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Working with CEOs

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FEBRUARY 3-5, 2010 • HOUSTON, TEXAS

Course Evaluation

Working with CEOs: Focusing on Antitrust Issues
Amy Mudge, *Arnold & Porter LLP*
Banks Brown, *McDermott Will & Emery*

For each question, please circle the answer that comes closest to your opinion.

1-strongly disagree **2-disagree** **3-neutral** **4-agree** **5-strongly agree**

⅄ This program was presented in a lively, stimulating way	1	2	3	4	5
⅄ The content was interesting and informative	1	2	3	4	5
⅄ The information presented will be useful to me	1	2	3	4	5

⅄ **What other topics in this area should we consider for next year?**

⅄ **Other Comments?**

Your comments will ensure a successful program next year. Thank you.
Please place this form in the designated box located in each session.

ARNOLD & PORTER LLP

2010 Antitrust Primer Update

____ Annual Hospitality Law Conference
February 4, 2010
Houston, Texas

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Amy Mudge practices in the area of trade regulation, both antitrust and consumer protection. She has represented clients in a wide variety of consumer product and service industries, including cigarettes, agriculture, Internet services, pharmaceuticals, dietary supplements, and car rentals. Amy has represented clients before the Federal Trade Commission (FTC), Department of Justice, state attorneys general and the self-regulatory National Advertising Division, as well as in private federal and state litigation. She has significant experience establishing effective compliance programs and providing antitrust and marketing law training to both lawyers and nonlawyers. Amy is a Chair of the Private Advertising Litigation Committee of the Antitrust Section of the American Bar Association. She co-edits a blog on consumer marketing legal developments, available at www.consumeradvertisinglawblog.com. Amy would like to thank Nadine Jones of Arnold & Porter for her invaluable assistance preparing the presentation materials.

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I. SHERMAN ACT

A. Sherman Act § 1

The Sherman Act was passed in 1890 and it prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. §1. If read literally, the Act could be applied to condemn every contract and as such the courts have read into the statute an "unreasonably restrains" requirement. *See Standard Oil Co. v. United States*, 221 U.S. 1, 63-66 (1911); *see also California Dental Ass'n v. FTC*, 526 U.S. 756, 769-81 (1999); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998); *NCAA v. Board of Regents*, 468 U.S. 85, 98 (1984); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 687-91 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

Elements of a Section 1 Sherman Act Claim include (1) the existence of a contract or agreement between two or more separate entities; (2) that agreement unreasonably restrains trade; (3) the restraint affects interstate or foreign commerce; and (4) antitrust injury (for private plaintiffs). *See, e.g.*, *Santana Prods. v. Bobrick Washroom Equip.*, 401 F.3d 123, 131-32 (3d Cir.), *cert. denied*, 126 S. Ct. 734 (2005); *American Ad Mgmt. v. GTE Corp.*, 92 F.3d 781, 788 (9th Cir. 1996); *Maric v. St. Agnes Hosp. Corp.*, 65 F.3d 310, 313 (2d Cir. 1995); *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Restraints that raise prices, reduce output, diminish quality, reduce choice will generally be considered to be "unreasonable." *See NCAA*, 468 U.S. at 113; *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986).

Certain restraints, however, are considered presumptively "unreasonable" in that courts will not engage in an analysis as to whether those restraints actually result in increased prices, reduced output or diminished quality but instead find them to be *per se* unlawful. *Per se* unlawful agreements are generally agreements between competitors (also called horizontal agreements) that affect the terms of trade, including horizontal price fixing, bid rigging, market allocation, and group boycotts. *See, e.g.*, *United States v. Trenton Potteries*, 273 U.S. 392 (1927) (horizontal price-fixing); *Addyston Pipe & Steel v. United States*, 175 U.S. 211 (1899) (market allocation -- i.e. divvying up customers and/or geographical markets among competitors); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986) (agreements not to compete).

That is, once it can be shown that such an agreement among competitors exists, the agreement will be condemned summarily. *Trenton Potteries Co.*, 273 U.S. 392. Moreover, such agreements also could be subject to criminal prosecution. Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), Pub. L. No. 108-237, §§ 211-15; Alternative Fine Statute, 18 U.S.C. § 3571(d).

Restraints other than those listed above generally are subject to rule of reason analysis. This can include vertical agreements or those between companies at different levels in the distribution chain. Under the rule of reason, the court weighs the restrictive practices against the anticipated procompetitive benefits as a result of the restraint. *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). If the benefits outweigh the restraint on competition, then the agreement will be found to be lawful. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Critical to all rule of reason analysis is the finding of "market power." Market power has been defined as the power of one firm to raise prices or restrict output. *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 n.38 (1984). Under the rule of reason, firms without market power are presumed not to have the power to affect competition. Thus, if a court determines that a defendant does not have market power, then there can be no violation of the antitrust laws under the rule of reason as there would not be an adverse effect on competition.

B. Sherman Act § 2

Section 2 of the Sherman Act prohibits monopolization, attempt to monopolize, and combination or conspiracies to monopolize. 15 U.S.C. § 2. A successful monopolization claim requires proof of: (i) monopoly power; and (ii) willful acquisition or maintenance of that monopoly. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). An attempted monopolization claim requires proof of: (i) anticompetitive conduct; (ii) specific intent to monopolize; and (iii) a dangerous probability of success. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). All Section 2 claims are analyzed under the rule of reason, which means that proof of market power is a critical component of all Section 2 claims.

II. Antitrust Enforcement

A. Governmental

The United States Department of Justice Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") have primary jurisdiction over the enforcement of the federal antitrust laws. 15 U.S.C., *et seq.*; Federal Trade Commission Act, 15 U.S.C. § 45. States also have authority to enforce both federal and their respective state antitrust laws. 15 U.S.C. §§ 15c, 15f. Finally, private plaintiffs who have suffered injury as a result of anticompetitive effects resulting from an antitrust violation also may sue. 15 U.S.C. §§ 15(a), 26.

As a general matter, the federal agencies do not have the power to extract civil fines from antitrust violators. A Government entity may recover damages if the government entity itself suffered loss as a result of the injury. 15 U.S.C. § 15(a). The typical remedy available to federal enforcers is injunctive relief (e.g., cease and desist, divestiture). States, on the other hand, may extract treble damages from antitrust violators when acting in their capacity as *parens patraie*. 15 U.S.C. §§15(c), 15(f). Otherwise, states may similarly impose only injunctive relief.

In addition to pursuing civil violations, the DOJ has jurisdiction to prosecute hard-core antitrust violations, such as price-fixing, bid rigging, and market allocation, criminally. Criminal prosecution could result in a felony conviction and up to 10 years in jail and/or $1 million fine for individuals. Corporate fines can be up to $100 million or twice the gain/twice the loss caused by the conspiracy, whichever is greater. ACPERA §§ 108-237; 18 U.S.C. § 3571(d).

B. Private Enforcement

Private plaintiffs also may sue for damages suffered as a result of an antitrust violation. Private plaintiff suits are not in lieu of government enforcement but rather are *in addition to* any government enforcement. 15 U.S.C. § 15(a). Thus, it is possible for one violator to pay millions of dollars in criminal fines and still be subjected to a treble damages suit following its criminal prosecution.

Plaintiffs may sue for injunctive relief and/or treble damages. Successful plaintiffs are also entitled to their attorneys' fees and costs. Of note is that successful defendants are not entitled to either.

III. Agreements

A. Horizontal Agreements

Antitrust law reserves it harshest treatment for horizontal agreements that unlawfully restrain trade. As noted above, certain agreements will be condemned as unlawful *per se* and all such agreements are horizontal in nature. All other agreements, both horizontal and vertical agreements, are subject to the rule of reason.

As a general matter, certain discussions among competitors are viewed as being highly suspect by courts, including discussions related to price, discounts, profits, margins/markups, credits, promotions, and costs. *Todd v. Exxon Corp.,* 275 F.3d 191, 198 (2d Cir. 2001) ("Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement."). Nevertheless, a mere exchange of information is not necessarily unlawful where the parties do not agree (expressly or implicitly) on how to use that information. *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113 (1975) ("[T]he dissemination of price information is not itself a per se violation of the Sherman Act."). Antitrust recognizes that "[e]fficiency gains from competitor collaboration often stem from combination of different capabilities or resources." Antitrust Guidelines for Collaborations Among Competitors, § 3.36 (Apr. 2000).

1. Information Exchanges

Information exchanges among competitors should always be undertaken under the advisement of an experienced attorney. Also, there must be a legitimate business justification for the exchange of information. *See Cement Mfg. Protective Ass'n v. United States*, 268 U.S. 588 (1925) (upholding the competitor-defendants' exchange of information because it was done to help prevent instances of fraud); *but see United States v. Container Corp. of Am*., 393 U.S. 333, 335 (1969) (condemning defendants' information exchange because the exchange served no underlying purpose other than "to furnish price information whenever requested"). Also, information exchanges made pursuant to an agreement that is itself unlawful will violate the antitrust laws, even under the rule of reason. *United States v. U.S. Gypsum*, 438 U.S. 422 (1978).

2. DOJ/FTC Safe Harbor

The DOJ and the FTC have promulgated information sharing guidelines laying out those issues that the agencies consider when evaluating information exchanges among competitors. *See Statement of Dep't of Justice and Federal Trade Commission on Provider Participation in Exchanges of Price and Cost Information* (revised 1996), *available at* http://www.ftc.gov/bc/healthcare/industryguide/policy/statement6.pdf. (While these guidelines have been adopted in the specific context of healthcare, they have been applied by the agencies to other industries as a matter of practice.) The agencies have agreed not to challenge information exchanges ("absent extraordinary circumstances") that meet the following conditions:

(1) the survey is managed by a third-party;

(2) the information provided by survey participants is based on data more than 3 months old; and

(3) there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

3. Joint Purchasing Arrangements

Legitimate joint purchasing arrangements generally are viewed under the rule of reason, and as such, they are lawful if they do not have an adverse effect on competition in the relevant market. To be legitimate, a joint purchasing arrangement must have demonstrated efficiency enhancing integration and be more than an agreement to fix prices paid to suppliers, which would be *per se* unlawful. *See Vogel v. American Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984).

Assuming demonstrated efficiencies, such as a central independent purchasing agent, the DOJ and FTC have articulated guidelines regarding operations they will not challenge. To qualify for this safe harbor treatment, the collective purchases of members through the purchasing group could not account for more than 35% of the total revenues derived from the sale of the purchased product in the relevant market. In addition, if the purchasing group members are competitors, then the safe harbor is available only where the cost of the purchased item is not more than 20% of the sale price of the members' finished products. *1996 Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care* ("*Health Care Guidelines*"), *Statement 7*, *available at* http://www.ftc.gov/reports/hlth3s.htm#7. *See also* R. Hewitt Pate, Assistant Attorney General, U.S. Department of Justice to Robert E. Marsh, Esq., counsel for The National Cable Television Cooperative, B.R.L. 03-578, 2003 WL 22668219 (Oct. 17, 2003) (citing Health Care Guidelines in approving joint purchasing agreement among cable operators for purchase of cable programming).

B. Vertical Agreements

Vertical agreements are agreements between firms that occupy different positions along the distribution chain -- e.g., manufacturer vs. distributor. As a general matter, vertical restraints are viewed as generating positive competitive results.

1. Vertical Price Restraints

Early court decisions, however, reflected great skepticism of such restraints. Both vertical price and non-price restraints were *per se* unlawful. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (making minimum resale price restraints *per se* unlawful); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (maximum resale price restraints *per se* unlawful). In *State Oil Co. v. Khan*, 522 U.S. 3 (1997), the Supreme Court overruled *Albrecht*'s holding to the extent it condemned vertical maximum price agreements as *per se* unlawful. And in 2007, the Supreme Court's decision in *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S.

Ct. 2705 (2007), overruled *Dr. Miles* to make minimum price agreements subject to the rule of reason.[1]

Although both maximum and minimum price restraints are now subject to the rule of reason analysis, *Leegin*'s ruling continues to generate much controversy and recent cases suggest that minimum pricing restraints will be subject to heightened scrutiny by the courts. *See, e.g., New York.* v. *Herman Miller, Inc.*, No. 08-CV-02977 (S.D.N.Y. Mar. 21, 2008); *In re Nine West Group, Inc., No. C-3937 (Apr. 11, 2000); FTC Nine West Press Release*, No. C-3937 (Mar. 6, 2000) (modifying decree in light of *Leegin* but suggesting that RPM should be treated as inherently suspect), *available at* http://www.ftc.gov/opa/2000/03/ ninewest.shtm. Moreover, the jury is still out as to whether the states intend to incorporate *Leegin* into their respective state laws, which means that minimum price restraints might be subject to the rule of reason under federal law, but still *per se* illegal at the state level. *See* Robert L. Hubbard, Director of Litigation, Antitrust Bureau New York State Office of the Attorney General, Presentation at the ABA Fall Forum (Nov. 15, 2007) (voicing states' continued objection to the Supreme Court's decision in *Leegin*), *available at* http://www.oag.state.ny.us/business/antitrust/pdfs/aba_fall_07_forum.pdf. At least one state, Maryland, has already passed a law that minimum resale price maintenance is *per se* unlawful under Maryland state antitrust law. Bills have also been proposed by Congress seeking to overrule the *Leegin* holding by regulation.

The Supreme Court gave general guidance as to how to apply the rule of reason to minimum resale price maintenance agreements. When a company implementing such an agreement has market power, this is more likely to raise competitive concerns. Thus, a small company will have greater freedom to implement such an agreement than a large company. Courts will scrutinize such agreements more closely when they are the rule in an industry rather than the exception. When customers are the impetus behind the vertical pricing agreement, this will be reviewed much more carefully than when the supplier is the motivating force. If a vertical pricing arrangement facilitates another anticompetitive agreement, such as when it is part of a price fixing conspiracy, it will be unlawful. As with all rule of reasons cases, courts will review and evaluate the business rationale and the effects in the market of the agreement.

2. Non-Price Vertical Restraints

Other vertical restraints can include territorial divisions, customer divisions, and marketing/brand integrity, among others. Such restraints are subject to the rule of reason and typically perceived as being good for consumers and competition as they promote competition between brands. *GTE Sylvania*, 433 U.S. 36.

3. Dual Distribution

In some cases, the parties to an agreement sit in both a vertical and horizontal position to one another. For instance, a franchisor may franchise its brand to independent franchisees but then also participate in direct sales to consumers. In such a case, the franchisor sits in both a vertical position (manufacturer-retailer), and a horizontal position vis-à-vis the franchisee

[1] The only remaining vertical agreement still subject to *per se* treatment is tying by a firm with market power. The market power component, however, means that even tying claims are not subject to the perfunctory condemnation reserved for typical *per se* cases. That is, plaintiffs must still make a showing of market power before a tying arrangement can be condemned, *per se*.

(retailer-retailer). In such cases, therefore, participating in certain types of restraints could raise additional antitrust concerns.

As a general matter, courts tend to analyze such restraints as vertical, although there was a time when courts would consider whether the restraint was initiated by the company-owned store or the franchisor. Company-owned-store-initiated restraints would be treated as horizontal, while franchisor-initiated restraints would be viewed as vertical. *See Hampton Audio Elecs. v. Contel Cellular, Inc.*, No. 91-2186, 1992 WL 131169, at *3 (4th Cir. Aug. 6, 1992) (dual distribution systems are subject to rule of reason when the benefits inure primarily to the manufacturer); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1231 (8th Cir. 1987) (stating that it would be inappropriate to treat restraints imposed from the top of the chain and designed to benefit the firm at the top as horizontal).

Notwithstanding the above, antitrust risks increase if company-owned stores and franchisees communicate directly on issues such as resale prices, promotions, or other competitively sensitive information. *Cf. Smalley & Co. v. Emerson & Cuming, Inc.*, 13 F.3d 366, 368 (10th Cir. 1993) (granting summary judgment where evidence showed that manufacturer did not want distributor-plaintiff to rig bids but also did not want plaintiff to compete with it for sales).

4. Robinson-Patman Act

The Robinson-Patman Act prohibits, *inter alia*, discrimination in price by a seller of goods of like grade and quality to competing buyers. 15 U.S.C. §§ 13-13(b), 21a (1936). Such discrimination also includes benefits, such as promotions, rebates, or other policies that confer a competitive net price advantage to one reseller not afforded to another. *See, e.g., Conoco Inc. v. Inman Oil*, 774 F.2d 895, 901-02 (8th Cir. 1985) (invoice price reduced by absorbed storage and inventory costs); *Indian Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891, 902 (3d Cir. 1985) (consumer coupons deemed component of price).

Sellers may, however, discriminate in price where the following defenses are met:

(i) Meeting Competition -- a seller may sell its products at different prices when it is trying in good faith to meet, but not beat, the low prices offered by a competitor. *See Standard Oil Co. v. FTC*, 340 U.S. 231, 251 (1951); *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 445 (1983).

(ii) Cost Justification -- price differentials based on a manufacturer's cost to produce, sell, or deliver its goods for one buyer versus another. This is an extremely difficult test, however, for manufacturers to meet. *See Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 561 n.18 (1990) (noting that this justification will rarely provide a defense of functional discounts).

(iii) Changing Conditions -- changes in the marketability of a good could justify differences in price. Changes such as technological obsolescence, or perishable goods, for instance, could qualify. *See, e.g., A.A. Poultry Farms v. Rose Acre Farms*, 683 F. Supp. 680, 691 (S.D. Ind. 1988) (eggs), *aff'd on other grounds*, 881 F.2d 1396 (7th Cir. 1989).

(iv) Functional Availability -- lower prices that are functionally available to the alleged disfavored purchaser constitutes a defense. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 42 (1948); *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 698-700 (7th Cir. 2006).

IV. CONCLUSION

U.S. antitrust laws have undergone relatively radical changes in the recent past, not the least of which is attributable to the current U.S. Supreme Court's active interest in hearing antitrust matters. The antitrust community expects more changes in 2010 as the Supreme Court continues to remain engaged in this area, and the Obama administration has expressed an intention to heighten antitrust enforcement efforts.

Antitrust Traps in the Hospitality Industry

February 3, 2010

Houston, Texas

Presenters

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- 2006 recipient of the Anthony G. Marshall Award for Pioneering and Continuous Contribution to Hospitality Law.
- Co-author of "Understanding Hospitality Law" (4th Ed. Educational Institute, AHLA).

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•Antitrust & Consumer Protection lawyer, representing consumer products and service clients before the FTC, DOJ, state AGs and in private litigation.
•Significant experience establishing effective compliance programs and providing antitrust training to both lawyers and nonlawyers.
•Chair of Private Advertising Litigation Committee, Antitrust Section of ABA

Penalties and Enforcement

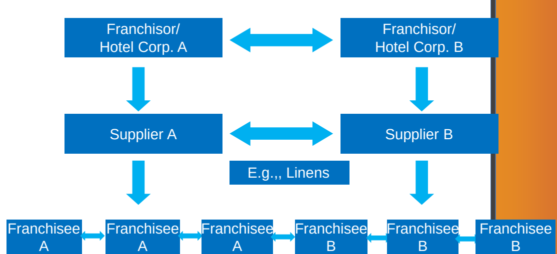
- Government and Private actors may enforce antitrust laws:
  - The DOJ and the FTC have primary federal jurisdiction over antitrust enforcement:
    - DOJ and FTC seek only injunctive relief for non hard-core violations
    - DOJ may prosecute hardcore violations (e.g. horizontal price fixing, bid rigging, market allocation, group boycott) criminally – up to 10 years in jail and $100 million in fines or twice the gross gain or twice the gross loss" resulting from the violation(whichever is greater)
  - Private citizens/corporations also may sue for injuries caused by a violation:
    - 3 times the plaintiff's actual injury ("treble damages") with no upper limit
    - *Plus* attorneys' fees and costs
    - Injunctive relief
  - Each State and the District of Columbia also have jurisdiction to enforce both state and federal antitrust laws

Antitrust Laws

- Antitrust laws preserve and protect competition by making illegal those practices or transactions that unreasonably restrain competition
  - Protect consumers
  - Lower prices, more consumer choice
- Sherman Act primary antitrust statute
  - Sherman Act § 1 (unlawful agreements)
  - Sherman Act § 2 (monopolization)
- Sherman Act analysis revolves around the relationship of the parties involved, i.e. Horizontal vs. Vertical

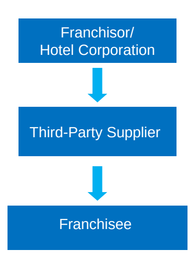
Horizontal

- Horizontal



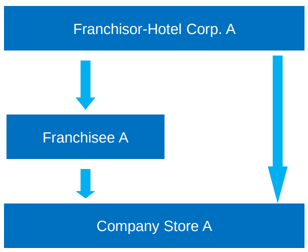
Vertical

- Vertical



Dual Distribution

- Dual Distribution



Sherman Act § 1
Per Se Rule vs. Rule of Reason

- Section 1 of the Sherman Act applies to *agreements* between separate entities that "unreasonably" restrain trade
  - Per se rule applied to "naked restraints" and conduct is unlawful without regard for possible procompetitive justifications
  - Some conduct is so anticompetitive that life is too short to listen to justifications
- The antitrust "rule of reason" is applied to the "vast majority" of agreements
  - Rule of reason balances the competitive restraints against the procompetitive benefits to be gained from the restraints
  - Restrictions must be tailored (but not essential) to meet legitimate goals
  - In reality, defendants usually win (at least on appeal)

- My Company needs information about what our competitors are doing to compete effectively? What are the ground rules for gathering competitive intelligence?

- We participate in several trade associations. What advice should I give my folks who attend these meetings?

- **COMPETITOR COLLABORATIONS**

What To Avoid

- **Horizontal Competitors Should Not Discuss Price or Terms**
  - **Discounts**
  - **Profits**
  - **Margins/Markups**
  - **Credits**
  - **Promotions**
  - **Costs**
- **Competition in the market**
  - **Market trends/Forecasts**
  - **Market shares**
  - **Relationships with other suppliers/customers**

Antitrust and Information Exchange by Competitors

- Antitrust recognizes that, in some cases, information exchanges between horizontal competitors can result in procompetitive benefits:
  – DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors state that "[e]fficiency gains from competitor collaboration often stem from combination of different capabilities or resources." § 3.36 (Apr. 2000).

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Antitrust and Information Exchange by Competitors, cont'd ….

- The DOJ/FTC Joint Information-Sharing Guidelines provide a "safe harbor" for horizontal competitor exchanges that conform to the following guidelines:
  – (1) the collection is managed by a **third party** (*e.g.*, a purchaser or trade association);
  – (2) any information that is shared among or is available to the competing providers furnishing the data must be more than **three months old**; and
  – (3) there are at least **five providers** reporting data upon which each disseminated statistic is based, no individual provider's data may represent more than **25 percent on a weighted basis** of that statistic, and any information disseminated must be sufficiently aggregated such that it would not allow recipients to identify the prices charged by any individual provider.

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Antitrust and Information Exchange by Competitors, cont'd ….

- Regardless of whether the exchange falls within the safe harbor, there should **always** be a legitimate business justification for the exchange of information:
  – *Cement Mfg Protective Ass'n v. U.S.*, 268 U.S. 588 (1925) (upholding the competitor-defendants' exchange of information because it was done to help prevent instances of fraud)
  – *U.S. v. Container Corp. of Am.*, 393 U.S. 333, 335 (1969) (condemning defendants' information exchange because the exchange served no underlying purpose other than "to furnish price information whenever requested")

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- Do lower costs, we are considering participating in a buying cooperative. How do I assess the risks?

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Joint Purchasing

- Naked agreement between buyers on prices to be paid to suppliers illegal *per se*
- Legitimate joint purchasing blessed by DOJ/FTC
  - Demonstrated efficiencies
  - Joint purchases = > 35% of total sales of the purchased goods/services in a market
  - Cost of the jointly purchased goods/services = > 20% of total revenues from all goods/services

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- **VERTICAL ARRANGEMENTS**

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- Is it legal for a brand to set a price, either a minimum or a maximum, and require a location to comply?

- Are there limitations on the terms a power buyer can require?

Distribution Restraints: Resale Price Maintenance

- Maximum RPM
  - Generally viewed as being good for consumers
  - Illegal per se until *State Oil v. Khan* (1997)
  - Not per se lawful, but difficult to see injury or standing unless it is a de facto minimum
- Minimum RPM
  - Consumer welfare effects ambiguous
  - Illegal per se under federal law until *Leegin* (2007)
  - Most definitely ***not*** de facto per se lawful
    - Market power (upstream or downstream)?
    - Requested by retailer?
    - Used by a majority of firms in the market?
  - States hate *Leegin*, Congress not thrilled

Non-Price Restraints

- Territorial or customer restrictions (*e.g. Continental TV v. GTE Sylvania*, 433 U.S. 36 (1977))
  - Rule of reason, but question of whether restriction is for the benefit of the supplier or the product of a horizontal conspiracy among customers
- Exclusive Dealing (*e.g. Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984))
  - Rule of reason – legality depends upon the extent of foreclosure, length of the exclusive, and justification

Dual Distribution

- Dual Distribution occurs when a franchisor sells its franchise to independent franchisees but then also operates a brick-and-mortar store that may compete with the franchisees:
  - Thus, the franchisor sits in both a vertical and horizontal relationship to the franchisee

Dual Distribution, cont'd …

- Courts generally treat nonprice territorial and customer restraints imposed in a dual distribution situation as vertical restraints, which then will be subject to the rule of reason
- Risks, however, increase when company-owned stores and independent franchisees engage in communications about resale prices or other competitively sensitive information.

- **EVERYTHING ELSE (OR CLOSE TO IT)**

Sherman Act § 2

- Prohibits monopolization, attempts to monopolize, and conspiracies to monopolize
- Elements:
  - Dominant position (large market share)
    - 40-50% may be high enough for "attempt"
  - Exclusionary conduct
    - Limiting rival's access to customers or suppliers
    - Below cost pricing
    - Disparaging rivals
  - Key cases:
    - Verizon Communs. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (monopolization standard)
    - Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993) (attempted monopolization standard)
- Market definition is critical

Robinson-Patman Act

- The Robinson-Patman Act prohibits price discrimination by a seller between competing buyers of goods of like grade and quality
- Nobody likes R-P, seriously
- Specifically, the elements of an R-P Act claim are:
  - Difference in Price (or Benefits)
  - Between Purchasers
  - Goods of "Like Grade and Quality"
  - Sold for Use or Resale in the U.S.
  - Which May Injure Competition or Competitors
  - Unless There is a Defense

Robinson-Patman Act, cont'd…

- R-P Act defenses include:
  - Meeting Competition
  - Cost Justification
  - Sales to Non-Profit or Governmental Entities
  - "For Own Use"
  - Functional Availability
  - Obsolete Goods

QUESTIONS?