Eleanor M. Fox, Rudolf J.R Peritz and Lawrence A. Sullivan, Cases and Materials on U.S. Antitrust in Global Context (2d ed. West 2004)

Appendix A

THE FRAMEWORK FOR U.S. ANTITRUST

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I. Introduction: The Statutes

The core antitrust law of the United States is the Sherman Antitrust Act, enacted in 1890 to stem the growth of combinations and monopolies that were gaining control over business in America. The Sherman Act prohibits contracts, combinations and conspiracies in restraint of trade, and monopolization and attempts and conspiracies to monopolize. The Sherman Act is supplemented by the Clayton Act, enacted in 1914 during the Progressive Era, which prohibits potentially anticompetitive acquisitions, exclusive dealing, tie-ins, and interlocking directorates. The Celler–Kefauver Amendment to the merger provision of the Clayton Act was passed in 1950 at a peak of concentration of business power. Intended to put more teeth into the merger law, it prohibits potentially anticompetitive mergers and acquisitions.

The Federal Trade Commission Act, like the Clayton Act, was enacted in 1914. This statute established the Federal Trade Commission and prohibits unfair methods of competition and unfair or deceptive acts or practices.

In 1936, spurred by price discrimination in favor of big business, Congress adopted the Robinson–Patman Act. The Robinson–Patman Act, which is an amendment to the Clayton Act, prohibits price discrimination in the sale of goods in interstate commerce when it harms competition. (The act does not apply to the sale of services). The central prohibition of the Robinson–Patman Act states that no person may sell the same goods at different prices to different customers where the effect of the discrimination may be substantially to lessen competition in any line of commerce or injure, destroy or prevent competition with one who grants or knowingly receives the benefits of the discrimination or with their customers. An exception is made when the discriminatory low price is cost-justified or necessary to meet competition.

Congress has passed various specialized amendments to the antitrust laws, including 1982 amendments that limit antitrust liability in export trade and foreign commerce, and the National Cooperative Research Act of 1984, which declares that research and development joint ventures shall be judged under a rule of reason and that parties who file notification of their research joint ventures are relieved of treble (but not single) damage liability if their joint venture should be anticompetitive. This statute was revised in 1993 to include production joint ventures.

The text of these statutes is set forth in Appendix B.

II. Antitrust in the World Today

Antitrust is a critical subset of competition policy. Competition policy includes the laws that establish an environment in which free enterprise can flourish, which limit the growth and exercise of power by private firms, and which set rules of the game that protect the integrity of the competition system. The importance of antitrust law and its symbiotic linkage with democracy has been underscored by the adoption of a market system and an antitrust law by nearly every Central and Eastern European nation, upon abolishing Communism and adopting democratic government.

Every industrialized country in the world and most developing countries have an antitrust law. Antitrust laws vary in their emphases; some, like United States law today, focus on efficiency aspects of competition, particularly consumer welfare; some, like the law of some newly democratized nations, focus also on establishing legitimacy of markets by limiting power; some, like the law of the European Union, focus on free movement of goods and services and opportunity for firms without power to compete on the merits. Even within the same nation, the focus of the law may change from time to time as the needs of the nation change. The central mission of United States law has shifted over time from promoting pluralism and access for less well-established people and firms to protecting the freedom of firms to act to enhance efficiency.

III. The Enforcement of the Federal Antitrust Laws

A. The Justice Department and the Federal Trade Commission

The federal antitrust laws may be enforced by the government and by private parties. Two arms of the federal government have antitrust enforcement jurisdiction—the Justice Department, through its Antitrust Division, and the Federal Trade Commission. The Antitrust Division is headed by the Assistant Attorney General in Charge of the Antitrust Division. When the Justice Department decides to sue, it brings suit in the federal courts. The Federal Trade Commission is an administrative agency and has responsibilities for both consumer protection and antitrust. Within the agency is a Bureau of Competition and a Bureau of Consumer Protection. The Director of the Bureau of Competition recommends antitrust cases to be brought. The Commission must approve and issue complaints. The Commission is comprised of five commissioners, each of whom may be appointed for a term of seven years. In an FTC proceeding, the staff tries the case before an Administrative Law Judge. The decision of the ALJ may be appealed to the Commission. If the respondent loses, it may appeal to a federal appellate court. The FTC may seek preliminary relief, e.g. to enjoin a proposed merger, in federal court.

The Department of Justice, through its Antitrust Division, enforces the Sherman Act and the Clayton Act. The Sherman Act is a criminal statute as well as a civil statute. The Justice Department normally chooses to sue criminally only in the event of hard core violations; principally price-fixing, which is a white collar crime. Individuals convicted of a Sherman Act violation may go to jail for up to 10 years and may be fined up to one million, or twice the victim's loss or defendant's gain, whichever is larger. Corporations convicted may be fined up to one hundred million dollars. In cases that it brings civilly, the Justice Department may seek injunctive and other equitable relief, and it may sue for treble damages if the government itself is the victim of the violation.

The Federal Trade Commission may sue to enforce the Clayton Act and the Federal Trade Commission Act. It has no criminal jurisdiction. Pre-merger notification filings are made to both agencies, which decide among themselves which agency will investigate the merger.

B. Private Enforcement

The antitrust laws may be enforced by private parties also. To ease the burden of suit faced by victims of violations, the Clayton Act provides that a judgment for the government shall be prima facie evidence of the violation in a later private suit against the same defendants. Successful private plaintiffs are entitled to three times their losses and attorneys' fees. Congress adopted the treble damage remedy in order to enlist the efforts of private "attorneys general" and thus to provide incentives to detect violations and to sue. The treble damage remedy is codified in Section 4 of the Clayton Act, which states:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The Supreme Court has put important glosses on the language of Section 4 of the Clayton Act. In Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), the Supreme Court held that an overcharged buyer is entitled to recover the whole artificial price increase charged to it by a seller; the defendant seller may not be relieved of liability or damages by proof that the plaintiff passed on the overcharge to downstream purchasers. In Illinois Brick Company v. Illinois, 431 U.S. 720 (1977), the Supreme Court held that indirect purchasers harmed by a price fix may not affirmatively assert that the direct purchaser passed on the overcharge to them.[1] Accordingly, treble damage suits by indirect purchasers are normally dismissed for lack of recoverable damages. However, the Supreme Court carved out an exception to its rule in *Illinois Brick.* An indirect purchaser who is party to a preexisting cost-plus contract or other arrangement that does not present the complex problems of tracing may be permitted to prove that overcharges were passed on to it. The exception is narrowly construed. See Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990). Many states authorize suits by indirect purchasers; and these state authorizations may allow circumvention of the *Illinois Brick* principle.

Brunswick Corporation v. Pueblo Bowl–O–Mat, Inc., 429 U.S. 477 (1977), limited recoverable damages to "antitrust injury," a concept that has had a profound effect in limiting private actions. In *Brunswick*, plaintiff bowling alleys sought to recover profits they lost when a big bowling company bought and revitalized a declining bowling alley that would otherwise have gone out of business. Plaintiffs were injured not by a lessening of competition, nor by anticompetitive acts en route to the lessening of competition, nor by anticompetitive acts made possible by an antitrust violation. They were injured by competition itself. The Court said, at 429 U.S. 489:

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[1] In 1996, NYNEX was the incumbent LEC for New York State. NYNEX subsequently merged with Bell Atlantic Corporation, and the merged entity retained the Bell Atlantic name; a further merger produced Verizon. We use "Verizon" to refer to NYNEX and Bell Atlantic as well.

> We therefore hold that for plaintiff to recover treble damages on account of [Clayton Act] § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations ... would be likely to cause." Zenith Radio Corp. v. Hazeltine Research, 395 U.S., at 125.

Brunswick holds lessons for firms injured by low-price competition. Even when maximum resale price fixing was illegal per se, injury from low prices was held not to be antitrust injury. If a dealer is required by its supplier to hold its prices down and a competitor of the dealer is squeezed from the market as a result of the illegal agreement, an antitrust action does not accrue to the competitor. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990).

While *Brunswick* speaks in terms of recoverable antitrust damages, later opinions speak in terms of standing to sue for antitrust damages. Standing is determined by application of a balancing test, subject to the *Brunswick* principle that one who is harmed only by competition itself may not recover. The Supreme Court has enumerated five principal factors material to a determination of standing:

(1) The harm should be direct rather than remote.

(2) The harm should be of the sort that the antitrust laws were designed to prevent or inextricably intertwined with it.

(3) Intent to harm plaintiff or those in plaintiff's class weighs in favor of standing.

(4) The prospect that standing will lead to duplicative recovery or difficult questions of apportionment weighs against standing.

(5) The prospect that standing will leave significant violations undetected or unremedied weighs in favor of standing.

Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519 (1983); Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982); Verizon Communications v. Law Offices of Curtis V. Trinko, Supreme Court Jan. 13, 2004. See App. G, Concurring opinion.

Victims of violations often bring class actions for their aggregate injuries. Often the cases are brought against numerous defendants, who may be the principal members of an industry charged with price fixing. If plaintiffs prove that defendants violated the law and that the violation caused an impact upon them, and if they prove the amount of their antitrust injury, they are entitled to judgment for their damages, trebled, against all defendant co-conspirators, jointly and severally. If a defendant settles—which would often be at discounted single damages directly attributable to sales by that defendant—plaintiff's claim for damages against the remaining defendants is reduced only by the dollar amount of the settlement. Moreover, a defendant who pays more than the share of damages it has caused directly (e.g., the damages attributable to its own sales at the inflated prices) has no recourse against its co-conspirators. Joint tort-feasors have no right to contribution. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

This structure of private enforcement can sometimes result in extraordinarily large judgments against a few non-settling defendants, who may be among the few hold-outs who decided to go to trial because they believed in the merits of their case (but lost). On the other hand, the prospect of such exposure undoubtedly deters conspiracies.

Private plaintiffs may sue for injunctive relief as well as damages. Under Section 16 of the Clayton Act, "any person" is entitled to an injunction "against threatened loss or damage by a violation of the antitrust laws ... under the same conditions and principles as injunctive relief ... is granted by courts of equity...." To have standing to seek injunctive relief, plaintiffs must be threatened with "antitrust injury," as defined in *Brunswick*, supra.

Through a series of cases after *Brunswick*, the courts have defined "antitrust injury" of a sort that will sustain injunctive relief. In Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986), the Supreme Court dismissed for lack of standing the plaintiff's suit to enjoin a merger of two of its competitors. The Court said that the plaintiff had failed to show how it might suffer antitrust injury; particularly, it had failed to show that the merged firm was likely to engage in price predation on the way to monopolization.

In R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102 (2d Cir.1989), cert. denied, 493 U.S. 815 (1989), however, which is another case against merging competitors, the Court of Appeals for the Second Circuit affirmed a district court decision denying a motion for summary judgment by the merging competitors. The merger would have produced a monopolistic market share (87%). Declaring that the plaintiff/competitor had raised a question of material fact as to whether it was threatened with antitrust injury, the appellate court breathed some life into competitor suits.

Takeover targets form yet another class of merger-suit plaintiffs. Their standing, too, was called into question by the *Brunswick* doctrine. The target, like all other antitrust plaintiffs, must show antitrust injury. Some courts have denied targets standing, apparently per se, on the theory that the target, becoming part of the merged firm, would be party to and not victim of any anticompetitive advantage gained. See, e.g., Central National Bank v. Rainbolt, 720 F.2d 1183 (10th Cir.1983). But in Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.1989), cert. dismissed, 492 U.S. 939 (1989), the appellate court held that the British target of a Luxembourg gold firm and the target's partly-owned American subsidiary both had standing to seek to enjoin the takeover. According to the court, the U.S. firm was threatened with antitrust injury because, following the monopolistic takeover, the new "grandparent" would be likely to shut down the U.S. firm's gold mines while it exploited its Luxembourg gold. The British target had standing because the target would lose its ability to compete independently and because its U.S. interests would be threatened with shutdown.

C. Enforcement of Federal Law by State Attorneys General

State attorneys general may also sue to enforce the federal antitrust laws. They have become major players in federal antitrust litigation, most recently as co-plaintiffs with the federal government in the *Microsoft* case. As *parens patriae* on behalf of natural persons residing in their states, they may seek treble damages, along with costs and attorneys fees. The authorizing provisions, Sections 4C to 4H of the Clayton Act, were added to the law by the Hart–Scott–Rodino Antitrust Improvements Act of 1976. This law expressly allows the use of statistical and sampling means to prove aggregate damages, and it authorizes the payment of damages into one fund. The big-fund recovery is called "fluid recovery." For example, if defendants have fixed the price of pencils at one cent higher than the price that would have prevailed without the conspiracy, and the state attorney general can establish by statistical or sampling means that defendants sold ten million pencils in the state at the elevated price during the relevant time period, the state as parens patriae would be awarded $300,000. The state is not put to the burden of calling as witnesses each of the purchasers of the price-fixed pencils.

After the state collects the damages, individuals may come forward to claim their share of the recovery. Money not claimed may be distributed in any manner that the district court may authorize, or the court may declare the money to be a civil penalty and cause it to be deposited with the state as general revenues. Clayton Act, Section 4E.

States may not sue for damages for injury to their general economy. Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). However, states may seek injunctive relief against violations that threaten their economy. Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945).

In the late 1980s when merger enforcement by the federal agencies was at a low water mark, state attorneys general began to organize for merger enforcement. Through the National Association of Attorneys General ("NAAG"), they issued their own merger guidelines: *http://www.naag.org/issues/issue-antitrust-resolutions.php*. The NAAG guidelines appear to have a somewhat lower threshold for enforcement than the federal agency guidelines (Casebook App. C), principally because they define markets with reference to actual patterns of trade rather than patterns based on a hypothetical price rise; but, as a result of revisions, the NAAG guidelines state that the market definition as described in the federal agency guidelines may be used by the parties before state antitrust officials if supported by sufficient empirical evidence.

Suing under Section 16 of the Clayton Act, the State of California successfully attacked American Stores' acquisition of the stock of one of its major competitors, Lucky Stores, even after the FTC had sued and consented to the acquisition subject to certain minimal divestitures. State of California v. American Stores Co., 495 U.S. 271 (1990). The Supreme Court upheld the district court's grant of a hold-separate order to the state, finding that the state had a reasonable chance of success on the merits and holding that even private parties (and thus states acting on their behalf) may be entitled to divestiture in a merger case if, among other things, they are not barred by laches.

Most famously, 19 states and the District of Columbia joined the federal government in the big monopoly case against Microsoft. See United States v. Microsoft, 253 F.3d 34 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001).

D. The Structure of Enforcement and Its Critics

The structure of enforcement—particularly, the rights of private parties and of states—perennially comes under attack. Some observers claim that the enforcement system makes it too easy for private plaintiffs to win and awards them too much when they do win, and thus that the system encourages frivolous and black-mail lawsuits and by doing so discourages procompetitive conduct. As to consumer class actions, it is claimed that aggressive lawyers take cases for "phantom" plaintiffs on the basis of contingent fees, that they bludgeon settlements of meritless cases, and that the plaintiffs' lawyers are the real beneficiaries of the system. As to suits by competitors, the claim is made that these cases are likely to be perverse. Firms have no interest in suing their competitors, so the argument runs, except to protect themselves against competition. Suppose, for example, that Firm *A* sues competitors *B* and *C* for an allegedly illegal merger. If the merger is price-raising and therefore anticompetitive, *A* will make extra profits under the price umbrella and will not want to stop the merger; if the merger is efficient and procompetitive, *A* stands to be hurt by competition and has the incentive to sue. Suits by takeover targets are called perverse because the target simply wants to abort the deal and sometimes can do so by mere delay. Moreover, suits by state attorneys general are claimed to be political only; the state attorney general, it is said, wants to protect local interests, curry favor with his or her constituency, and become Governor and President. Individuals who urge these views often seek treble damage "reform," class action "reform," narrower private and state attorney general standing, and broader preemption of state law by federal law.

Others see private and state enforcement as an important aid in detecting and deterring violations and enforcing the law. Especially in times of lax federal government enforcement, they see individuals, firms and state enforcers as an important reserve team in the wings. Moreover, it is thought, private enforcement is important to justice: Victims of violations *ought* to be recognized and compensated and violators *ought* to disgorge the fruits of the violation. Supporters of private enforcement disagree with the notion that the private right to sue should be cut back merely because some private cases may be brought for "wrong reasons" and may be without merit. Litigation is expensive. It is not lightly undertaken. It is for the courts to decide the merits. Federal government officials may also bring suits for "wrong reasons"; and federal officials may fail to bring meritorious suits for wrong reasons. Moreover, supporters of generous standing principles challenge as simplistic and unrealistic the notion that if a competitor sues competitors the transaction challenged must be procompetitive. They assert that transactions and their effects are complex; that mergers, for example, even if they may raise prices in some niches, can give the merged firm strategic power to impose costs on their smaller competitors while harming competition at the same time.

E. Some Questions for Discussion

If you were designing the enforcement system, how would you design it? Would you want two arms of federal antitrust enforcement (the Justice Department and the FTC) or only one? Which one? Would you opt for private enforcement? For more than compensatory damages? What multiplier would you urge and for what kinds of suits? Would you allow targets of unfriendly takeovers to wage an antitrust challenge to the takeover, in spite of the fact that the target's management does not have the virtues of competition at heart? Would you allow indirect purchasers to recover their overcharges from price-fixing defendants, even though direct purchasers may sue, too? Would you let private attorneys get contingent fees? Would you allow, or disallow, suits by state attorneys general under federal law? Would you allow state attorneys general to attack mergers that have an important state impact but also an important interstate impact? Are your answers influenced by the fact that we now live in a global antitrust world? The European Commission and numerous other (of approximately 100) antitrust jurisdictions may bring proceedings, too.

To what extent do your answers depend upon the scope of substantive law and on the level of federal enforcement? At times when law is narrowly construed, when plaintiffs' cases are hard to prove, and when federal enforcement is at a low ebb, would you want broader rights for private plaintiffs and states? And at times when even fancifully anticompetitive transactions are likely to be stopped in their tracks, might you be less hospitable to private enforcement? If you desired a stable structure of enforcement and stable rules of standing, appropriate to weather the peaks and valleys of federal enforcement, what system of enforcement would you choose?

IV. The Reach of the Federal Antitrust Laws—The World, the Nation, the State, the City

Competition policy does not extend to all reaches of United States trade and commerce. State and local governments impose restraints that may lessen competition. The federal government enacts regulatory law and creates exemptions. Foreign government regulation may lessen U.S. competition. A variety of government granted privileges and government imposed barriers—including licensing statutes and trade restraints—limit the extent to which pure competitive merit determines success.

With lower barriers to trade in the world, the tension between competition and nationalism, free trade and protected markets, becomes all the more poignant.

A. The Limits of U.S. Antitrust in International Transactions

Transactions that affect American interests increasingly involve foreign commerce. Some challenged acts are directed, authorized, or encouraged by foreign governments. Some are conducted wholly by foreign firms on foreign soil. Some conduct of American firms may cause harm exclusively to foreign interests, and some conduct of foreign firms may harm American interests solely by foreclosing export opportunities or depressing the prices at which American firms sell. At least two very different sets of facts arise from these facts. One, as a matter of statutory construction, how far does the Sherman Act reach?[2] Second, are there other limits to

[2]Order Directing Improvements To Wholesale Service Performance, *MCI Worldcom, Inc.* v. *Bell Atlantic–New York*, Nos. 00–C–0008, 00–C–0009, 2000 WL 363378 (N.Y. PSC, Feb. 11, 2000); Order Directing Market Adjustments and Amending Performance Assurance Plan, *MCI Worldcom, Inc.* v. *Bell Atlantic–New York*, Nos. 00–C–0008, 00–C–0009, 99–C–0949, 2000 WL 517633 (N.Y. PSC, Mar. 23, 2000); Order Addressing OSS Issues, *MCI Worldcom, Inc.* v. *Bell*

legislative jurisdiction and to the jurisdiction of American courts derived from U.S. foreign relations law or international law in view of the sovereign interests of foreign nations?

The Supreme Court, in an early opinion by Justice Oliver Wendell Holmes, held that the Sherman Act stops at U.S. shores. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). Within two decades after *American Banana*, however, the holding of this case was deeply eroded. In United States v. Sisal Sales Corporation, 274 U.S. 268 (1927), the Supreme Court held the Sherman Act applicable to conspiracies and a monopoly in Mexico, involving both private parties and foreign government officials, which threatened to have a direct anticompetitive impact in the United States. Some conspiratorial meetings were held in the United States but the situs of the monopoly and the principal situs of the conspiracy was Mexico.

It soon became common ground that the Sherman Act applied even to foreign actors acting abroad when the actors intended to and did affect U.S. commerce and the effects were something more than insubstantial ripples. E.g., United States v. Aluminum Co. of America ("Alcoa"), 148 F.2d 416 (2d Cir.1945); United States v. Watchmakers of Switzerland Info. Center, 133 F.Supp. 40 (S.D.N.Y.1955). This principle became known as the "effects" doctrine, or the *Alcoa* doctrine. *Alcoa* was often said to hold that if acts abroad have effects within the United States, they are caught by the Sherman Act.

The *Alcoa* doctrine always had limits. U.S. courts could not order a foreign firm to do on its home territory that which its home country commanded it not to do, or not to do on its home territory that which its home country ordered it to do. Watchmakers of Switzerland, supra. Moreover, there were (and are) a trio of defenses: (1) Foreign sovereign immunity—The sovereign is immune from suits challenging its sovereign acts (Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1602); (2) Act of State–Courts may not question the validity of the act of a sovereign taken on its own territory; see, for scope and limits, W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1990); and (3) Foreign sovereign compulsion—If a foreign sovereign compels its own national to do an act, particularly on its own territory, the performance of that act is not a violation of the U.S. law. See Watchmakers of Switzerland, supra.

Within these limits, the U.S. law was applied broadly to catch restraints imposed from abroad that hurt American consumers (e.g., offshore cartels with targeted U.S. effects). U.S. law was also applied to protect American exporters' access to foreign markets. E.g., Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962). Moreover, U.S. law was applied, at least sometimes, to protect foreign firms and foreign consumers from restraints by American firms abroad even when the restraints were permitted by host country law and offended only U.S. law. E.g., Waldbaum v. Worldvision Enterprises, 1978–2 Trade Cas. ¶ 62,378

Atlantic–New York, Nos. 00–C–0008, 00–C–0009, 99–C–0949, 2000 WL 1531916 (N.Y. PSC, July 27, 2000); *In re Bell Atlantic–New York Authorization Under Section 271 of the Communications Act to Provide In–Region, InterLATA Service In the State of New York*, 15 FCC Rcd. 5413 (2000) (Order); *id.*, at 5415 (Consent Decree).

(S.D.N.Y.1978).

Some lawsuits against foreign firms were class actions for treble damages. In many of these, plaintiffs served extensive, American-style discovery requests. The expansive reach of U.S. antitrust law, combined with liberal U.S. discovery practice and the risk of enormous money judgments against losing defendants triggered angry reactions by America's trading partners. Great Britain led the way in objecting to U.S. jurisdiction over British nationals who acted on British territory. See Rio Tinto Zinc Corp. v. Westinghouse Electric Corp., [1978] A.C. 547 (H.L.). Great Britain enacted a "blocking and claw-back" law which blocks discovery of documents located in Britain and entitles British nationals against whom treble damage judgments are entered to "claw-back" in British courts two-thirds of the amount of the judgment paid in the United States. The British Protection of Trading Interests Act of 1980, c. 11 s. 1–4.

Indirectly at least, pressure was put on U.S. courts to curb their "excesses" in exercising jurisdiction over foreigners. As a result, many U.S. courts retreated from the simple *Alcoa* test. They would require that foreign defendants' conduct have a direct, substantial and reasonably foreseeable effect on U.S. commerce, and often purport to balance foreign contacts and interests against U.S. contacts and interests. E.g., Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir.1979); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir.1976). See Restatement of Foreign Relations Law (Third) §§ 402, 403, 425 (1987). But see Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 949–50 (D.C.Cir.1984). If U.S. interests are directly and significantly threatened and there is no direct conflict that makes defendant's compliance with both sets of laws impossible, the balance would virtually always be struck in favor of U.S. jurisdiction.

In the early 1980s when the United States faced a serious export deficit, U.S. firms asserted that applications of U.S. law to their international transactions handicapped them in their foreign trade and investment. The complaints of the U.S. firms found sympathy in the Commerce Department and, generally, in the Administration. In response, Congress adopted the Export Trading Company Act and the Foreign Trade Antitrust Improvements Act of 1982. The Export Trading Company Act provides a procedure whereby U.S. firms that export or propose to export may seek a certificate of review. To qualify, they must meet certain standards, most notably, that their export activity will not lessen competition within the United States nor create a substantial restraint of the export trade of any competitor. A certificate holder is exempt from the U.S. antitrust laws for activities described in the certificate, except that an injured person may sue for an injunction and single damages if, contrary to predictions, the export activity does lessen competition within the United States or substantially restrain the export trade of a competitor.

The Foreign Trade Antitrust Improvements Act of 1982 amends the Sherman Act and the Federal Trade Commission Act. The act is a limitation on the applicability of the Sherman and FTC Acts. The limitation expressly does not apply to conduct involving import trade or commerce. As to conduct involving all other (i.e., non-import) U.S. trade or commerce with foreign nations, the Sherman and FTC Acts are declared inapplicable unless the conduct has a "direct, substantial and reasonably foreseeable effect" on U.S. commerce or on the export trade of a person engaged in such trade in the United States.

The principal intended effect of this act is to remove from the scope of the U.S. antitrust laws U.S. firms' acts in foreign commerce where the only persons hurt are foreign competitors or foreign consumers. Thus, as far as the U.S. antitrust laws are concerned, U.S. firms may form export cartels as long as the cartel activity does not spill over into price rises in the United States and does not otherwise harm U.S. competition.

While the reach of U.S. law is cut back to U.S. shores where the only interests at stake are those of foreign consumers and foreign competitors,[3] other nations may and many do apply their own competition laws to imports into their countries. Thus, while the U.S. law may not prohibit Americans from price-fixing into the European Community, the law of the European Community prohibits importers from implementing a price-fixing conspiracy therein. Ahlstrom Osakeyhtio v. Commission (Wood pulp), Cases 89 et alia/185, [1988] ECR 5193.

In the 1990s there were two major sets of developments, one regarding inbound trade and the other regarding U.S. exports. In the first category, the U.S. Supreme Court decided Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), which concerned conspiracies of U.S. and London insurers and reinsurers to cut back the scope of the insurance package that they would offer to insureds in the United States. Affirming denial of a motion by the London insurers to dismiss the case against them, the Supreme Court held that existence in the UK of an insurance regulatory regime that entrusted self regulation to the industry and did not proscribe the challenged conduct did not create a conflict of a sort that would require or allow dismissal of the case on the basis of comity. The Court's sweeping language ("the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States") threw into question the continued viability of the balancing approach of cases such as *Timberlane*, supra.

The second prong involves U.S. exports. U.S. business had persistently complained that Japan and Japanese business blocked the entry of U.S. firms by tariff and non-tariff barriers. In 1991–1992 the United States was involved in negotiations with Japan called the Strategic Impediments Initiative, or SII. While the United States Trade Representative was negotiating with the Japanese government for better terms of trade, the Assistant Attorney General in Charge of the Antitrust Division, James F. Rill, Jr., announced that he was looking for the right case to bring against American subsidiaries of Japanese firms that were maintaining an exclusionary cartel in Japan to block access of Americans to the Japanese market. The Clinton Administration incorporated the concept into the 1995 Guidelines on International Operations. (See Casebook Appendix E). Is such an initiative available under the Sherman Act? Does the law reach so far?

At the turn of the twentieth century and the beginning of the twenty-first, a new set of

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[3]Respondent also relies upon *United States* v. *Terminal Railroad Assn. of St. Louis*, 224 U.S. 383 (1912), and *Associated Press* v. *United States*, 326 U.S. 1 (1945). These cases involved *concerted* action, which presents greater anticompetitive concerns and is amenable to a remedy that does not require judicial estimation of free-market forces: simply requiring that the outsider be granted nondiscriminatory admission to the club.

extraterritorial cases occupies the courts: What are the limits of U.S. law when purchasers in foreign markets sue for injury from illegal conduct in the United States (In re Microsoft Corp. Antitrust Litigation, 127 F.Supp.2d 702 (D.C. Md. 2001)), or for injury from a global conspiracy that included or impacted the United States? E.g., Empagran S.A. v. F. Hoffman–LaRoche, Ltd., 315 F.3d 338 (D.C. Cir. 2003), petition for cert. granted; Kruman v. Christie's Int'l PLC, 284 F.3d (2d Cir. 2002); Den Norske Stats Oljeselskap As v. Heeremac v.o.f., 241 F.3d 420 (5th Cir. 2001). Should all persons injured, no matter where, be entitled to U.S. treble damage remedies, as long as they were directly, substantially and foreseeably injured by U.S. conduct or even by a conspiracy with direct U.S. effects? (The federal circuits are split.)

In view of the interdependence of the nations of the world, should nations have broad scope for application of their law to foreign acts that hurt their citizens? Are supranational laws needed? What form should supranational law take? Must new institutions be created to enforce it?

B. The Limits of U.S. Antitrust in Domestic Transactions

1. Interstate and Intrastate Commerce

The Sherman Act covers only agreements or acts "in restraint of trade or commerce among the several States, or with foreign nations." The Clayton Act has a similar commerce requirement. However, the threshold requirement for finding a sufficient impact on interstate commerce is quite low. In Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991), the plaintiff, an ophthalmologist on the staff of a Los Angeles hospital, claimed to be the victim of a boycott carried out through a peer review process and resulting in termination of his staff privileges at the hospital. The defendants sought to have the case dismissed for lack of interstate commerce. Defendant relied on the fact there was no allegation and could be no proof that the termination of the doctor's staff privileges itself affected interstate commerce. The Supreme Court rejected defendants' argument, by a five to four vote. The Court held that effect on commerce must be measured "by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which [the plaintiff] has been excluded." Since the market from which plaintiff was excluded was in interstate commerce and the peer review process was also in interstate commerce, the jurisdictional requirement was satisfied.

Virtually all states have antitrust laws of their own; in most cases the language is quite similar to that of the Sherman Act. State antitrust law governs restraints in intrastate commerce and may apply as well to restraints that have effects both in and out of the state. Thus, in many transactions, both federal and state law may apply.

2. Federal Exemptions

Federal law contains a series of exemptions from the federal antitrust laws. Some exemptions are explicit; e.g., the labor exemption in Clayton Act § 6, and an exemption for restraints in the business of insurance other than boycotts, 15 U.S.C.A. §§ 1011, 1012 (1988)(McCarran–Ferguson). Others are implicit; an exemption may be implied where necessary to make a regulatory statute work. United States v. National Ass'n of Securities Dealers, 422

U.S. 694 (1975); Gordon v. New York Stock Exchange, 422 U.S. 659 (1975).

As the Supreme Court has stated, "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust laws and regulatory provisions." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350–51 (1963). Accordingly, even in regulated industries such as the telephone industry (pre-breakup), the electric power industry, and the health care industry, the antitrust laws apply. Firms must comply with the antitrust laws wherever they can feasibly do so and comply with the regulatory statute at the same time. E.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. American Telephone and Telegraph Co., 524 F.Supp. 1336 (D.D.C.1981). But compare *Trinko*, App. G.

There are several other exemptions from antitrust that are simply vestiges of the past. The reserve system of professional baseball is not subject to the federal antitrust laws because, in 1922 when the first antitrust test against baseball came before the Supreme Court, baseball games were likened to exhibitions and were deemed not to be a subject of "commerce." Federal Baseball Club v. National League, 259 U.S. 200 (1922). While the concept of "commerce" greatly expanded over the years and now clearly includes professional sports, Congress never overruled the 1922 precedent despite the repeated introduction of bills to do so. The exemption continues in view of Congress's "positive inaction." See Flood v. Kuhn, 407 U.S. 258, 283 (1972). See also Square D Company v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986), reaffirming the "Keogh" rule which holds that rates filed by carriers with the Interstate Commerce Commission are not a basis for treble damages.

3. State Action

The third and perhaps most important exception from competition policy is state and local government regulation. In many areas of business, state or local regulation substitutes for market forces. State regulation is an incident of state sovereignty and is not invalidated by reason of its tendency to restrain trade or commerce as long as it does not impose an undue burden on interstate commerce or conflict with the federal antitrust laws. Thus, a Maryland law prohibiting producers and refiners of gasoline from operating retail service stations in the state was held valid and not preempted either by the commerce clause or by the antitrust laws. The Court said: "[I]f an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the State's power to engage in economic regulation would be effectively destroyed." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978)(footnote omitted). On the other hand, the state has no power to authorize or even order private persons to do an act that violates the federal antitrust laws (such as to fix prices) and give the actors immunity from the federal antitrust laws. Schwegmann Bros. v. Calvert Distillers, 341 U.S. 384 (1951). Such state action would create a direct conflict with the federal law and is therefore preempted. Id. See also California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ("Midcal").

If not preempted or an impermissible regulation of commerce (see Section V infra), state action is valid no matter how seriously it restrains competition. E.g., Hoover v. Ronwin, 466 U.S. 558 (1984)(alleged cartel to limit the number of lawyers in Arizona). Moreover, state officials, local governments and private persons carrying out state policy may be accorded the benefits of state action immunity.

The case law defining the contours of the state action exemption has been evolving for half a century. We summarize its evolution.

The first state action case was an action by a California raisin farmer against California state officials to enjoin the officials from carrying out the state's raisin cartel—a stabilization program designed to cure the evils of overproduction of raisins in California. The Supreme Court dismissed the case, holding that the Sherman Act was not intended to prohibit states from exercising control over their own officials in imposing restraints on their domestic commerce. Parker v. Brown, 317 U.S. 341 (1943). Thus was born the *Parker* doctrine, which, for many years, was thought to shield broadly both public and private acts undertaken pursuant to state and local regulation.

Beginning in the mid 1970s, the Court chipped away at the doctrine. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), in a suit against state and county bar associations for lawyer fee-fixing through minimum fee schedules, the Court upheld liability despite the fact that the state bar, which in one capacity was an arm of the state, approved of and facilitated the fee schedules. The Court said: "It is not enough that ... anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign." Id. at 790. Shortly thereafter, in Cantor v. Detroit Edison Company, 428 U.S. 579 (1976), the Supreme Court held that an electric utility's practice of providing its customers with "free" light bulbs along with electricity was not immune from antitrust scrutiny although the tie-in was ordered to be carried out by a state-approved tariff. The Court stressed the fact that Detroit Edison itself had originated the light bulb plan and that the state had no policy regarding light bulbs.

In the following year the Court decided *Midcal*, supra, which remains one of the principal state-action authorities. By statute, California had directed wine producers to fix resale prices in the state, and a discounter had failed to comply with its supplier's price list. The Court held the state statute invalid. The Court ruled that valid state action must meet a two-prong requirement: (1) The state must have a clearly articulated and affirmatively expressed policy to replace competition with regulation, and (2) there must be active supervision by the state. California had failed to meet the first prong.

Meanwhile, there evolved a line of cases involving municipal action. Antitrust cases were brought against cities, and the cities moved to dismiss on grounds that they, the cities, stood in the place of the state and were entitled to assert the state action exemption. In City of Lafayette v. Louisiana Power and Light Company, 435 U.S. 389 (1978), the Supreme Court held that municipal action is not exempt from the federal antitrust laws. Cities are not sovereign and they do not need the freedom to take governmental initiatives that may impair competition, as do the states. Autonomous city regulation (said the Court) creates the danger of parochial restraints at the expense of the public. Therefore, exemption must depend upon whether the state authorized the municipality to operate as it did or whether it "contemplated the kind of action complained of." 435 U.S. at 413.

Local officials' fears of litigation were further fueled by the Supreme Court's decision in Community Communications Company v. City of Boulder, 455 U.S. 40 (1982). Boulder was a home rule city. Under the Constitution of the State of Colorado, a home rule city's laws were supreme, even in the event of conflict with laws of the state. Nonetheless, Boulder's allegedly anticompetitive cable ordinance (which temporarily prevented an incumbent from expanding) was held subject to antitrust scrutiny.

Lafayette and *Boulder* opened the door to a plethora of challenges to cities' social regulation. Claiming that city taxi cab regulation, which limits entry and price, was an unfair method of competition in violation of the Federal Trade Commission Act, the FTC sued two cities—Minneapolis and New Orleans—seeking to dismantle the regulation. 46 BNA Antitrust & Trade Reg. Rep. 970 (May 17, 1984). On the private front, landlords in Berkeley, California sued Berkeley, claiming that its rent stabilization ordinance was both anticompetitive and unconstitutional.

The FTC attack on city taxi regulation failed when the states came to the aid of their cities; they specifically authorized the cities' taxi regulation, and mooted the suits.

In the private attack on rent control, the City of Berkeley won. The Court held that the Sherman Act did not preempt the rent control ordinance because the ordinance did not compel or authorize conduct that was illegal; it did not, for example, compel the landlords to combine and fix prices. Fisher v. City of Berkeley, 475 U.S. 260 (1986).

In 1984, Congress passed the Local Government Antitrust Act, relieving cities and city employees acting in an official capacity of treble damages for violation of the antitrust laws. The statute does not immunize local governments or officials from injunctive relief.

A remaining question on local government action was clarified in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). Active state supervision is not a requirement where the actor is a municipality. Merely, there must be clear state articulation of a policy to replace competition with regulation. This requirement is satisfied if the state "has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects."

Also in 1985, the Court held that a private party seeking the benefit of the state action exemption need not be acting pursuant to *direction* by the state. It is enough that the state has a policy to permit the anticompetitive activity and that the state actively supervises the outcome. Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985) (carriers combined in rate bureaus to fix proposed tariffs).

In 1992 the Court clarified the second prong of *Midcal:* Active state supervision is a serious and demanding requirement, to assure that the activity is properly attributable to the state. The state must play a substantial role in determining the specifics of the conduct. Thus, a mere negative option of the state to disapprove jointly filed insurance rates does not qualify for state action immunity, absent detailed scrutiny by the state. FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).

In short, action that is an act of the state itself is exempt from the antitrust laws. An act of a city that is authorized by the state pursuant to a clearly articulated policy to replace competition with regulation or that is authorized by the state and entails restraints that are foreseeably anticompetitive is exempt. An act of a private party that is directed or permitted by the state (or by an authorized city) pursuant to such a clearly articulated policy and that is actively supervised by state or local government is exempt. If the scope of these resulting exemptions is unduly broad, recourse lies with Congress.

4. Petitioning Government and Political Boycott

Fourth and finally, there is a right to petition and lobby for government action, even by competitors in combination with one another and even though the conspirators' sole intent is to kill the competition. This exception is called the *Noerr-Pennington* doctrine, named after Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965). The doctrine applies only when government action is seriously invoked and not when the petitioning is mere sham. California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508 (1972).

A situation qualifies as a sham only when the defendant does not genuinely invoke government action. Where a dominant firm lobbied government officials in order to procure anticompetitive legislation, giving them gifts and campaign contributions, the defendant did not lose its *Noerr-Pennington* immunity. The Court said that the immunity would be available even if the defendant procured the government action by illegal means such as bribery, or if the defendant "conspired" with the legislators to procure the result, or if the outcome was against the "public interest." "[T]he antitrust laws regulate business, not politics...." City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991). A lawsuit may be a sham if it is "objectively baseless" and is " 'an attempt to interfere *directly* with the business relationships of a competitor' " through the use of the government process (the court system) rather than through the outcome of the lawsuit. Professional Real Estate Investors v. Columbia Pictures, 508 U.S. 49 (1993).

While the *Noerr-Pennington* doctrine shields conduct designed to hurt competitors by getting government action, a related concept shields conduct designed to get political action by hurting traders; i.e., grass-roots boycotts. NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

The Supreme Court qualified the political boycott exception in FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990). There, lawyers who regularly accepted appointments by the District of Columbia court to represent indigent criminal defendants ("CJA regulars") lobbied for an increase in their $20 and $30 per hour statutorily prescribed fees. They claimed that higher fees were necessary to attract sufficient lawyers and to provide proper representation to the indigent defendants. When lobbying failed, almost all of the CJA regulars engaged in a boycott to call attention to their plight. They agreed among themselves to accept no new cases until their fees were raised. The lawyers created a crisis, and the D.C. Council raised their fees. Noting that the lawyers' acts were both a boycott and a price fixing agreement, that the lawyers had restrained trade to get government action rather than seeking government action to restrain trade, and that the lawyers themselves stood to profit financially from their boycott and cartel, the Court held the activity illegal. It rejected both *Noerr-Pennington* and First Amendment defenses.

V. The Commerce and Supremacy Clauses and the Reach of Competition Policy

The Commerce Clause of the Constitution of the United States provides that Congress shall regulate interstate commerce. State regulatory statutes may run afoul of the Commerce Clause if they discriminate against interstate commerce, regulate wholly out-of-state commerce, or impose an undue burden on interstate commerce. A Connecticut statute required out-of-state shippers of beer to affirm that their posted prices for beer sold to Connecticut wholesalers were no higher than the prices at which the shippers sold the same products in bordering states at the time of the posting. The Supreme Court held that the statute impermissibly burdened and discriminated against interstate commerce and was unconstitutional. Healy v. Beer Institute, Inc., 491 U.S. 324 (1989).

In West Lynn Creamery v. Healy, 512 U.S. 186 (1994), the Supreme Court held unconstitutional a Massachusetts pricing order that taxed all milk sold in or into the state, and directed the distribution of all of these tax moneys to the Massachusetts dairy farmers, who were struggling to compete with lower-cost out-of-state dairy farmers. The Supreme Court characterized the order as "economic protectionism" which the dormant commerce clause prohibits. Note, however, that U.S. law, unlike European Community law, does not prohibit state subsidies, and the Court was able to reach its conclusion only in view of the fact that a tax was involved, even though the tax itself was non-discriminatory.

The Supremacy Clause provides that federal law shall be supreme; it prevails over, or preempts, any inconsistent state law to the extent that interstate commerce is implicated. Federal law can preempt state law by express language or by language from which Congress's intent to preempt is made clear. Also, federal law can preempt state law by occupying an entire field so that there is no room for state law; and federal law is preemptive where the state law will necessarily undermine the scheme of the federal law. Courts are reluctant to find preemption by implication, however. In CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987), the Supreme Court held that a state takeover statute that gave extra benefits to a local takeover target was not preempted by the Williams Act (and also that it did not impose an undue burden on interstate commerce in securities); and in California v. ARC America, 490 U.S. 93 (1989), the Supreme Court held that a state antitrust law that allowed indirect purchasers to recover their antitrust damages was not preempted by the Clayton Act, even though the Clayton Act (under the Illinois Brick doctrine) disallows damage recovery by indirect purchasers, largely because proof complications would unduly burden the system.

In connection with mergers that threaten to cause both local and interstate effects, both state and federal law may apply to the same transaction. The laws of several foreign nations may apply as well if the merger has a transnational dimension. Suppose, when Mobil sought to take over Marathon, Mobil worked out a consent decree with the federal government agreeing to spin off the Yates oil field; the federal government then regarded the takeover as procompetitive; but Marathon sued under the Ohio antitrust law and the Ohio state court judge had a more negative view of the competitive effects of the takeover. Could the Ohio court enjoin the merger? Do the federal merger laws preempt the Ohio law, in its application? Would the Ohio injunction constitute an undue burden on interstate commerce? See State of California v. Texaco, Inc., 762 P.2d 385, 399, 415–30 (Cal. Sup. Ct. 1988)(Mosk, J., concurring and dissenting, regarding the possible application of California antitrust law to the Texaco/Getty merger).

Public policy issues of this sort are magnified in a more nearly integrated world of multitudinous antitrust enforcers, as they were in the case of the planned merger of General Electric and Honeywell—approved by U.S. authorities and prohibited by the European Commission. European Commission decision, Case COMP/M 2220, July 3, 2001, appeal pending.

VI. End Note

This essay sets out the procedural and jurisdictional limits of U.S. antitrust and examines the scope for and balances between various centers of sovereign authority. The Casebook addresses the substantive scope of antitrust, with occasional reference to the procedural and practical framework of the law.

There is a distinct interplay between substance, procedure, limits of competence, and enforcement patterns. When substantive scope is thought to have expanded too far, new procedural rules and doctrine—such as standing rules—tend to develop in ways that will rein it in. When the prime U.S. enforcer (the federal government) under-enforces the law, other enforcers—such as the states—step in. When a nation treads too far on to the territory of another nation, the response of the offended sovereign, and counter-reactions of the first, set in motion the creation of a new equilibrium.

Has U.S. law struck the proper balance between national concerns and foreign concerns? between federal concerns and state and local concerns? between competition policy and other federal policies? Does U.S. law reflect a proper understanding of the place of and possibilities for competition law within a nation and within the world?