018.

Synopsis
Background: United States brought action against credit card company, alleging it engaged in restraint of trade by including antisteering provisions in its contracts with merchants that prevented merchants from discouraging customers from using company's cards. Following a bench trial, the United States District Court for the Eastern District of New York, Garaufis, J., 88 F.Supp.3d 143, entered judgment against company, and imposed a permanent injunction, 2015 WL 1966362. Credit card company appealed. The United States Court of Appeals for the Second Circuit, Wesley, Circuit Judge, 838 F.3d 179, reversed and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:

[1] it would analyze two-sided market for credit card transactions as a whole, and

[2] United States failed to carry its burden of proving that antisteering provisions had anticompetitive effects.

Affirmed.

Justice Breyer filed a dissenting opinion, in which Justices Ginsburg, Sotomayor, and Kagan joined.

West Headnotes (17)

[1] Antitrust and Trade Regulation
Illegal Restraints or Other Misconduct

In view of the con
United States when
the phrase "restrain
undue restraint. Sh
§ 1.

Cases that cite this

[2] Antitrust and Tra
Per se
Antitrust and Trade Regulation
Horizontal

A small group of restraints on trade are per se unreasonable under the Sherman Act because they always or almost always tend to restrict competition and decrease ou
only horizontal restraints, whic
imposed by agreement betwee
qualify as unreasonable per se. S
1, 15 U.S.C.A. § 1.

9 Cases that cite this headnote

[3] Antitrust and Trade Regulatio
Rule of reason
Antitrust and Trade Regulatio
Market Power; Market Shar

Restraints on trade that are not unreasonable per se under the Sherman Act are judged under the rule of reason, which requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition. Sherma
U.S.C.A. § 1.

10 Cases that cite this headnote

[4] Antitrust and Trade Regulatio
Rule of reason

The goal of the rule of reason
whether restraints on trade
per se unreasonable violate
Act is to distinguish between
anticompetitive effect that are
consumer and restraints stimulating competition that are in the consumer's best interest. Sherman Act, § 1, 15 U.S.C.A. § 1.

"A two-sided platform offers different products to two different groups who both depend on the platform to intermediate between them."

Ohio v. American Express Co.

"Two sided platforms often exhibit … network effects, where the value of the two-sided platform depends on how many members of a different group participate."

Ohio v. American Express Co.

"Two sided platforms cannot raise prices on one side without risking a feedback loop of declining demand."

Ohio v. American Express Co.

The Second Circuit's *Sabre* Decision

2019 WL 4281729
Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

US AIRWAYS, INC., for American Airlines, Inc., as Successor and Real Party in Interest, Plaintiff-Appellee-Cross-Appellant,
v.
SABRE HOLDINGS CORPORATION, Sabre Travel International Limited, Sabre GLBL Inc., Defendants-Appellants-Cross-Appellees.

Docket Nos. 17-960, 17-983
|
August Term, 2018
|
Argued: December 13, 2018
|
Decided: September 11, 2019

Attorneys and Law Firms

Anton Metlitsky (Andrew J. Frackman, David K. Lukmire, Yaira Dubin, on the brief), O'Melveny & Myers LLP, New York, NY, for Plaintiff-Appellee-Cross-Appellant.

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Before: Sack, Livingston, AND Chin, Circuit Judges.

Opinion

Sack, Circuit Judge:

*1 The plaintiff, US Airway
suit in the United States D
District of New York against
Corporation, Sabre Travel
GLBL Inc. (collectively "Sa
a travel technology platform
distribution system: an elect
use to search for and book ai
US Airways alleged that so-
contained in two separate cor
executed in 2006 and one in
of trade in violation of Sect
Act, 15 U.S.C. § 1, and that
the Act, 15 U.S.C. § 2, by n
system services to Sabre sub

Following a motion to dism
judgment filed by Sabre, two
were dismissed by the distri
were also limited by the coun
contract. At trial, a jury returned a verdict for US Airways on Count 1 of its complaint only.

Sabre appeals the district court's order declining to grant its post-trial motion for judgment as a matter of law, or in the alternative a new trial, on Count 1 basing its arguments largely on a recent Supreme Court decision, *Ohio v. American Express Co.*, —— U.S. ——, 138 S. Ct. 2274, 201 L.Ed.2d 678 (2018). Sabre therefore seeks judgment as a matter of law in its favor, or in the alternative, a new trial on Count 1.

US Airways cross-appeals, contending that Counts 2 and 3 of its complaint were erroneously dismissed by the district court for failure to state a claim, and that the district court erred in limiting its damages under the remaining counts to those arising from its 2011 contract with Sabre.

For the reasons set forth below, we affirm the district court's judgment insofar as it limited US Airways's damages; reverse the court's dismissal of Counts 2 and 3 of US Airways's complaint; vacate the jury's verdict on Count 1 of the complaint and the court's order in response to Sabre's post-trial motion; and remand the case for further proceedings consistent with this opinion, including a new trial on Count 1 of US Airways's complaint.

BACKGROUND [1]

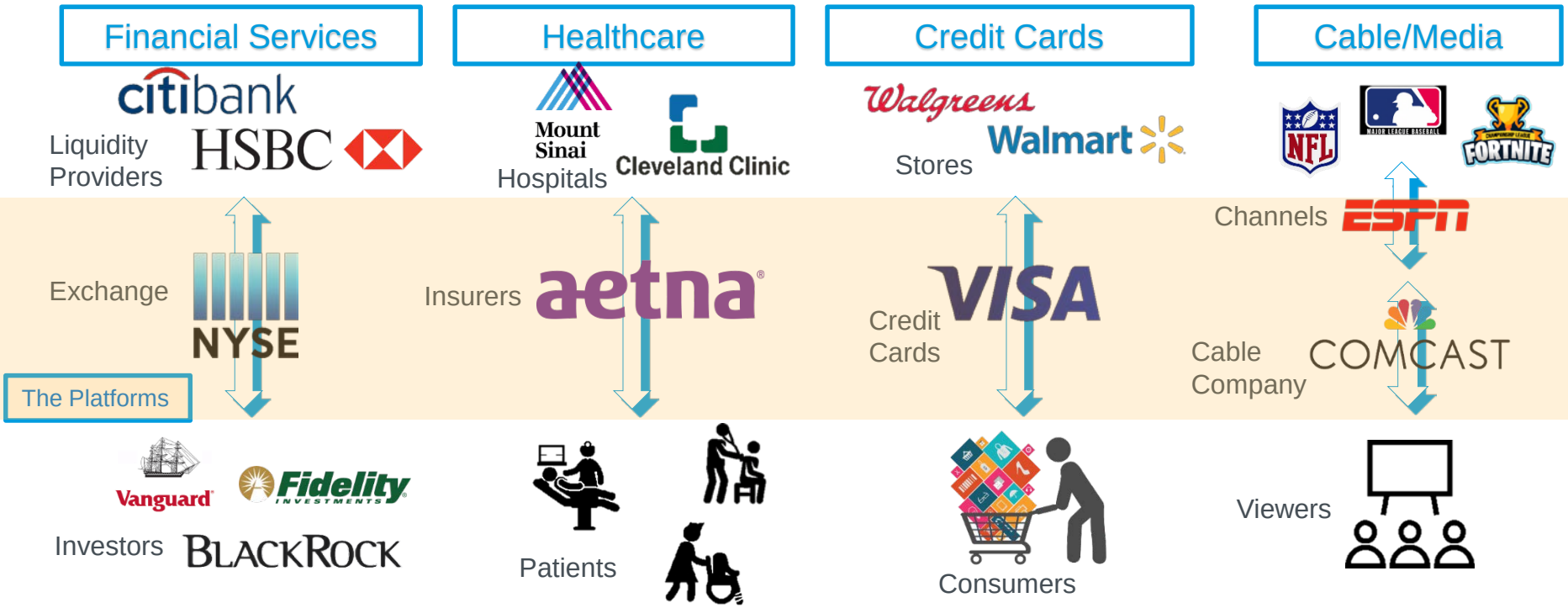
"It is not always necessary to consider both sides of a two-sided platform. When … network effects are minor … or run [only] in one direction, the market should be treated as one sided…. But a ***transaction platform*** – where the business cannot make sale to one side of the platform without simultaneous making a sale to the other – ***must always receive two-sided treatment***."

US Airways v. Sabre.

Newspaper Ad Markets are Single-Sided

Credit Card Markets are Dual Sided

Some Common Platforms

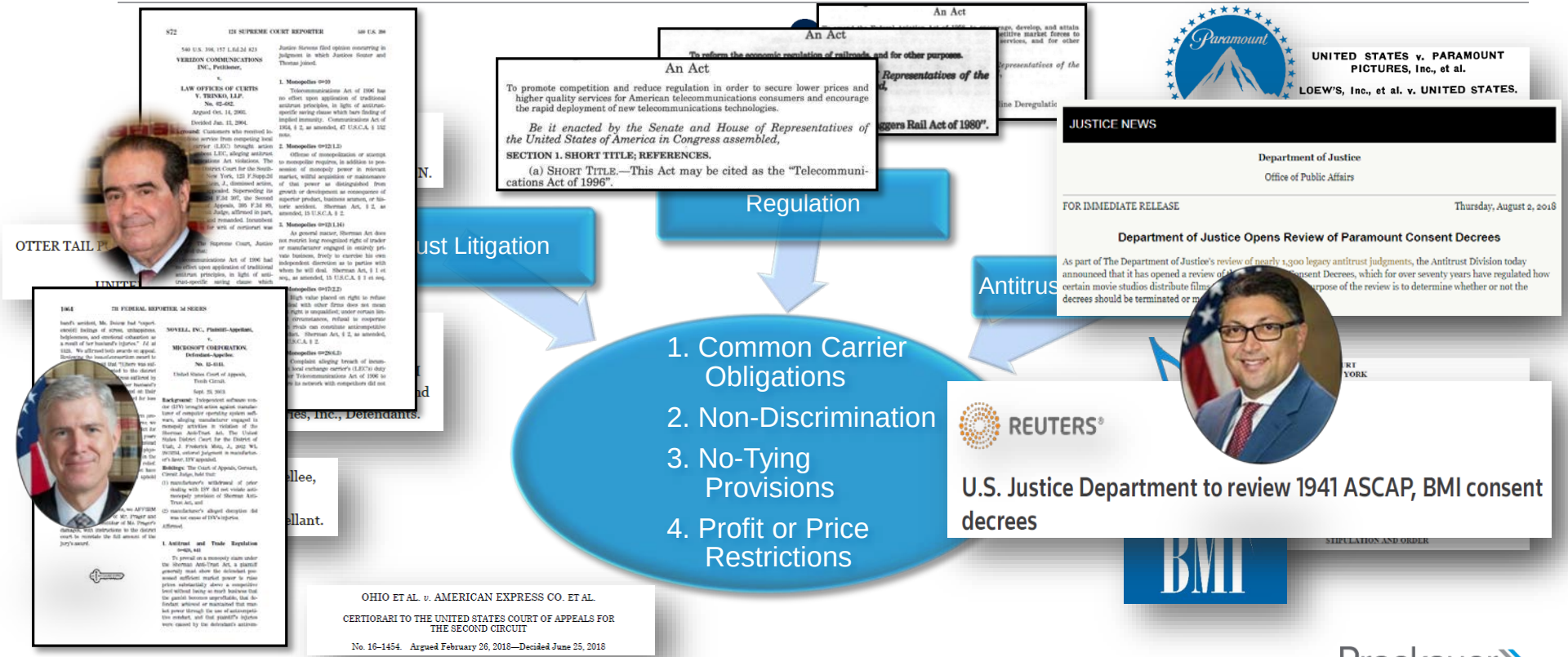


Is Amazon a Platform?

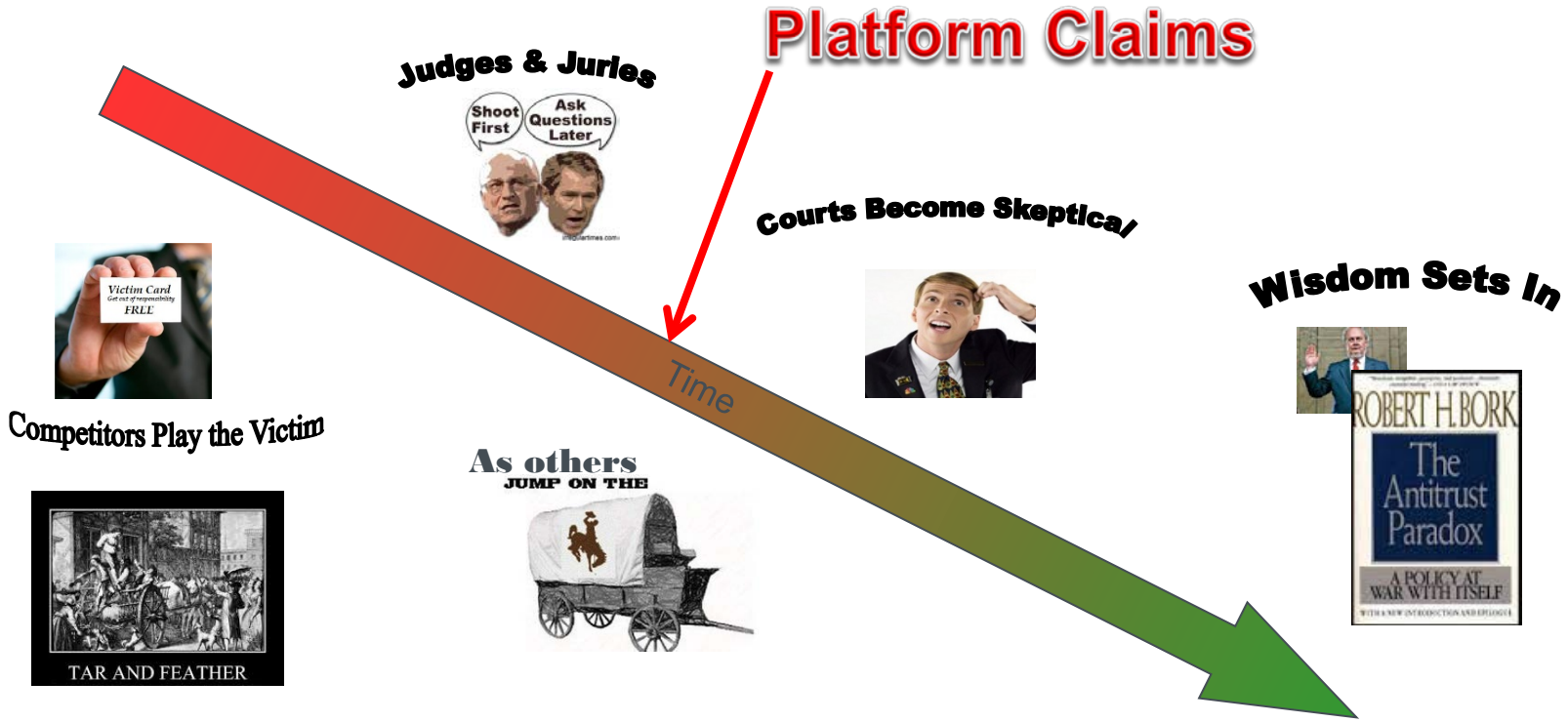
If Amazon is a Platform … is Sears?

Platforms Are Not New … or New to Regulation…

But… That Regulation Has All But Disappeared

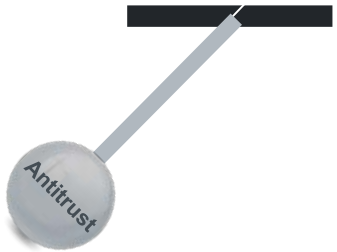


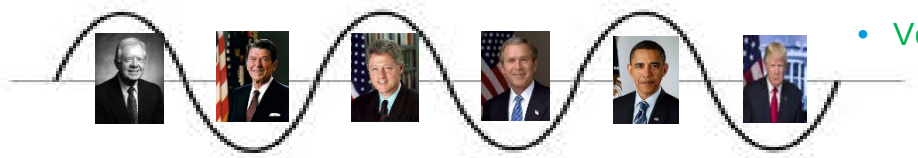
Antitrust Claims Follow A Well-Worn Path



The Evolution Of Antitrust Enforcement

- Price Fixing
- Vertical Mergers
- Refusals to Deal
- Monopoly Leveraging
- Exclusive Dealing
- Predatory Pricing
- Price Discrimination
- Minimum Resale Price Maintenance
- Maximum Resale Price Maintenance
- Dealer Terminations
- Customer Restraints
- Territorial Restraints





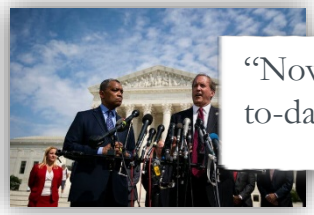
1970's 1980's 1990's 2000's 2010's 2020's

- Territorial Restraints
- Customer Restraints
- Dealer Terminations
- Maximum Resale Price Maintenance
- Minimum Resale Price Maintenance
- Price Discrimination
- Predatory Pricing
- Exclusive Dealing
- Monopoly Leveraging
- Refusals to Deal
- Vertical Mergers

Are Big Tech Platforms Different?

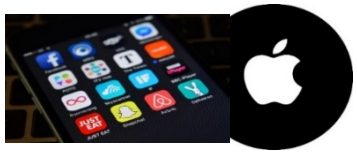
"In some digital markets, the ***competition is for user attention or clicks***. If we see the commercial dynamics of internet search, for example, in terms of the Yellow Pages that were delivered to our doors a generation ago, we cannot properly assess practices that create, enhance, or entrench monopoly power."

"For digital markets in particular, where consumers often pay nothing, price effects alone do not provide a complete picture of market dynamics. Harms to innovation and quality are also important dimensions of competition that can have far reaching effects. ***Privacy, for example can be an important dimension of quality***, and so by protecting competition, we can have an impact on privacy and data protection."



"Now, more than ever, ***information is power***, and the most important source of information in Americans' day-to-day lives is the internet. When most Americans think of the internet, they no doubt think of Google,"

Everyone's Getting In On the Game



Consumers

January 2012

Elizabeth Warren

March 2019

FTC

February 2019

DOJ

July 2019

States

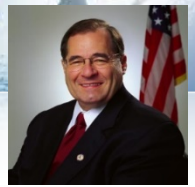
September 2019

European Union

2017

President Trump

June 2019



House Judiciary Committee

June 2019

UNLOCKD vs Google

Competitors

July 2019

Proskauer

What Are They Looking For?

In the U.S.:

- Two-Sided Markets
- Acquisitions of Nascent Competitors
- Interoperability and Data Portability
- Exclusive Dealing

In the EU:

- Everything in the US & More
- Level Playing-Field
- Discriminatory Conduct
- Conglomerate Mergers

CMA
Competition & Markets Authority

Hypos: Planet of the Apps

Introducing…

- *Dominant* Alt-Coin B-2-B shopping and payment network
- *Leading* marketplace for third parties to sell products and services
- *Provider* of consulting and analytic services based on mining the platform
- *Critical* platform for many sellers
- *Seller* of high-quality gorilla-made products

Refusals to Deal

Unhappy with QuickAccounts accounting software, Gorrilla decides not to renew contract and offers customers GorrillaAccounts® instead.

No Violation: Antitrust laws are not designed to interfere with normal contract negotiations, platforms are not common carriers, and introducing new products is clearly procompetitive.

Violation: You're leveraging your monopoly, go to jail.

Trinko

124 S.Ct. 872
Supreme Court of the United States

VERIZON COMMUNICATIONS INC., Petitioner,
v.
LAW OFFICES OF CURTIS V. TRINKO, LLP.

No. 02-682.
Argued Oct. 14, 2003.
Decided Jan. 13, 2004.

Synopsis
Background: Customers who received local telephone service from competing local exchange carrier (LEC) brought action against incumbent LEC, alleging antitrust and Communications Act violations. The United States District Court for the Southern District of New York, 123 F.Supp.2d 738, Sidney H. Stein, J., dismissed action, and customers appealed. Superseding its prior opinion, 294 F.3d 307, the Second Circuit Court of Appeals, 305 F.3d 89, Katzmann, Circuit Judge, affirmed in part, vacated in part and remanded. Incumbent LEC's petition for writ of certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

[1] Telecommunications Act of 1996 had no effect upon application of traditional antitrust principles, in light of antitrust-specific saving clause which barred finding of implied immunity;

[2] complaint alleging breach of incumbent LEC's duty to share its network with competitors did not state monopolization claim under § 2 of Sherman Act;

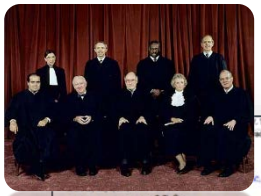
[3] traditional antitrust principles did not justify addition of case to few existing exceptions to proposition that there was no duty to aid competitors; and

[4] disposition of case made it unnecessary to consider alternative contention of lack of antitrust standing.

> "As a general matter, the Sherman Act ***does not restrict*** the long recognized right of a trader or manufacturer engaged in an entirely private business, ***freely to exercise his own independent discretion as to parties with whom he will deal***."
>
> *Verizon Comm's, Inc. v. Trinko*, 540 U.S. 398 (2004)

> "***Under certain circumstances***, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. We have been ***very cautious in recognizing exceptions***, because of the ***uncertain virtue of forced sharing*** and the ***difficulty of identifying and remedying anticompetitive conduct*** by a single firm."
>
> *Trinko*, 540 U.S. at 408.

But the Platform is Essential!



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[3] traditional antitrust principles did not justify addition of case to few existing exceptions to proposition that there was no duty to aid competitors; and

[4] disposition of case made it unnecessary to consider alternative contention of lack of antitrust standing.

Reversed and remanded.

Justice Stevens filed opinion concurring in judgment in which Justices Souter and Thomas joined.

West Headnotes (8)

[1] Antitrust and Trade Regulation
Validity
Telecommunications Act effect upon application of principles, in light saving clause which bars immunity. Communicati as amended, 47 U.S.C.A.
8 Cases that cite this head

[2] Antitrust and Trade Regulation
Elements in General
Antitrust and Trade Regulation
Elements in General
Offense of monopolizat monopolize requires, in ad of monopoly power in rel acquisition or maintenan distinguished from growt as consequence of superior product, business acumen, or historic accident. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.
136 Cases that cite this headnote

[3] Antitrust and Trade Regulation
Manufacturers
As general matter, Sherman Act does not restrict long recognized right of trader or manufacturer engaged in entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.
53 Cases that cite this headnote

We have never recognized the essential facilities doctrine "crafted by some lower courts," and we "find no need either to recognize it or to repudiate it here."

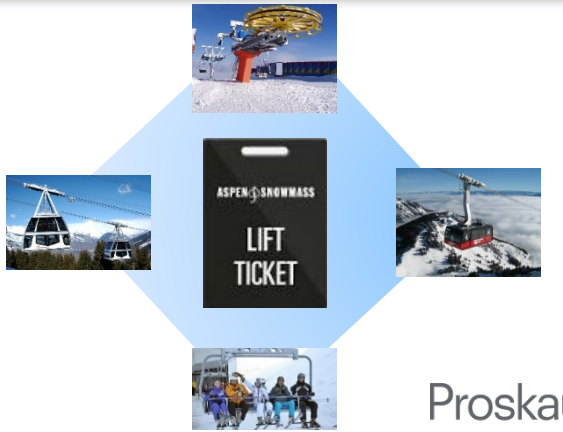
Trinko, 540 at 398

The Aspen Ski Exception

- In the Beginning:
  - Aspen was losing out to other global destinations because operators only offered limited, single-mountain choices

The Aspen Ski Exception – cont'd

- In the Beginning:
  - Aspen was losing out to other global destinations because operators only offered limited, single-mountain choices
- A network emerges:
  - Competitors engaged in "co-opetition" to create a "multi-mountain ticket"



The Aspen Ski Exception – cont'd

- In the Beginning:
  - Aspen was losing out to other global destinations because operators only offered limited, single-mountain choices
- A network emerges:
  - Competitors engaged in "co-opetition" to create a "multi-mountain ticket"
- Defendant acquires power, kicks off rival
  - Plaintiff no longer able to offer multi-mountain ticket
  - Worse result than pre-inception competitive market

Refusals to Deal – the EU approach

- Dominant, data-rich firms may generally refuse access to data
- Uncertainty exists over whether such refusals to grant access to data, including through interoperability, is anti-competitive
- But… could be considered anti-competitive (abuse of a dominant position) if it leads to foreclosure or other forms of exclusionary conduct
  - Application of Article 102 TFEU
    - includes an “essential facilities” doctrine. However, is the doctrine fit for purpose?

Favoritism

Ok, I'll let QuickAccounts on the platform. But I'm going to give special treatment to GorillaAccounts ® (icon placement and seamless integration). Can I do that?

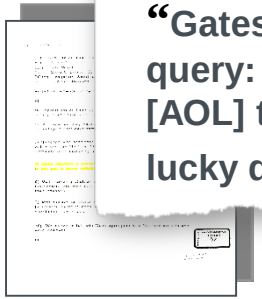
No violation: You can develop better products if you want, and no reason why you can't promote your products over third-parties. Grocery stores, for example, often promote their own private label products. You can too.

Violation: You're a monopolist and can't do what others do. Even if it's good, it's bad. And self-dealing and discrimination is very bad.

“Microsofting”

Remember Netscape?

- Contract restrictions preventing computer OEMs from removing or adding icons (e.g., rival browser Apps).
- “Technologically binding” Internet Explorer and Windows.
- Exclusive dealing contracts with Internet Service Providers.



“Gates delivered a characteristically blunt query: how much do we need to pay you [AOL] to screw Netscape?? (‘This is your lucky day’).”

The Other Microsoft Case

Remember Word Perfect?

Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (2013)
2013-2 Trade Cases P 78,523

KeyCite Yellow Flag - Negative Treatment
Distinguished by Viamedia, Inc. v. Comcast Corporation, N.D.Ill., November 4, 2016

731 F.3d 1064
United States Court of Appeals,
Tenth Circuit.

NOVELL, INC., Plaintiff–Appellant,
v.
MICROSOFT CORPORATION,
Defendant–Appellee.

No. 12–4143.
|
Sept. 23, 2013.

Synopsis

Background: Independent software vendor (ISV) brought action against manufacturer of computer operating system software, alleging manufacturer engaged in monopoly activities in violation of the Sherman Anti-Trust Act. The United States District Court for the District of Utah, J. Frederick Motz, J., 2012 WL 2913234, entered judgment in manufacturer's favor. ISV appealed.

Holdings: The Court of Appeals, Gorsuch, Circuit Judge, held that:

[1] manufacturer's withdrawal of prior dealing with ISV did not violate anti-monopoly provision of Sherman Anti-Trust Act, and

[2] manufacturer's alleged deception did was not cause of ISV's injuries.

Affirmed.

West Headnotes (9)

[1] Antitrust and Trade Regulation
Elements in General
Antitrust and Trade Regulation
Market Power;Market Share

To prevail on a monopo
the Sherman Anti-Trust
generally must show the def
sufficient market power
substantially above a c
without losing so much b
gambit becomes unprofitabl
achieved or maintained tha
through the use of anticom
and that plaintiff's injuri
by the defendant's anticom
Sherman Act, § 2, 15 U.S.C.

4 Cases that cite this headno

[2] Antitrust and Trade Regulati
Illegal Restraints or Oth
Antitrust and Trade Regulati
Refusals to Deal
Antitrust and Trade Regulatio
Tying Agreements

Monopoly misconduct usually involves some

free to assign what prices they hope to secure for their own products. Sherman Act, § 2, 15 U.S.C.A. § 2.

1 Cases that cite this headnote

"Microsoft chose to share its internal protocols with [third-party developers] in an effort to spur them into writing software for Windows 95. Then Microsoft reversed course, choosing to keep [the protocols] to itself. ***This sort of unilateral behavior—choosing whom to deal with and on what terms—is protected by the antitrust laws.***"

Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013) (Gorsuch, J.)

"The point of the ***profit sacrifice test*** is to isolate conduct that has ***no possible efficiency justification***."

Microsoft, 731 at 1076

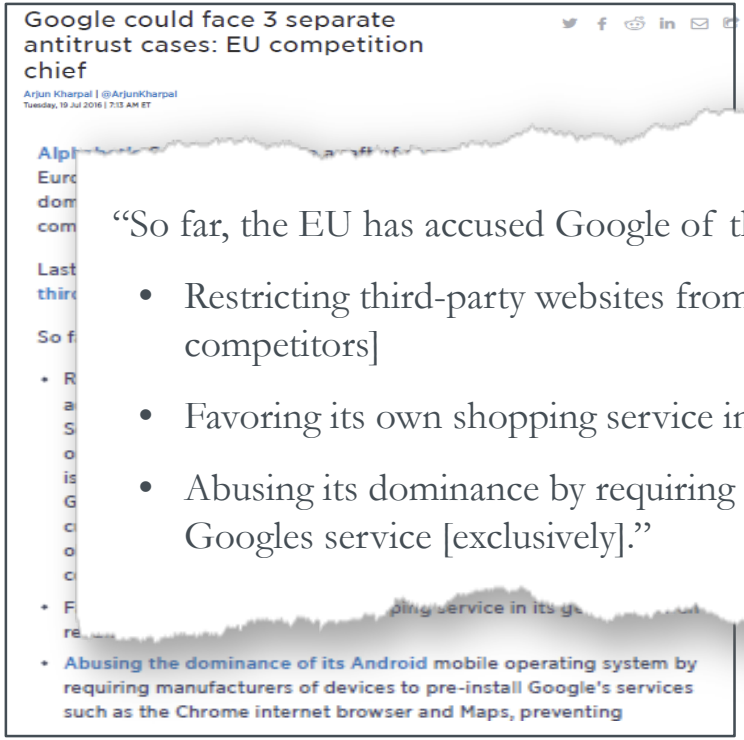
"Maybe the e-mail suggests an uncharitable intent toward rivals, maybe even a wish to "hurt" or "destroy" them. But ***the intent to undo a competitor in this process should hardly surprise***."

Microsoft, 731 F.3d at 1078

The Google Neutrality Wars

- Google was accused of favoring its own services and certain third-party advertisers when returning “search” results.
- The third-parties were not “excluded” from the search platform, but were downgraded below the first page.
- The FTC investigated for two years, ultimately concluding that Google’s search results were either unbiased or it had legitimate business justifications for its algorithms.

The Regulators Across The Pond


Google could face 3 separate antitrust cases: EU competition chief

Arjun Kharpal | @ArjunKharpal

Tuesday, 19 Jul 2016 | 7:13 AM ET

"So far, the EU has accused Google of the following:

- Restricting third-party websites from [dealing with Google's competitors]
- Favoring its own shopping service in its general search result
- Abusing its dominance by requiring [third-parties to use] Googles service [exclusively]."

- Abusing the dominance of its Android mobile operating system by requiring manufacturers of devices to pre-install Google's services such as the Chrome internet browser and Maps, preventing

M&A Strategy

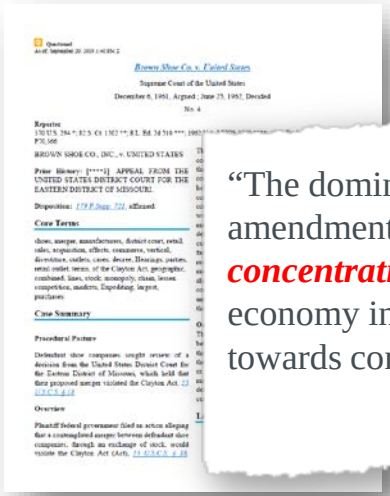
I'll just buy QuickAccounts, then I'll buy some other nascent B2B platforms.

"Buh-Bye"

No violation. Assuming no horizontal overlap in accounting software, QuickAccounts acquisition is fine. Nascent platforms are also a dime-a-dozen. Really speculative that any would pose a threat, just need some credible story about why you want to buy them.

Violation: You want to buy QuickAccounts because they collect data on your platform and can disintermediate you in the data monetization markets. Because Big Tech is a "winner-take-all" market, efforts to squash nascent competitors are especially anticompetitive.

Incipiency and Potential Future Competition



Brown Shoe Co. v. United States

Supreme Court of the United States

December 6, 1961, Argued ; June 25, 1962, Decided

No. 4

BROWN SHOE CO., INC., v. UNITED STATES

Core Terms

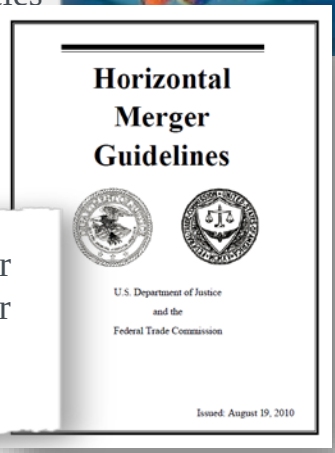
Case Summary

Procedural Posture

Overview

"The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a ***rising tide of economic concentration*** in the American economy [and] the danger to the American economy in unchecked corporate expansions through mergers. … [T]endencies towards concentration in industry ***are to be curbed in their incipiency***…."

- *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962)



Horizontal Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

Issued: August 19, 2010

"[I]f one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market conditions with a new technology or business model, their merger can involve the ***loss of actual or potential competition.***"

The Regulators Across the Pond

- On EU's radar! Commission's Chief Competition Economist focused on "platform envelopment" and potential leverage:
  - *WhatsApp/Facebook* deal seen as a missed opportunity to review transaction more closely
  - Various Member States have changed merger control thresholds to catch acquisitions of nascent competitors by including a size of transaction threshold
- Margrethe Vestager voiced concerns about how a "gatekeeper" role controlling access to data and information would allow platforms to reinforce their power across the digital ecosystem:
  - Some of this is nothing new – tying, bundling and leveraging can all be part of a platform envelopment strategy and have been examined in the context of conglomerate mergers
  - BUT: In the last fifteen years, no deal has been blocked by the European Commission solely on the basis of concerns about conglomerate effects
  - NOTE: EU regulators are being creative with existing rules to call in transactions in the sector for review. Much debate about whether this is to obtain internal documents about the parties and their strategies

Pierre Régibeau, Chief Economist

Margarethe Vestager

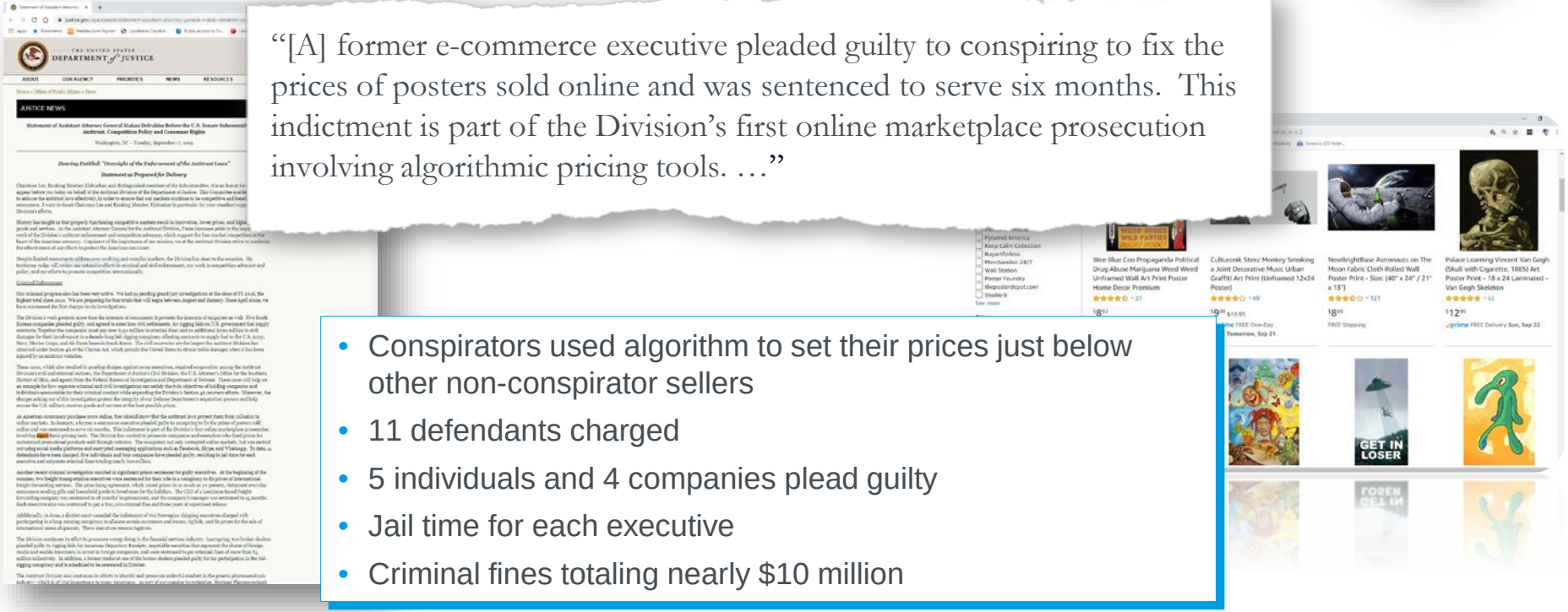
Algorithmic Conspiracies

Platform data can estimate demand elasticities for every customer/product, I'm going to offer third-party sellers dynamic pricing consulting services. Ok?

No Violation: Using data to set prices is procompetitive because it clears markets. Offering consulting services is standard fare, and pricing decisions remain unilateral. It is only a problem if Gorilla sells products in competition with those to whom it offers dynamic pricing recommendations.

Violation: Gorilla is the conduit for fixing market-wide prices. Algorithmic price-fixing is still price-fixing. Whether Gorilla is a *both* a hub and spoke of the conspiracy or just the hub is irrelevant.

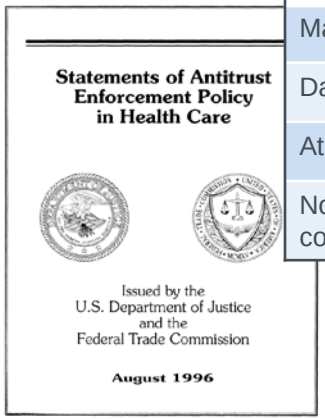
Price Fixing is Price Fixing



"[A] former e-commerce executive pleaded guilty to conspiring to fix the prices of posters sold online and was sentenced to serve six months. This indictment is part of the Division's first online marketplace prosecution involving algorithmic pricing tools. …"

- Conspirators used algorithm to set their prices just below other non-conspirator sellers
- 11 defendants charged
- 5 individuals and 4 companies plead guilty
- Jail time for each executive
- Criminal fines totaling nearly $10 million

The Platform is Similar to a Trade Association Conveying Aggregated Pricing Information?



Information Exchange Safe-Harbor	
Managed by a Third-Party	Yes
Data based on historical data older than 3 months	No?
At least 5 providers	Yes
No individual provider greater than 25% of participating competitors	Yes

- Likely based on real-time data, not historical?
- Likely to include recommended price, not just average price info?
- How the black box works may be important, e.g., it may matter if algorithm seeks to maximize all participant's collective profits or just each participant's own profits.

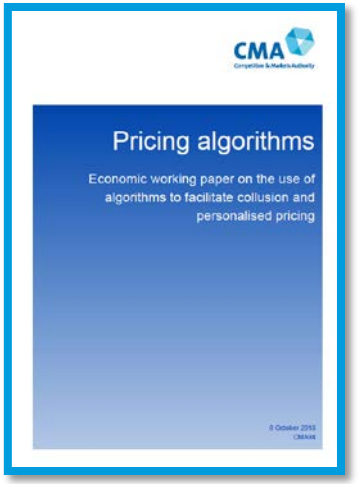
Algorithms, the Teenage Troublemakers of EU Competition Law

European Commission

"*Where there is a problem, there is an algorithm not far behind*"

- Professor of Mathematics, Marcus du Sautoy

- Consider three different types:
  - *Implementing Algorithms* – the algorithm implements an already made agreement
  - *Administrator Algorithms* – algorithm runs platform where companies sell their products
  - *Independent Algorithms* – unrelated companies use algorithm to determine their prices
- Three key takeaways from UK's CMA:
  - The growth of algorithmic pricing software increases the risks of firms colluding
  - But personalised pricing could make it less likely that algorithms would achieve coordinated outcomes
  - Acknowledged benefits of algorithms but need to be compliant with all applicable competition laws



Antitrust Insights Seminar

On the Court and in the Courtroom

Anastasia Danias Schmidt, General Counsel, Major League Soccer

Brad Ruskin, Partner and co-chair of Sports Law

Scott Cooper, Partner

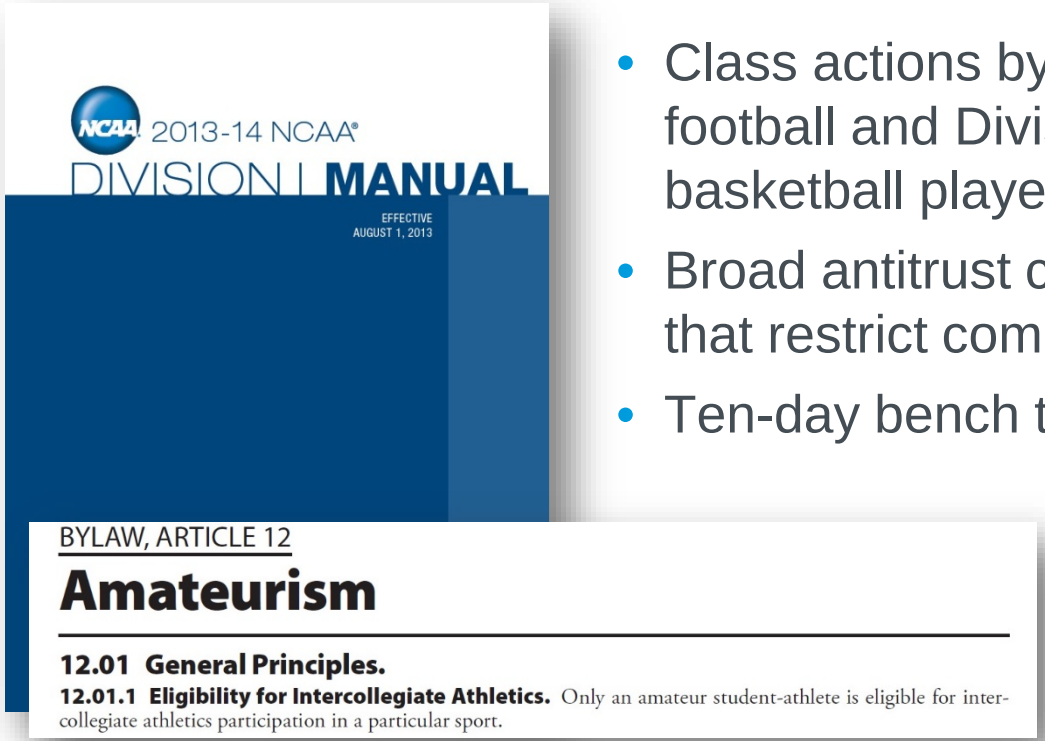
Proskauer

Topics


Amateurism – *NCAA Grant-in-Aid Cap Antitrust Litigation*
Amateurism – Proposed Name, Image & Likeness Legislation
Sanctioning Bodies – *NASL v. U.S. Soccer Federation*
Pooled Media Rights – *NFL's Sunday Ticket Antitrust Litigation*

In re: NCAA Grant-in-Cap Antitrust Litigation

In re NCAA Grant-in-Aid Cap Antitrust Litigation (N.D. Cal.)



- Class actions by current and former FBS football and Division I men's and women's basketball players.
- Broad antitrust challenge to NCAA bylaws that restrict compensation and benefits.
- Ten-day bench trial in September 2018.

In re NCAA Grant-in-Aid Cap Antitrust Litigation (N.D. Cal.) – cont'd


SPORTS

Los Angeles Times

NCAA can claim victory after losing federal antitrust case

The Washington Post

Democracy Dies in Darkness

For former athletes fighting NCAA amateurism rules, a muted victory

The New York Times

ON COLLEGE BASKETBALL

The N.C.A.A. Lost in Court, but Athletes Didn't Win, Either

- N.D. Cal. Judge Claudia Wilken entered judgment for plaintiffs.
- But, in doing so, Judge Wilken largely upheld the NCAA's amateurism rules as valid.
- "[W]hen compared with having no limits on compensation, some of the challenged compensation rules may have an effect on preserving consumer demand for college sports as distinct from professional sports"

In re NCAA Grant-in-Aid Cap Antitrust Litigation (N.D. Cal.) – cont'd

The court enjoined limits on "compensation or benefits related to education," with an enumerated list of such items, including computers, musical instruments, scientific equipment, paid internships, scholarships at other schools, and study abroad.

In re NCAA Grant-in-Aid Cap Antitrust Litigation (N.D. Cal.) – cont'd

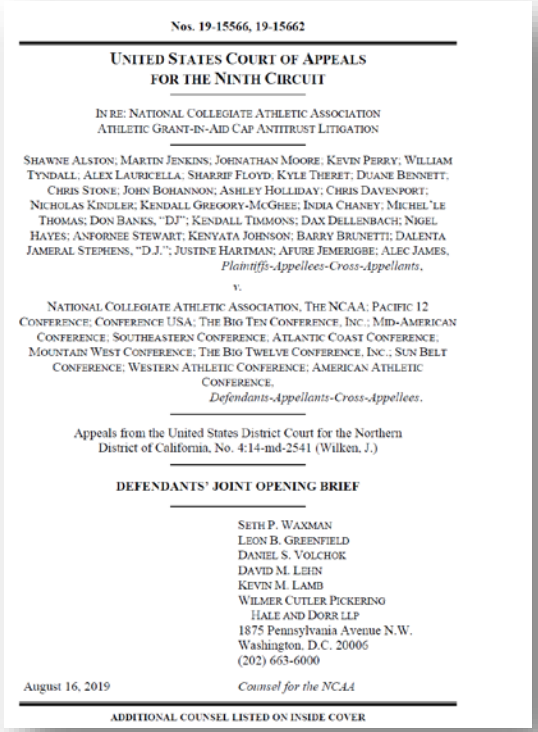
- Additionally, the NCAA must permit cash academic awards and incentive payments in an amount at or above the maximum combined amount a student-athlete could receive in non-cash participation, championship, or special achievement awards.

In re NCAA Grant-in-Aid Cap Antitrust Litigation (N.D. Cal.) – cont'd

Judge Wilken retained jurisdiction over the matter, including to:

- Amend the injunction;
- Amend the list of "compensation and benefits related to education" that the NCAA must allow without limit; and
- Approve or disapprove of new rules the NCAA adopts in the future that define what benefits are "related to education."

In re NCAA Grant-in-Aid Cap Antitrust Litigation (9th Cir.)



Nos. 19-15566, 19-15662

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION

SHAWNE ALSTON; MARTIN JENKINS; JOHNATHAN MOORE; KEVIN PERRY; WILLIAM TYNDALL; ALEX LAURICELLA; SHARRIF FLOYD; KYLE THERET; DUANE BENNETT; CHRIS STONE; JOHN BOHANNON; ASHLEY HOLLIDAY; CHRIS DAVENPORT; NICHOLAS KINDLER; KENDALL GREGORY-MCGHEE; INDIA CHANEY; MICHEL'LE THOMAS; DON BANKS, "DJ"; KENDALL TIMMONS; DAX DELLENBACH; NIGEL HAYES; ANFORNEE STEWART; KENYATA JOHNSON; BARRY BRUNETTI; DALENTA JAMERAL STEPHENS, "D.J."; JUSTINE HARTMAN; AFURE JEMERIGBE; ALEC JAMES,
Plaintiffs-Appellees-Cross-Appellants,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NCAA; PACIFIC 12 CONFERENCE; CONFERENCE USA; THE BIG TEN CONFERENCE, INC.; MID-AMERICAN CONFERENCE; SOUTHEASTERN CONFERENCE; ATLANTIC COAST CONFERENCE; MOUNTAIN WEST CONFERENCE; THE BIG TWELVE CONFERENCE, INC.; SUN BELT CONFERENCE; WESTERN ATHLETIC CONFERENCE; AMERICAN ATHLETIC CONFERENCE,
Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court for the Northern District of California, No. 4:14-md-2541 (Wilken, J.)

DEFENDANTS' JOINT OPENING BRIEF

SETH P. WAXMAN
LEON B. GREENFIELD
DANIEL S. VOLCHOK
DAVID M. LEHN
KEVIN M. LAMB
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6000

August 16, 2019 — *Counsel for the NCAA*

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

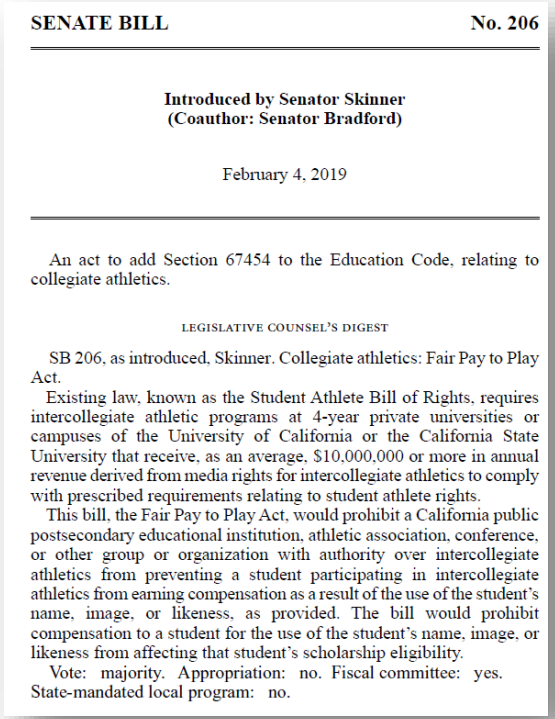
- The NCAA and conference defendants have appealed to the Ninth Circuit, arguing that Judge Wilken misapplied the burden-shifting Rule of Reason test.
- The NCAA also argues that the district court's adjustments to the NCAA's caps on compensation – despite also recognizing the pro-competitive benefits of compensation caps – amounts to "improper judicial price-setting."

In re NCAA Grant-in-Aid Cap Antitrust Litigation (9th Cir.) – cont'd

- The Plaintiffs also have appealed to the Ninth Circuit. Their opening brief (and opposition to the Defendants') currently is due October 16.
- Plaintiffs are expected to argue that the Court did not go far enough, and should have concluded that there is no procompetitive justification for the NCAA's rules limiting compensation to student-athletes.

Proposed Name, Image and Likeness Legislation

Proposed State Legislation: California SB 206



SENATE BILL No. 206

Introduced by Senator Skinner
(Coauthor: Senator Bradford)

February 4, 2019

An act to add Section 67454 to the Education Code, relating to collegiate athletics.

LEGISLATIVE COUNSEL'S DIGEST

SB 206, as introduced, Skinner. Collegiate athletics: Fair Pay to Play Act.

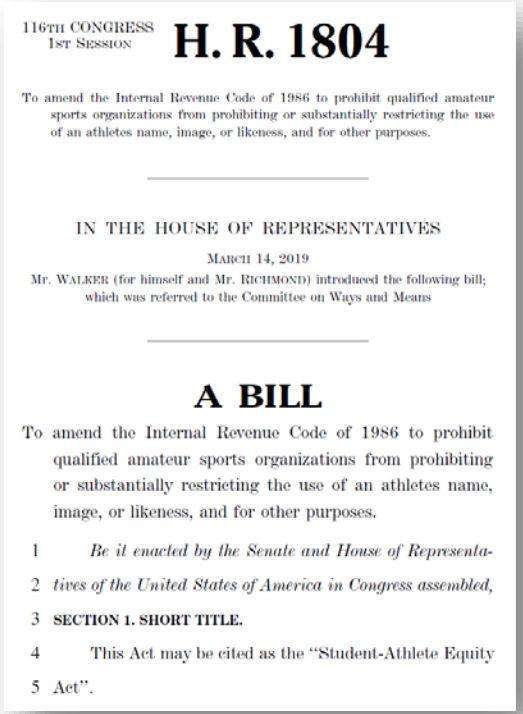
Existing law, known as the Student Athlete Bill of Rights, requires intercollegiate athletic programs at 4-year private universities or campuses of the University of California or the California State University that receive, as an average, $10,000,000 or more in annual revenue derived from media rights for intercollegiate athletics to comply with prescribed requirements relating to student athlete rights.

This bill, the Fair Pay to Play Act, would prohibit a California public postsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics from preventing a student participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness, as provided. The bill would prohibit compensation to a student for the use of the student's name, image, or likeness from affecting that student's scholarship eligibility.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

- The California state legislature has passed a bill that would prohibit California universities from "uphold[ing] any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness."
- If signed by the governor, the new law will take effect in January 2023.

Similar Proposed Legislation: U.S. Congress



116TH CONGRESS
1ST SESSION

H. R. 1804

To amend the Internal Revenue Code of 1986 to prohibit qualified amateur sports organizations from prohibiting or substantially restricting the use of an athletes name, image, or likeness, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 14, 2019

Mr. WALKER (for himself and Mr. RICHMOND) introduced the following bill; which was referred to the Committee on Ways and Means

A BILL

To amend the Internal Revenue Code of 1986 to prohibit qualified amateur sports organizations from prohibiting or substantially restricting the use of an athletes name, image, or likeness, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Student-Athlete Equity Act".

- H.R. 1804, introduced in Congress by Mark Walker (R - NC), would amend tax code (Internal Revenue Code § 501) to eliminate tax-exempt status for "an organization that substantially restricts a student athlete from using, or being reasonably compensated for the third party use of, the name, image, or likeness of such student athlete."

Similar Proposed Legislation: State Legislatures

- Other states, including Washington, South Carolina, New York and Florida, are also considering bills on the issue.
- Some bills – like New York's and South Carolina's – would go farther than the California statute.
- Prominent athletes and other sports figures are speaking out on both sides of the issues.

NASL v. U.S. Soccer Federation, Inc. and Major League Soccer, LLC

NASL v. United States Soccer Federation, et al. (E.D.N.Y)

- **Overview**
  - Antitrust action brought by the North American Soccer League (“NASL”), a former Division II men’s professional league against the U.S. Soccer Federation (“USSF”) and Major League Soccer (“MLS”).
  - Crux: USSF has applied its professional standards and divisional certifications, among other acts, in an anticompetitive and discriminatory manner; and has done so in conspiracy with, and to protect the monopoly of MLS.
  - Asserts claims under Sections 1 and 2 of the Sherman Act.

NASL v. United States Soccer Federation, et al. (E.D.N.Y) – cont'd

- USSF
  - National association member of FIFA and governing body for soccer in the United States.
  - Required by FIFA to organize & oversee professional soccer among its members in the U.S.
  - Adopts, amends, and applies Professional League Standards ("PLS"), which classify professional soccer by divisions/level of play – Division I, Division II, and Division III.
  - In addition to setting the rules for professional soccer, USSF also funds, trains and manages the USMNT and USWNT.
- NASL
  - Formed in 2009, began play in 2011.
  - Formerly operated as a "Division II" league under USSF Professional League Standards.
  - Canceled 2018 season after being denied Division II sanctioning by USSF.
- MLS
  - Formed in connection with the 1994 FIFA World Cup.
  - Began play in 1996.
  - Sole men's Division I soccer league in the United States.
  - Most commercially successful soccer league in U.S. history, and now consists of 24 teams (21 in U.S., 3 in Canada).

NASL v. United States Soccer Federation, et al. (E.D.N.Y) – cont'd

- Background on the PLS
  - "Designed in an attempt to (a) reduce (not eliminate) the risk of league and team failures, particularly during the middle of a season, and (b) further USSF's mission of growing the game at all levels."
  - Reflect a mix of FIFA requirements and USSF's business judgment.
  - Standards have typically included requirements relating to:

• Number of teams	• Size of market
• Number and location of time zones for teams	• Stadium capacity
• Coaching licenses	• Organizational requirements
• League Requirements	• Financial viability

PLS set forth different requirements for Division I and Division II sanctioning.

  - Leagues must apply annually for sanctioning.
  - USSF Board of Directors vote on amendments and applications to PLS.
  - PLS are periodically revised.

NASL v. United States Soccer Federation, et al. (E.D.N.Y) – cont'd

- Factual Background:
  - NASL, along with USL, was originally awarded provisional Division II sanctioning in 2011 by USSF.
  - NASL was later granted waivers to PLS and granted full Division II sanctioning.
  - In 2015, NASL sought Division I sanctioning, and requested additional waivers for a number of requirements it deemed anticompetitive. NASL's Division I application was rejected, and it remained a Division II-sanctioned league (albeit with waivers).
  - In August 2017, NASL submitted an application for Division II sanctioning for the 2018 season, and sought waivers to two requirements (minimum team number and time zone). Following a presentation by NASL to the USSF Board, on September 1, 2017, NASL was denied Division II status for 2018.

NASL v. United States Soccer Federation, et al. (E.D.N.Y) – cont'd

- Litigation commenced:
  - Case brought in EDNY.
  - NASL filed suit on September 19, 2017 against the USSF.
  - NASL moved for a preliminary injunction on September 20, 2017 seeking Division II sanctioning for the duration of the litigation.
  - Judge Margo Brodie

NASL v. United States Soccer Federation, et al. (E.D.N.Y) – cont'd

- NASL's claims:
  - USSF has adopted and applied the PLS in a discriminatory manner as part of a conspiracy to entrench MLS as the sole Division I league, and USL as the sole Division II league.
    - USSF's standard-setting process was anticompetitive because MLS members sit on the USSF Board and therefore, the Board places MLS interests ahead of others.
    - USSF and MLS has conspired to routinely amend and toughen the PLS to prevent NASL from achieving Division I sanctioning.
    - USSF has a conflict of interest because it maintains a business relationship with MLS through SUM, a marketing entity that holds the commercial rights to MLS, the World Cup, and the USMNT and USWNT, among others.
    - Failure of USSF to allow for promotion/relegation entrenches MLS monopoly.

NASL v. United States Soccer Federation, et al. (E.D.N.Y) – cont'd

- Alleged relevant markets:
  - Product Markets: Markets for top-tier professional soccer and second-tier professional soccer leagues in the United States.
  - Geographic Markets: Alleged as the United States and Canada.

NASL v. United States Soccer Federation, et al. (E.D.N.Y) – cont'd

- **Nov. 2017**: The district court denies NASL's preliminary injunction:
  - NASL did not make a clear showing that it was entitled to relief because NASL could not demonstrate, based on the evidence presented, concerted action among USSF, MLS, and USL as is required by Section I of the Sherman Act.
  - Judge Brodie ruled:
    - League Standards were not direct evidence of an unlawful agreement under the Sherman Act;
    - NASL did not provide evidence of an agreement to agree among Board members to vote in a particular way; and
    - NASL did not present evidence that the alleged conflict of interest between USSF and MLS unduly influenced the adoption of the PLS (particularly in light of the fact that NASL could voice its concerns to the Board, because of the recusal of MLS representatives from PLS voting, and because the Board's fiduciary duty to its members prevents the Board from "blindly benefitting" MLS).
  - Court did not closely analyze alleged relevant markets in reaching its decision.

NASL v. United States Soccer Federation, et al. (E.D.N.Y) – cont'd

- **Feb. 2018**: Second Circuit Affirms denial of preliminary injunction motion:
  - "Quick Look" analysis would have been inappropriate because PLS are "far from being obviously anticompetitive."
  - USSF met its burden to demonstrate the "procompetitive virtues" of the PLS.
    - Standards coordinate necessary competition.
    - Prevent free-riding.
    - Provide stability to leagues financially.
  - NASL did not show a "meaningful financial conflict of interest stemming from the SUM agreement."
  - District Court did not err in concluding that NASL failed to prove that any legitimate procompetitive benefits could have been achieved by less restrictive means.
  - Second Circuit acknowledged that "NASL has a case left to make."

NASL v. United States Soccer Federation, et al. (E.D.N.Y) – cont'd

- NASL cancels 2018 season shortly after denial of preliminary injunction.
- **Feb. 2018**: NASL brings state law claim alleging that USSF board members have violated their fiduciary duties improperly exercised their influence to undermine and stop the growth of the NASL:
  - State court Complaint dismissed by Justice Andrea Masely in January 2019.
  - Action was highly duplicative of federal action.
- **March 2018**: NASL Amends its antitrust Complaint.
  - Added MLS as a Defendant.
  - Added claim for monetary damages.
  - Added standalone Section 1 claim challenging PLS as anticompetitive in and of themselves.
  - Added two monopolization-related counts against MLS, alleging monopolization and attempted monopolization in "the market for top-tier men's professional soccer leagues in the U.S. and Canada, or in the alternative a broader relevant market for men's professional soccer leagues in the U.S. and Canada, in violation of Section 2 of the Sherman Act".
- Discovery is ongoing, with expert discovery concluding in January 2020.
- Potential Summary Judgment motions.

NFL's Sunday Ticket Antitrust Litigation

In re NFL's Sunday Ticket Antitrust Litigation (C.D. Cal.)

- Rather than each NFL team selling its game broadcast rights separately, the teams pool those rights, and the NFL sells them collectively to networks and other purchasers.
- Networks like Fox and CBS show a subset of games each week, with different games broadcast in different locations. A fan with only over-the-air or cable television can only view the games broadcast in their geographic market.

In re NFL's Sunday Ticket Antitrust Litigation (C.D. Cal.) – cont'd

- The NFL bundles all other "out-of-market" games as part of a product called NFL Sunday Ticket, available exclusively in the U.S. from AT&T, through its subsidiary, DirecTV.
- DIRECTV residential and commercial subscribers brought several putative class and individual actions, claiming the teams' pooling of rights (horizontal), to be sold exclusively to DIRECTV (vertical) – restrains trade and leads to increased costs for consumers.

In re NFL's Sunday Ticket Antitrust Litigation (C.D. Cal.) – cont'd

- C.D. Cal. Judge Beverly Reid O'Connell granted the NFL's motion to dismiss.
- Judge O'Connell analyzed the two agreements separately – the agreement between the NFL teams to pool their rights and the agreement between the NFL and DirecTV to show out-of-market games.

In re NFL's Sunday Ticket Antitrust Litigation (9th Cir.) – cont'd

- Judge O'Connell held that the vertical agreement between the NFL and DirecTV did not reduce output, because every NFL game is available for broadcast.

- The court also held that plaintiffs did not have standing to challenge the horizontal agreement between NFL teams, because they were not direct purchasers of the pooled rights.

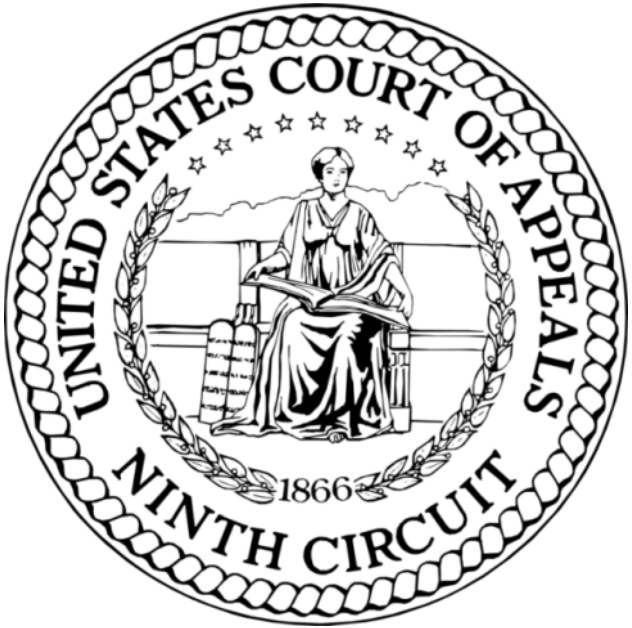
In re NFL's Sunday Ticket Antitrust Litigation (9th Cir.) – cont'd

- On appeal, the Ninth Circuit did not analyze the two agreements separately, as the district court had.
- Instead, the Court of Appeals treated the contracts as "interlocking agreements [that] work together to suppress competition for the sale of professional football game telecasts.
- The court therefore purported to take "a holistic look at how the interlocking agreements actually impact competition."

In re NFL's Sunday Ticket Antitrust Litigation (9th Cir.) – cont'd

- As for antitrust standing, the Ninth Circuit held that "principles of proximate cause apply differently when the injury to plaintiffs is caused by a multi-level conspiracy to violate antitrust laws."
- The court held that standing was appropriate under such circumstances, so long as the plaintiff was "the immediate purchaser from any of the conspirators" – such as DirecTV.

In re NFL's Sunday Ticket Antitrust Litigation (9th Cir.) – cont'd



- The Ninth Circuit also held that the plaintiffs had sufficiently pled harm to competition.
- The Court of Appeals rejected the definition of output adopted by the district court – number of games – and defined output instead as the number of game broadcasts.
- Absent their agreements with the NFL, the Ninth Circuit held, the teams could plausibly broadcast each game on more than one network.

Sports Antitrust Cases Filed in Past Year

- *City of Oakland v. Oakland Raiders*
  (N.D. Cal., filed Dec. 11, 2018)
- *U.S. v. Learfield Communications*
  (D.D.C., filed Feb. 14, 2019)
- *Reapers Hockey Ass'n v. Amateur Hockey Ass'n of Illinois*
  (N.D. Ill., filed Feb. 21, 2019)
- *American Cricket Premier League v. USA Cricket*
  (D. Colo., filed May 28, 2019)
- *Relevent Sports, LLC v. United States Soccer Federation*
  (S.D.N.Y., filed Sept. 9, 2019)

Speaker Bios

Anastasia Schmidt
General Counsel, MLS

Anastasia Schmidt is the Executive Vice President and General Counsel of Major League Soccer. She previously worked for nearly 20 years at the National Football League, most recently as the NFL's Deputy General Counsel, Litigation and Legal Affairs, overseeing all antitrust litigation involving the NFL and its affiliated companies.

Bradley Ruskin
Partner and co-chair, Sports Law

Brad Ruskin is a senior partner and co-chairs Proskauer's Sports Law Group. He has also served as co-chair of the Litigation Department and has served four terms on the Firm's Executive Committee. As head of the litigation section of Proskauer's preeminent Sports Law Group, a significant portion of Brad's practice is dedicated to litigating issues and counseling clients active in the sports business.

Scott Cooper
Partner

Scott Cooper has been successfully litigating complex commercial cases for over 30 years at every level of the state and federal courts, including the United States Supreme Court. Scott represents clients in the sports industry such as Major League Baseball in league governance disputes and antitrust litigation, and the Pac-12 Conference in antitrust litigation.

Antitrust Insights Seminar

Antitrust and M&A: An In-House Counsel Guide to Risk Management

Brian Buchert, Church & Dwight

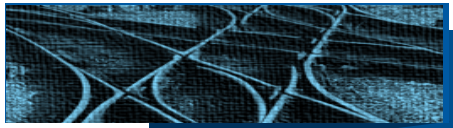
Michael Ellis, Partner

John Ingrassia, Senior Counsel

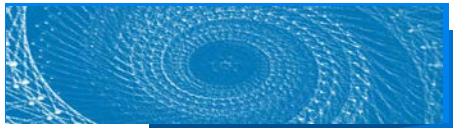
Rucha Desai, Associate

Proskauer

Agenda



Assess The Antitrust Risk



Tools For Addressing Antitrust Risk

Enforcing The Contract Provisions

Assess The Antitrust Risk

Access the Antitrust Risk

- Collect and analyze company documents and data (documents agencies always request, Win-loss data, Competitive analyses)
- Calculate shares of potential markets
- Gather information on market competitors
- Assemble efficiency information
- Evaluate relevant agency precedent
- Develop and implement customer outreach strategy

Access the Antitrust Risk – cont'd

- Is there an Antitrust risk?
  - Are the parties competitors in a particular product or service offering?
  - Do they operate in the same geographic markets?
  - Does the transaction raise significant antitrust issues – substantial lessening of competition?
  - What is the likelihood that antitrust regulators will seek a remedy prior to clearance?
- What is the Antitrust risk?
  - De minimus – no material competitive concerns
  - Medium – potential competitive concerns
  - High – likely competitive concerns
- If risk is minimal, unlikely that risk-shifting provisions will be required
- The greater the risk, the more likely seller will demand risk shifting provisions

Dealing With Contract Provisions/Antitrust Risk Shifting

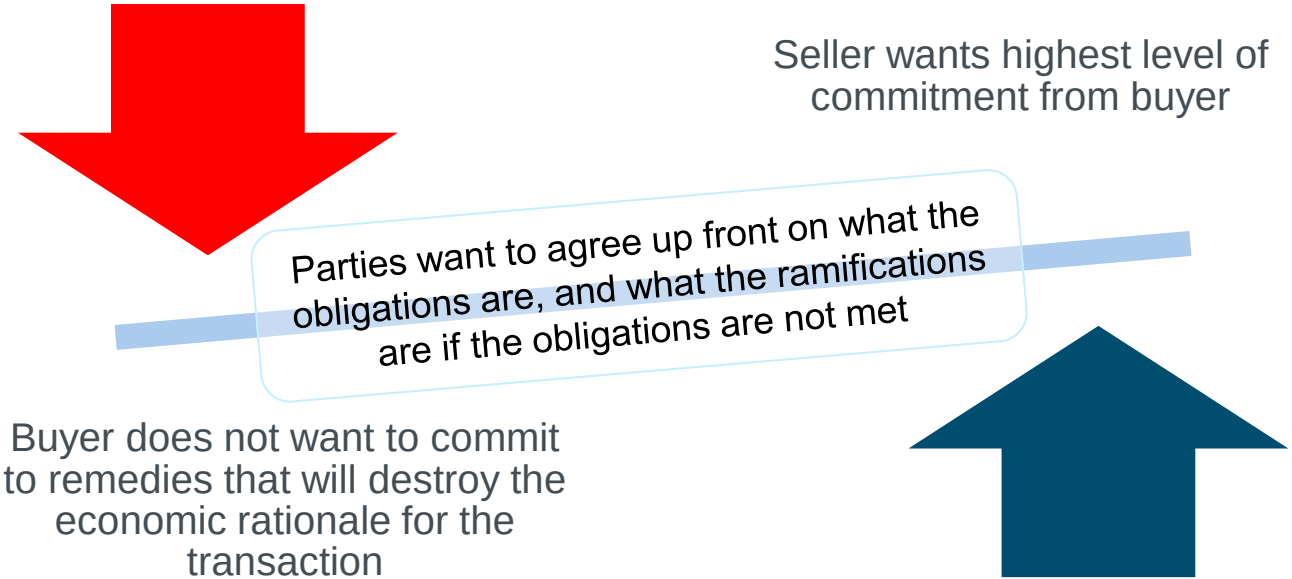
- Antitrust risk associated with a merger or acquisition usually lies with the seller
  - While waiting for a deal to close, seller could lose valuable customers and/or key employees
- If there is a real risk that an investigation could delay closing or even kill a deal, the seller may want to protect itself by shifting Antitrust risk to the buyer or the parties may elect to allocate the risk of obtaining Antitrust approval between themselves.

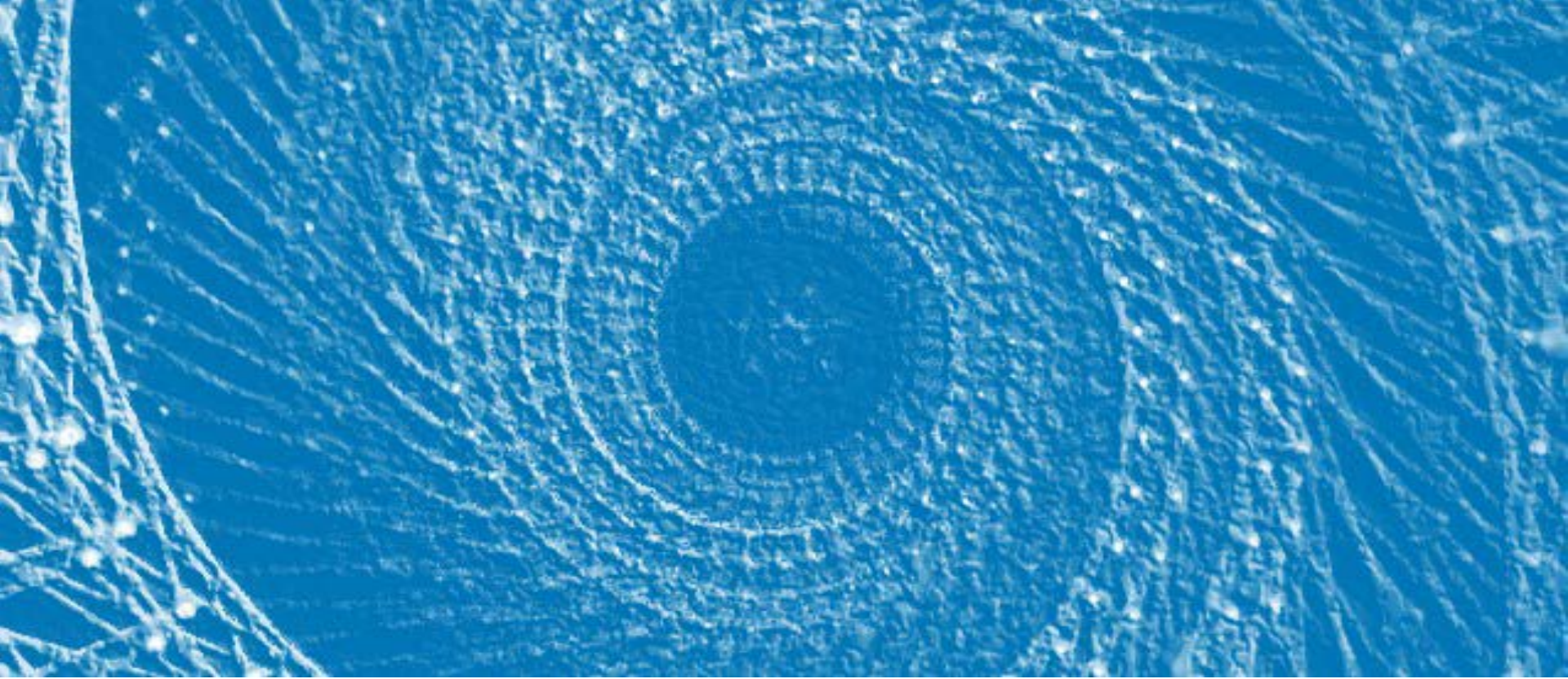
Dealing With Contract Provisions/Antitrust Risk Shifting – cont'd

Remedy Provisions	Financial Provisions	Timing Provisions
No obligation to divest assets or agree to behavioral remedy	Each party bears its own costs; no reverse break-up fee	No timing obligation
Obligation to divest specified assets	Buyer/Seller pays for the costs of HSR filing	Right to terminate if a Second Request is issued
Obligation to divest immaterial assets	Buyer/Seller pays for the costs of the HSR filing/attorney's fees/other costs associated with regulatory approval	
Obligation to divest any assets of the target, but not any of the buyer's	Buyer pays a reverse break-up fee if unable to get antitrust approval	Obligation to comply with a Second Request, but can terminate if transaction challenged
Obligation to divest/offer other remedies, necessary to obtain regulatory approval	Ticking Fee paid to Seller goes up as the clock ticks past the stated approval deadline	Obligation to litigate (potentially through appeal)

Antitrust and M&A: An In-House Counsel Guide to Risk Management

- Addressing the issues in a predictable manner that accounts for each party's risk tolerance level





Tools for Addressing Antitrust Risk

Tools for Addressing Antitrust Risk

Efforts clauses

End dates

Break or termination fees

Material adverse event clauses

Control of investigation strategy

Efforts Clauses

- Efforts clauses govern what the parties have agreed to do in order to obtain antitrust clearance for the transaction
- The level of effort and actions range from light touch – for transactions with no real antitrust issues – to onerous – for transactions where heavy agency scrutiny is expected
- Clauses typically include:

Efforts Clauses – Hell or High Water

- Obligates buyer to undertake any and all actions necessary to gain antitrust clearance
  - Second Request – full-blown antitrust investigation
  - Divestitures or other remedies to satisfy antitrust regulators
  - Litigation, if deal is challenged on antitrust grounds
- Generally used in transactions that present real antitrust risk
- Why would a buyer agree to this?
  - Price
  - Different view of risk
  - Negotiating leverage
  - Competitive nature of bidding pool

Efforts Clauses – Tribune/Sinclair

- In the *Tribune/Sinclai*r transaction, the parties agreed to use "reasonable best efforts" to take "all actions" and do "all things" necessary for closing
- After the FCC decided not to approve the merger, Tribune terminated its agreement with Sinclair and sued for breach of contract
- Tribune alleged that Sinclair:
  - Refused to sell stations in the specified markets in spite of assurances from the agency that the merger would clear if Sinclair agreed to sell certain stations
  - Proposed divestiture structures that risked delay or rejection
  - Engaged in "belligerent and unnecessarily protracted negotiations" with authorities over regulatory requirements
- The litigation is ongoing

Efforts Clauses – Anthem/Cigna

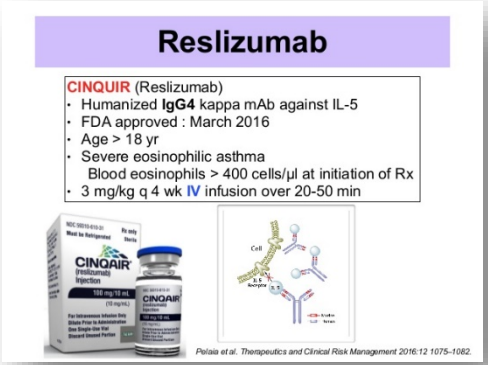
- The failed Anthem/Cigna merger also resulted in litigation over who was at fault for the deal's failure to pass antitrust muster, and which party is responsible to the other for the termination fee
- Cigna claims that Anthem's merger announcement affected regulatory and antitrust reviews, and that Anthem deliberately used the merger to harm Cigna
- Anthem claims that Cigna "sabotaged" the agreement by undermining Anthem's efforts to cooperate with the DOJ in getting approval because Cigna's executive officers were not satisfied with their post-closing roles and titles
- The court has yet to rule

Efforts Clauses – Nidec and Whirlpool

- In the *Nidec/Whirpool* transaction, the parties anticipated the transaction would encounter significant antitrust issues
- The purchase agreement allocated the antitrust risk to Nidec – including a ***"hell or high water"*** provision
- While antitrust clearance ***and*** the transaction were still pending, Whirlpool sued Nidec claiming Nidec had not done everything it could to allay the concerns of the EU, Mexico and Turkey
- The court dismissed the suit without prejudice as premature
- The transaction was ultimately approved and completed

Efforts Clauses – Himawan v. Cephalon

- When Cephalon bought Ception in 2010, the company agreed to use '***commercially reasonable efforts***' to develop the antibody Rezlizumab
  - Merger agreement defined term to mean efforts commensurate with those a similar company would undertake
- Cephalon failed to gain regulatory approval, and ultimately abandoned efforts to develop and commercialize Rezlizumab
- *Himawan v. Cephalon* involves a breach of contract claim for failure to use commercially reasonable efforts to obtain regulatory approval
- The litigation is ongoing



End Dates

A '***Drop-dead date***' or '***Outside date***' lets the parties agree up-front how long is too long, and when it's time to move on

Extended investigations can impact financing efforts, impact the ongoing businesses of the parties, and have other adverse effects

The implications are myriad, depending on which party has the right to terminate at the end of the prescribed period, and on what bases

Break or Termination Fees

- Agreement to gain antitrust clearance by a date certain or trigger a termination clause/break or termination fee

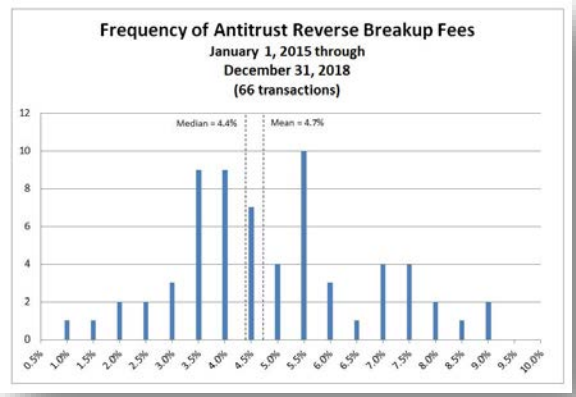
Reverse Termination Fees	***Ticking Fees***
Buyer agrees to pay a fixed fee if a deal terminates for failure to obtain antitrust approval	Buyer agrees to pay additional fees if deal is not closed by a certain date or certain milestones are not met

End Dates and Break or Termination Fees – Anthem/Cigna

- In *Anthem/Cigna*, either party could terminate the deal and seek the reverse termination fee if the deal did not close by April 30, 2017, so long as it was not in breach and had not "proximately caused or resulted in the failure of" the merger closing
- DOJ sued to block the deal in July 2016 and the Court blocked the merger in 2017
- Cigna attempted – and failed – to terminate the agreement and ultimately filed suit to obtain a $1.85 billion reverse termination fee, and $13 billion in damages
- In May 2017, the Chancery Court denied Anthem's preliminary injunction of Cigna's termination
- Litigation is ongoing

End Dates and Break or Termination Fees – Rent-a-Center/Buddy's Home Furnishings

- Vintage Capital/ Buddy's Home Furnishings and Rent-A-Center agreed to employ commercially reasonable efforts to obtain antitrust approval and close their merger
- The merger agreement provided each party the unilateral right to extend the end date or terminate upon written notice
- If terminated, Vintage would pay to Rent-A-Center a reverse breakup fee equal to 15.75% of the transaction's value
- Rent-A-Center terminated after Vintage did not extend
- The Court ruled the termination valid in spite of an existing timing agreement and active FTC investigation
- Vintage Capital paid $92.5 million to Rent-A-Center



Material Adverse Event Clauses

- ***Revenue or material adverse effect/change*** threshold are sometimes employed to limit the level of divestitures a buyer is required to make in order to gain antitrust clearance
  - May identify specific assets that the buyer must agree to divest, while leaving others off the table
- This raises the obvious question of the provision's impact on the parties' ability to fairly negotiate remedies with the agency where the agency knows precisely what the buyer must agree to divest to gain clearance
- Agencies have historically not used the provisions as a sword, or 'road-map'

Material Adverse Event Clauses – Fresenius/Akorn

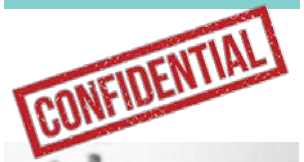
- Fresenius and Akorn agreed to merge in 2017
- In the second quarter of 2017, following news of alleged breaches of FDA data integrity requirements, Akorn's stock price plunged by ~47% in two days
- Both parties agreed to use ***reasonable best efforts*** to complete the merger, and Fresenius committed to taking all necessary actions to secure antitrust approval
- In April 2018, Fresenius sought to exit based on Akorn's noncompliance and the fact that its obligation to close was conditioned on Akorn not having suffered a Material Adverse Effect
- The Court of Chancery found that Fresenius fulfilled its contractual obligations and that Akorns actions resulted in a $900 million loss
- The parties settled

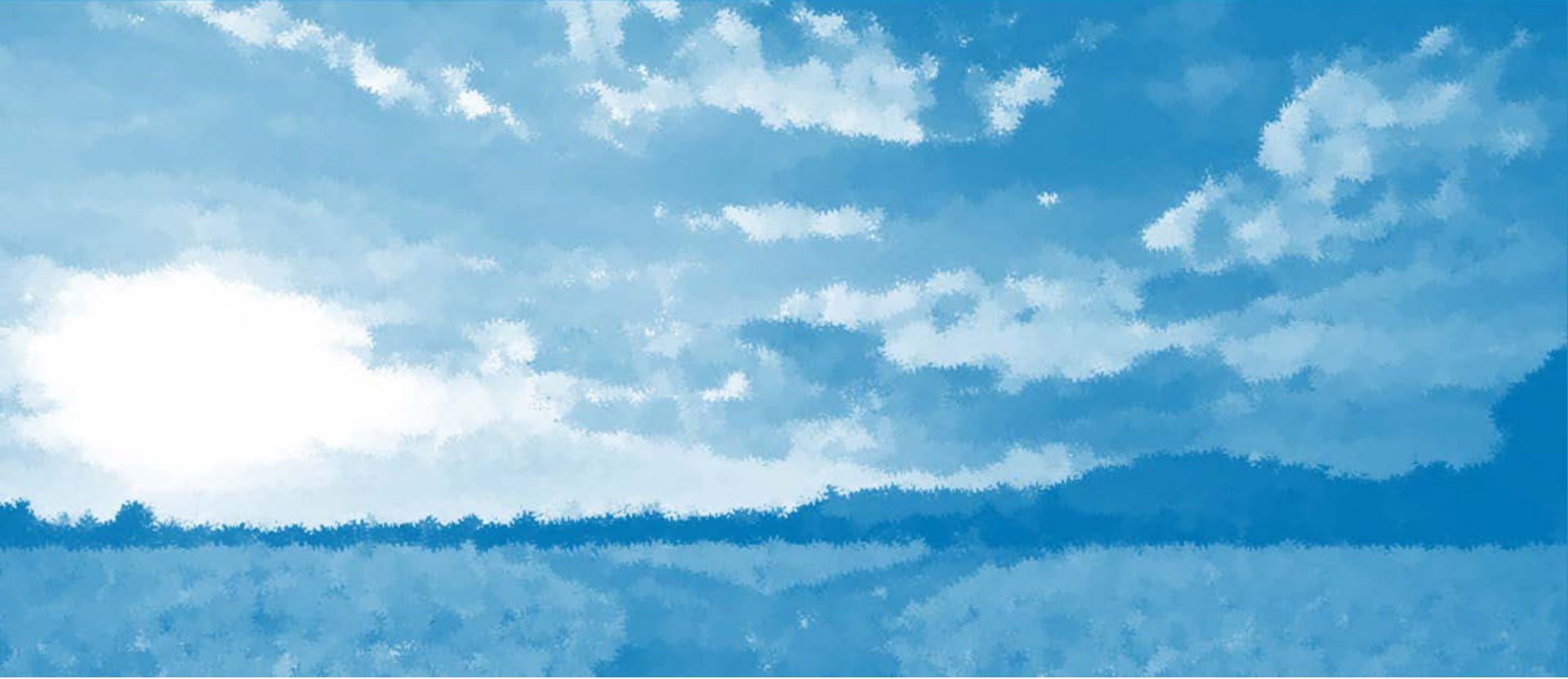
Control of Investigation Strategy

- Other important provisions addressing antitrust in merger agreements include those dealing with control of the antitrust clearance strategy
- A buyer will typically want full control and final decision making authority to the extent the buyer is assuming all or substantial antitrust risk
- Where the risk is more evenly shared, parties typically agree to shared control of antitrust strategy
- In each case, parties will typically agree to work cooperatively towards the end goal of securing antitrust clearance

Related Provisions and Agreements

- Transactions that present antitrust risk typically require parties and their advisors to ***share documents and information*** that inform on the competitive landscape and the parties' internal competitive positioning, along with counsels' views and assessments
- Exchanges of competitively sensitive information will often be subject to ***confidentiality agreements*** as NDAs, and ***clean team procedures***
- ***Joint defense agreement(s)*** may be necessary to protect privilege when sharing advice/information, allowing parties' advisors to work cooperatively without risking the waiver of privilege





Enforcing The Contract Provisions

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