Study B-750 March 16, 2023

First Supplement to Memorandum 2023-16

Antitrust Law: Presentation

Professor Thomas Greene made a slide presentation to the Commission at the March 16, 2023 meeting, discussing monopoly and monopsony. Professor Greene gave permission to reproduce his slides. They are attached.

Respectfully submitted,

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Monopoly and Monopsony

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California Law Revision Commission

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UC Law San Francisco

Disclaimer

The views expressed are those of the presenter and do not necessarily represent the views of the U.S. Department of Justice or UC Law SF.

Today's Agenda

- Monopolization, attempted monopolization and conspiracy to monopolize under federal law
  - Language, brief history, elements
  - Key cases; burden shifting
- Overview: Abuse of dominance (EU)
- Gaps in current California law
- Buy-side antitrust
  - Brief history
  - Monopsony
  - Recent cases and issues

Nomenclature

- Monopoly
  - According to the OED, term first used by Sir Thomas More in 1534 in his book *Treatise upon the Passion*.
  - From the Greek, this comes from the combination of “monos” (only or one) and “polein” (to sell).
- Monopsony
  - A word used first by Cambridge economist Joan Robinson in her classic 1932 book *The Economics of Imperfect Competition*
  - She consulted with a Greek scholar for a word that would be analogous to monopoly but focused on the purchase of goods or services.
  - Generally, this book focused on determining why employees with the same skills and credentials received significantly different rates of pay, which she concluded was related to employer market power.
- *Monopolization*
  - In this presentation, this covers violations of Sherman Act, § 2. These violations can cover both sell-side and buy-side transactions

Federal Monopolization Law (15 U.S.C. § 2)

Sherman Act, § 2 (15 U.S.C. § 2); Key Text

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or if any other person, $1,000,000 or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.

Timeline

Standard Oil (1911)

- First articulation of Rule of Reason
- Initial development of section 2 law

U.S. Steel (1920)

- Permissive view of dominant firm behavior

Thurman Arnold Revives Antitrust (1938-1943)

- *Lorain Journal (1951)*
- *Alcoa* (1945)

Bork's Antitrust Paradox Published (1978)

- Deep skepticism about exclusion theories (but approves *Lorain Journal*)
- Inspires decisions like *Brooke Group* (1993) and *Trinko* (2004)

Post-Chicago Push-Back

- *Aspen Skiing* (1985)
- *Microsoft* (2001)

United States v. Microsoft, 253 F.3d 34 (2001)

Microsoft-Paradigmatic § 2 case

- Updates the power + conduct paradigm articulated in ALCOA
- Monopoly power can be proved using direct evidence or inferred from circumstantial evidence of a dominant market share in a relevant market
- Purported improper conduct is assessed using a burden-shifting framework
    - Step 1: Plaintiff demonstrates anticompetitive effects on competition of challenged restraints
    - Step 2: Defendant can rebut this evidence by demonstrating that the challenged conduct has procompetitive effects, which cannot be achieved in a less anticompetitive way
    - Step 3: Plaintiff can rebut defendant's evidence by demonstrating that the defendant's claims are pretextual, can be achieved by less restrictive means, or that the harm from the challenged conduct outweighs the asserted benefits.
- Also determined that antitrust applies to efforts to eliminate nascent competitors and that network effects can be powerful barriers to entry.

Disintermediation Threat According to Bill Gates

Gates identified "a new competitor 'born' on the Internet" -- Netscape.

- "Their browser is dominant, with 70% usage share, allowing them to determine which network extensions will catch on. The are pursuing a multi-platform strategy where they move the key API into the client to commoditize the underlying operating system." [citations omitted]
- Gates stated that Netscape was "creating a product that would either reduce the value or eliminate demand for the Windows operating system if they continued to improve it and we didn't keep improving our product." (DOJ Proposed FOF's at 56.1(i)), https://www.justice.gov/atr/usdoj-antitrust-division-us-v-microsoft-corporation-browser-and-middleware-findings-fact.

Direct Evidence of Monopoly Power

- ***Definition: "***The Supreme Court defines monopoly power as 'the power to control prices or exclude competition.' [] More precisely, a firm is a monopolist if it can raise prices substantially about the competitive level." *Microsoft*, 253 F.3d at 51 (citations omitted).

- ***Pricing:***
  - Per trial court, "the company set the price of Windows without considering rivals' prices

- ***Successful Exclusion:***
  - Also per lower court, Microsoft's "pattern of exclusionary conduct could only be rational 'if the firm knew that it possessed monopoly power.'"

- ***Such evidence ordinarily only found in conduct cases***

Circumstantial (or Indirect) Proof of Monopoly Power

Inference of market power from market share:

- Defined relevant market as market for PC operating systems
  - Excluded Apple computers, information appliances and middleware

- PC market share protected by so called "Applications Barrier to Entry:"
  - Most consumers prefer OS that has a large number of applications
  - Most developers prefer to write applications for an OS that already has lots of users
  - Meant that competitors could not enter the OS market easily (or at all)
  - Example of what is sometimes referred to as a "Network Effect" or a "Virtuous Cycle"

- Within the defined PC operating system market, Microsoft had a 95% share

Market Definition is a Big Deal (Because Market Share is a Big Deal)

- In ALCOA, the Court could have concluded that Alcoa had shares ranging from 30+% to 90%, the figure it found correct.

- "Lake Erie" defense: In a proposed merger of cola manufacturers, what is in the market:
    - Only carbonated cola drinks?
    - All carbonated beverages?
    - All fruit-flavored drinks?
    - All bottled waters?
    - All potable water (so include Lake Erie?)

- Various econometric tools for determining what is in or out of a market

- *Key point*: Plaintiffs typically plead narrow markets (to increase shares within the chosen market) while defendants typically argue for broad markets.

How much share do we need today?

- *Bl. Cross & Bl. Shield of Wis. v. Marshfield Clinic,* 65 F. 3d 1406, 1411 (7th Cir. 1995) ("Fifty percent is below any accepted benchmark for inferring market power from market share.") (Posner, C.J.).

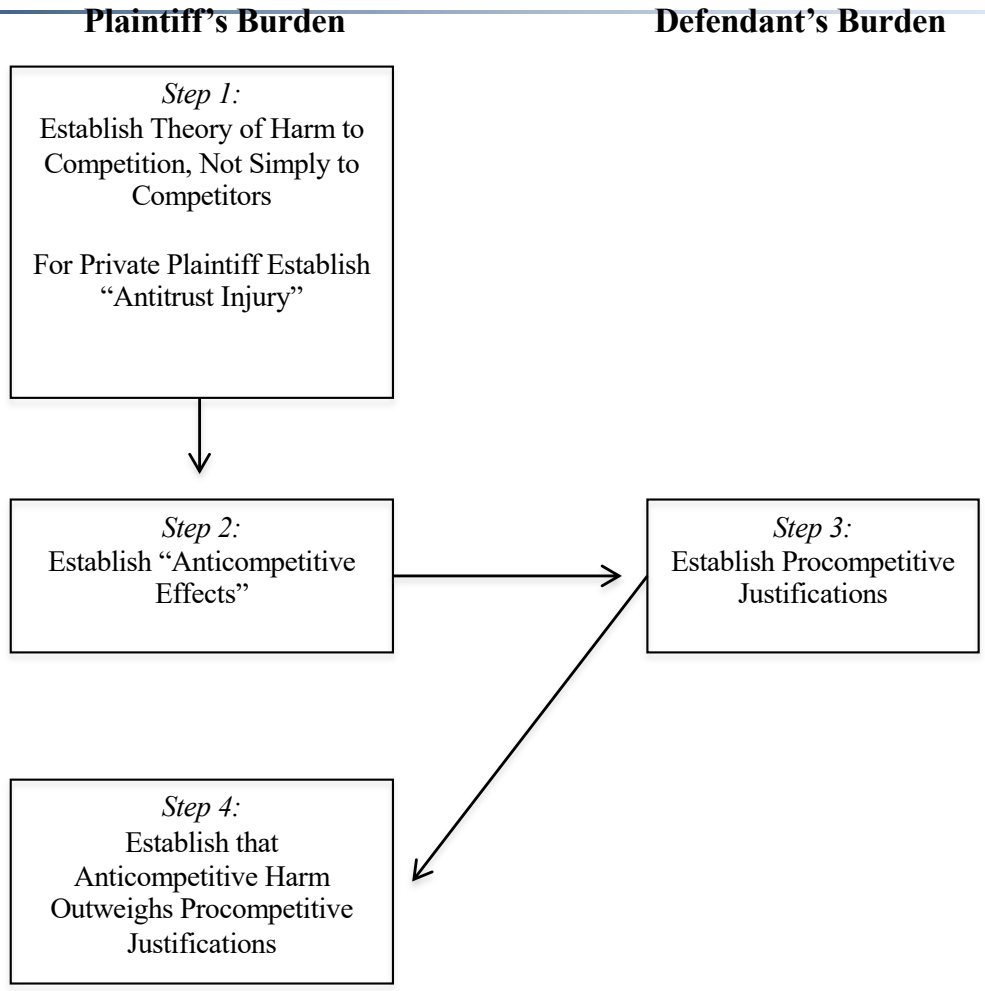
- *Image Tech. Servs. v. Eastman Kodak Co.,* 125 F.3d 1195, 1206 (9th Cir. 1997) *(*citing *Am. Tobacco Co. v. United States,* 328 U.S. 781, 797 (1946)) (65% market share generally required to establish a prima facie case of market power")

- 1 Section of Antitrust Law, Antitrust Law Developments § 2B (8th ed. 2017) ("The greatest uncertainty exists when market shares are between 50 percent and 70 percent.")

Exclusionary Conduct: Sample Formulations

- Growth "not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade."
    - *United States v. Standard Oil*, 221 U.S. 1, 74-76 (1911).
- Supreme Court contrasted "willful acquisition or maintenance of [monopoly] power" with growth arising from a "superior product, business acumen, or historical accident."
    - *United States v. Grinnell Corp*., 384 U.S. 563, 570-571 (1966).
- "'[E]xclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."
    - *Aspen Skiing Co. v. Aspen Highlands Ski Corp.,* 472 U.S. 585, 605 n. 32 (1985) (quoting P. Areeda and D. Turner, *Antitrust Law* 78 (1978)).

Microsoft's Structured Analysis (A. Gavil *et al.*, *Antitrust Law in Perspective 4th* , Fig. 4.2 (West 2022))



Microsoft's Restrictions: Examples

- *Exclusionary Contracts*: "By ensuring that the "majority" of all IAP subscribers are offered IE either as the default browser or as the only browser, Microsoft's deals with the IAPs clearly have a significant effect in preserving its monopoly; they help keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly." *Microsoft, 253 F.3d at 70.*

- *Technical Restrictions:* "[T]he OEM channel is one of the two primary channels for distribution of browsers. By preventing OEMs from removing visible means of user access to IE, the license restriction prevents many OEMs from pre-installing a rival browser and, therefore, protects Microsoft's monopoly from competition that middleware might otherwise present." *Id.* at 61.

Microsoft's Justifications

Have an "absolute and unfettered right to use its intellectual property as will"

- No basis
- Note similarities to rejected defense in *Lorain Journal*

Reduced consistency and stability of platform

- No basis

Substitution of shell significant alteration in look/feel of Windows

- Big change
- On balance, a marginal anticompetitive effect, so not exclusionary

Nascent Threats Sufficient

In reviewing 'nascent threat':

- Issue is whether the exclusion is "type of conduct that is reasonably capable of contributing to defendant's continued monopoly power?"

Conclusion:

- "[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will."

- Ample findings about potential middleware threat to Microsoft

Duty to Deal Cases: *Otter Tail Power*, *Aspen Skiing and Trinko*

Refusals to Deal: Classic Cases

U.S. v Terminal RR Ass'n (1912)

- Denial of access to strategic RR bridge

Associated Press v. U.S. (1945)

- Denial of access to AP news feed by second newspaper in market

Otter Tail Power v. U.S. (1973)

- Denial of access to interstate power lines needed to "wheel" power

- *Aspen Skiing Co. v. Highland Ski Co.* (1985)
  - Termination of joint 4-mountain pass

Verizon v. Trinko, 540 U.S. 398 (2004)

Pre-History

U.S. v. AT&T

- AT&T sued under § 2 (1974)
- Consent decree entered (1982)
- Divestitures effectuated (1984)
- Complex regulatory decree designed to keep “Baby Bells” and AT&T from resuscitating their historic dominance
- Credited with an explosion in innovation in telecommunications

Telecommunications Act of 1996

- Incorporated key provisions of the AT&T decree into federal law

SCOTUS Analysis

Justice Scalia writing for the Court:

- Both the FCC and a state PUC had fined defendant for failing to promptly complete calls on its local networks (at 412-413)
- No "voluntary" prior dealings between rivals and Verizon (at 399)
- Monopoly prices are "an important element of the free market system…[which] attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." (at 407)
- "Compelling [monopolists] to share the source of their advantage…may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. (at 407-408)
- *"Aspen Skiing* is at or near the outer boundary of sec. 2 liability." (at 408)

Alternate Views on the Duty to Deal

- Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 Yale L. J. 1483 (2022)

- William P. Rogerson & Howard Shelanski, *Antitrust Enforcement, Regulation and Digital Platforms*, 168 U. Pa. L. Rev. 1911 (2020)

- Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973 (2019)

- Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 Antitrust L. J. 1 (2008)

Predatory Pricing Cases: *Brooke Group, LePage's and Cascade Health*

Predatory Pricing: Four Approaches

1. ***Cost-based school***

   - Can infer predation from below cost pricing
   - Leading exponents: Areeda and Turner
   - Marginal cost theoretically best, but most practical rule: prices below average variable cost

2. ***Recoupment school***

   - Predatory only if defendant(s) can recoup all losses of predatory prices
   - Then, but only then, review prices vs. costs
   - Best example: *Brooke Group*

Predatory Pricing: Four Approaches

3. ***Per se lawful school***
   - Successful predatory pricing exceedingly rare
   - Courts not competent to distinguish predatory pricing from pro-competitive pricing
   - Buying market share usually procompetitive

4. ***Game-theoretic school***
   - Predation is a rational strategy
   - Predation can be effective even when predator's prices are above cost
   - Predators can exclude equally efficient rivals

Competing Priors for Price Predation

"[P]redatory pricing schemes are rarely tried, and even more rarely successful"

- *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 574, 589 (1986) (quoting John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. L. & Econ. 137 (1958))

<u>BUT</u>:

"McGee's article is a theoretical polemic masquerading as an empirical case study."

- Christopher R. Leslie, *Revisiting the Revisionist History of Standard Oil*, 85 So. Cal. L. Rev. 573, 599 (2012)

""A large body of empirical research has found that predatory pricing can be an attractive anticompetitive strategy."

- Sandeep Vaheesan, *Reconsidering Brooke Group: Predatory Pricing in Light of the Empirical Learning*, 12 Berkeley Bus. L. J. 81, 82 (2015)

"In cases of monopolization or attempted monopolization, such 'above-cost predation' may be more plausible and prevalent than below-cost predation."

- Aaron S. Edlin, *Stopping Above-Cost Predation*, 111 Yale L.J. 941, 942 (2001)

Brooke Group v. Brown & Williamson, 509 U.S. 209 (1993)

Brooke Group: Background

- Cigarette market a tight oligopoly and among most profitable industries in the U.S.
- Most profitable portion of market so-called premium brands like Marlboro
- Liggett's share plummeted from 20% to 2% by 1980.
- In response, Liggett begins introduction of discount cigarettes
- B & W begins major discounts to wholesalers to counter Liggett
- Liggett sues B&W under the Robinson-Patman Act, alleging B & W's discounts designed to incent Liggett to close price gap with premium brands

Brooke Group-Two Elements

Plaintiffs must prove two major elements:

1. *Below cost sales:* '[A] plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." (at 222)

2. *Recoupment:* "[A] demonstration that the competitor had a reasonable prospect, or under § 2 of the Sherman Act, a dangerous probability, of recouping it investment in below-cost prices." (at 224)

    - Recoupment is the ultimate object of an unlawful predatory pricing scheme" (at 224)

- Policy Rationale: "As we have said in the Sherman Act context, 'predatory pricing schemes are rarely tried, and even more rarely successful.'" (at 226 (citing *Matsushita,* which cited McGee's article))

Brooke Group-Causation

- In a non-monopoly setting, must show agreement "on how to allocate present losses and future gains among the firms involved, and each firm must resist powerful incentives to cheat on whatever agreement is reached." (at 227)

- Liggett's theory of competitive injury through oligopolistic prices coordination depends upon a complex chain of cause and effect.." (at 230-231)

    - Causation analysis highly criticized by modern economists because it ignores oligopoly and game theory. *See, e.g.* Hovenkamp & Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. Penn. L. Rev. 1843 (2020)

Brooke Group-Bad News for Plaintiffs

Together, *Matsushita* and *Brooke Group* have proven to be formidable hurdles to the successful prosecution of predatory pricing cases. Since Matsushita was decided in 1986, no plaintiff, including the Department of Justice, has succeeded in satisfying the two prong "below cost + recoupment standard." Gavil, et al., *Antitrust Law in Perspective* 594 (4th ed. 2022)

Bundled Discounts: Limits on *Brooke Group*

LePage's Inc. v. 3M Co., 324 F.3d 141 (3d Cir. 2003)

LePage's:-Facts and Result

Facts:

- LePage's made/sold transparent tape, usually offered as house brands, e.g. Staples brand tape
- LP product cheaper than 3M's Scotch brand product
- 3M countered with substantial discounts on bundle of products, including tape and products LP did not sell

Decision

- LP argument: 3M's bundled discount excluded its otherwise cheaper product from market, and resulted in higher prices after LP left market
- Court rejects 3M's procompetitive justification
- Court rejects 3M defense that *Brooke Group* controls

Cascade Health v. Peacehealth, 515 F.3d 883 (9th Cir. 2008)

Cascade Health v. Peacehealth, 515 F.3d 883 (9th Cir. 2008)

Facts:

- Peacehealth:
  - 3 hospitals
  - 90% share of tertiary services
  - 75% share of primary and secondary care services

- McKenzie-Willamette Hospital
  - 1 hospital
  - Offered only primary and secondary acute care services
  - Cheaper than Peacehealth for primary and secondary care services

9th Circuit Synthesis

- *Bundled discounts to be actionable must be "below an appropriate measure of the defendant's costs" (at 903-904)*

- *ADOPTS: "discount attribution" standard (at 906)*

    - "discounts given by the defendant on the bundle are allocated to the competitive product or products. If the resulting price of the competitive produce or product is below the defendant's incremental cost to produce them, …may find the bundled discount is exclusionary for purposes of § 2."

- *Cites with approval Areeda and Hovenkamp: " A requirement that the bundling be sufficiently severe as to exclude an equally efficient single-product rival, and without an adequate business justification, seems to strike the right balance…(at 906-907)*

Attempted Monopolization

Spectrum Sports v. McQuillan, 506 U.S. 447 (1993): Additional Elements

Plaintiff not required to show current monopoly power, but must prove that:

(1) Defendant has engaged in predatory or anticompetitive conduct with

(2) A specific intent to monopolize and

(3) A dangerous probability of achieving monopoly power.

- *Spectrum Sports*, 506 U.S. at 456

U.S. v. Zito: Use of § 2 in an attempted bid rigging case

- Zito reached out to competitor to divide markets for highway sealing services, i.e. fixing cracks.
    - Zito to get Montana and Wyoming
    - Competitor to get South Dakota and Nebraska
- If agreement reached, Zito would have had a monopoly share in his assigned markets.
    - *See* U.S. DOJ, Executive Pleads Guilty to Criminal Attempted Monopolization (Act. 31, 2022), https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization.

Overview of the EU's Abuse of Dominance Framework

Abuse of Dominance

- Instead of the U.S. monopolization requirement for a market share around 60%, "dominance" analysis in the EU starts with a market share of 40%.
    - *See, e.g.* E.U., *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive conduct by dominant undertakings*, 2009/C 45/02, ¶14, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29.

- Well understood potential trade restraints are presumed unlawful, shifting the burden of proof to defendant
    - *Id.* at ¶¶ 32-88

- This is a rebuttable presumption and the recent *Intel* decision suggests how this rebuttal opportunity can be effectively used by the defense.
    - Case T-286/09 RENV, *Intel Corp. v. Commission,* EU:T:2022:19 (26. 1. 2022) (burden shift not sufficient in light of defense evidence of lack of impact and errors in Commission's analysis), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009TJ0286%2801%29.

“Hardcore” Vertical Restraints

- EU law separately calls out specific “hardcore” trade restraints.
    - COMMISSION REGULATION (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, Art. IV (“Hardcore Restrictions”), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0720&qid=1652368074897.
- These include vertical price fixing, exclusive or exclusionary contracts and predatory pricing. For such restraints, the burden is on the defense to defend as procompetitive.
    - Communication from the Commission COMMISSION NOTICE Guidelines on vertical restraints 2022/C 248/01, Art. 6.1 *et seq*., https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2022.248.01.0001.01.ENG.

Gaps in Current California Law

No Direct California Analogues to Sherman, § 2

- Monopolization contrary to California common law. *Burdell v. Grandi*, 152 Cal. 376 (1907)
    - Resulted in non-enforcement of monopolistic agreements

- Cartwright Act prohibits trusts, which are defined as a "combination of capital, skill or acts by two or more persons." Cal. Bus. & Prof. Code § 16720.
    - Arguably covers conspiracies to monopolize but not single-firm conduct

- California's Unfair Competition Law (UCL) could pick up § 2 monopolization through its prohibition against "any unlawful, unfair or fraudulent business act or practice." Bus. & Prof. Code § 17200.
    - Remedies less robust and tied to federal antitrust law standards

- California's Unfair Practices Act, Bus. & Prof. Code §§ 17000 *et seq*. calls out specific trade restraints, e.g. below cost sales, without reference to the existence of combination or conspiracy.

Monopsony and Buy-Side Antitrust

Anticompetitive Conduct on the Buy-Side Actionable: Examples

- *Swift & Co. v. United States*, 196 U.S. 375 (1905) (Sherman Act upheld as constitutional in case against "Big Six" meatpackers for a buying cartel for the purchase of cattle)

- *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219 (1948) (buyer cartel of sugar refiners subject to *per se* treatment).

- *United States v. Rice Growers Association of California*, 1986 WL 12562, *9-*10 (E.D. Cal. Jan. 31, 1986) (merger of two rice millers enjoined because it would have harmed competition in the input market for "the purchase or acquisition for milling of paddy rice grown in California").

Increasing Focus on Employment Markets

- "The markets in which labor is purchased are often less competitive than the product markets in which laborer's work. In fact, suppression of labor market competition is an area in which the antitrust laws are underenforced." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 983 (4th & 5th ed. 2018-2022).

- Labor markets across the nation are highly concentrated and increased concentration is associated with lower pay. J. Azar, *et al.*, *Labor Market Concentration* (Nat'l Bur. of Econ. Research, Working Paper No. 24147, 2017), https://www.nber.org/papers/w24147.

- Addressing employment markets may need additional or updated analytic tools. S. Naidu, E.A. Posner & G. Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536, 574-595 (2018)

Non-Compete Agreements

- Agreements typically between employee and employer not to take a job at a competing firm.
    - Such agreements are *illegal* in California, with limited exceptions. Cal. Bus. & Prof. Code §§ 16600 *et seq.*
- *In the Matter of Prudential Security et al., FTC File No. 2210026 (Jan. 4, 2023) (Consent entered in challenge to non-compete agreements precluding security guards from seeking employment from competing firms in a 100-mile radius), https://www.ftc.gov/legal-library/browse/cases-proceedings/2210026-prudential-security-et-al-matter.*
- FTC, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition, see also 88 Fed. Reg. 3482 (Jan. 19, 2023).

No-Poach Agreements: Examples

- *United States v. Adobe Systems, Inc.*, No 1:10-cv=01629 (N.D. Cal)
  - Multiple technology companies agreed to not "cold call" (recruit) employees of other members of the conspiracy
  - Settlement resulted in injunction against future illegal conduct. *See* U.S. DOJ Archive, U.S. v. Adobe Systems, https://www.justice.gov/atr/case/us-v-adobe-systems-inc-et-al.
- *In re: High-Tech Employee Antitrust Litigation*, No. 11-cv-2509 (N.D. Cal.)
  - Follow-on class action
  - Settled for $415 million. *See* Dan Levine, *U.S. Judge Approves $415 Mln. Settlement in Tech Worker Lawsuit*, Reuters, Sept. 2, 2015, https://www.reuters.com/article/apple-google-ruling-idCNL1N11908520150903.
- United States v. Hee, No. 2:21-cr-00098 (D. Nev.) (Included wage fixing as well)
  - U.S. DOJ, *Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses*, Oct. 27, 2022, https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses

Wage-Fixing

- United States v. Hee, No. 2:21-cr-00098 (D. Nev.).
  - Noted above as a no-poach case but also involved wage-fixing for nurses

- *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85 (3d Cir. 2010).
  - Decision sustained complaint that large hospital system and insurer conspired to suppress reimbursements to providers

- *New Mexico Oncology & Hematology Consultants, Ltd. V. Presbyterian Healthcare Servs.,* 54 F. Supp. 3d 1189 (D.N.M 2014).
  - Conspiracy between hospital and insurer to suppress reimbursement rates

- U.S. DOJ and FTC, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016), https://www.justice.gov/atr/file/903511/download.
  - Explains that no-poach and wage fixing agreements subject to criminal enforcement under U.S. antitrust laws.

Mergers Affecting Employees: Examples

- *United States v. Bertelsmann SE & Co. KGaA*, 2022 WL 16748157 (D.D.C. Nov. 7, 2022)
    - Challenge to the proposed purchase of Simon and Schuster by the largest bookseller in the world, Penguin Random House.
    - Focus of the litigation on the downward pressure on advances and other payments to authors.
    - Merger permanently enjoined. U.S. DOJ, Archives, United States v. Bertelsmann, https://www.justice.gov/atr/case/us-v-bertelsmann-se-co-kgaa-et-al.
- *United States v. Anthem, Inc.* 855 F.3d 345, 377-378 (D.C. Cir.), *cert. denied*, 137 S.Ct. 2250 (2017) (dissent recognizes viability of government's alternate theory of liability that merged firm would have monopsony power in the upstream markets for doctors and hospitals).

Implications for the Commission

Potential Implications for the Commission

- Several of these cases involve mergers which are actionable under federal law, but awkwardly reachable under California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200).
    - The Commission may want to include monopsony issues in the context of any discussion of proposals to make mergers actionable under state law.
- Recent defenses to no-poach and wage-fixing cases have included assertions that such agreement are not *per se* unlawful. You may want to consider addressing this issue in future discussions.
    - Note: Recent Canadian legislation makes wage-fixing agreements simply unlawful. *See* *https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/enforcement-guidance-wage-fixing-and-no-poaching-agreements*.

Thank you and questions