

The Greener Side of Antitrust



Nevada Chapter Luncheon
December 14, 2010

Presented by

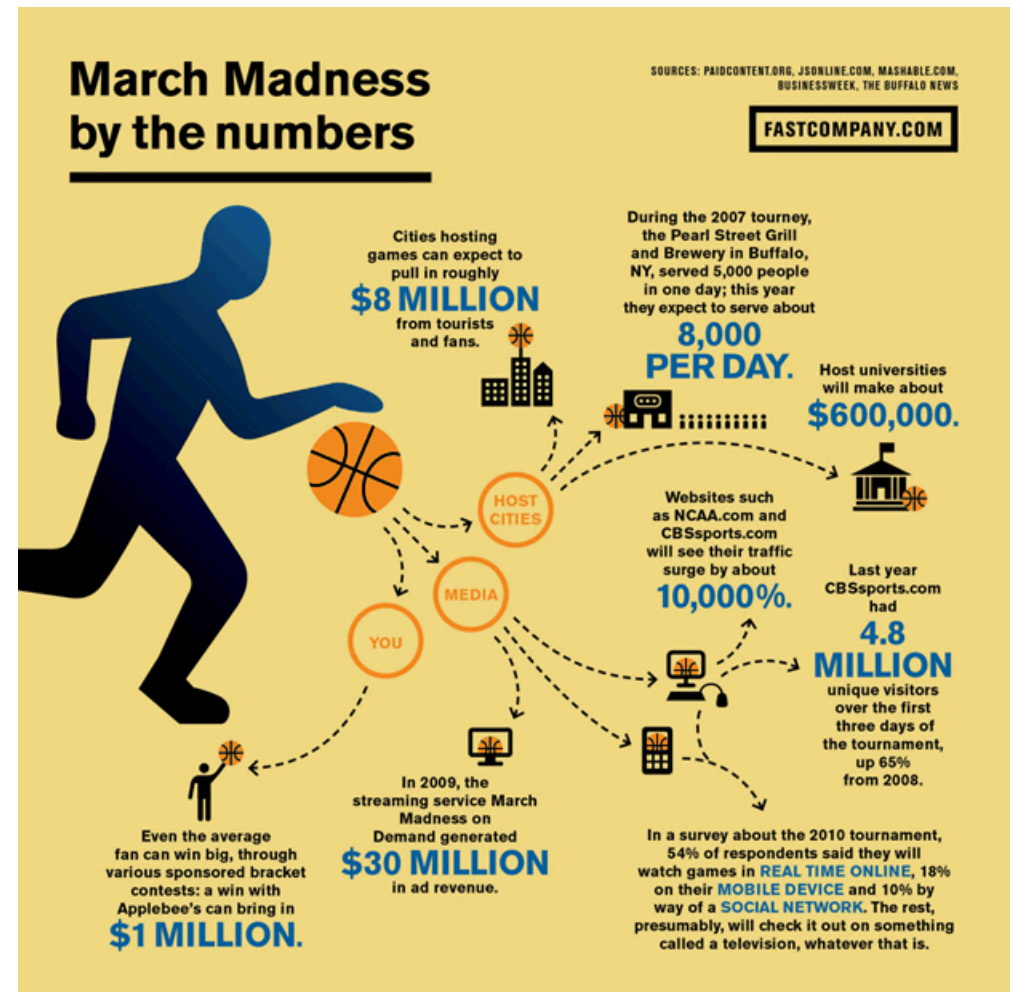


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Always There™

Sample Cases

- NIT v. NCAA
- Sightline v. GCA
- Arizona Nurses
- American Needle v. NFL
- Insurance brokerage
- NFLPA v. NFL



Sources of Law

- Sherman Act Sec. 1 and 2 (15 U.S.C. §§ 1 and 2)
 - monopolies and unreasonable restraint of trade
- Clayton Act Sec. 4 and 16 (15 U.S.C. §§ 15 and 26)
 - private right of action for damages
 - private right of action for injunctive relief

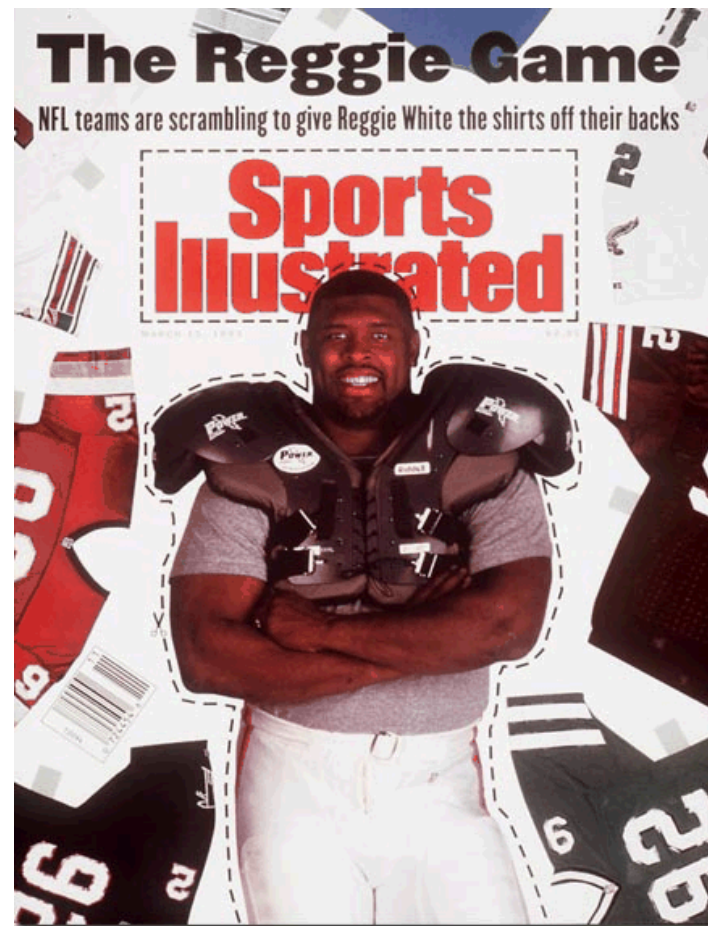
Sources of Law

- Clayton Act Sec. 4b (15 U.S.C. § 15b)
 - statute of limitation is 4 years
- Clayton Act Sec. 7 (15 U.S.C. § 18)
 - mergers and acquisitions lessening competition or tending to create a monopoly

Sources of Law

- Robinson Patman Act (15 U.S.C. § 13)
 - unlawful price discrimination
- Nevada Unfair Trade Act (NRS 598A)

Sources of Law – Benefits to Plaintiffs



Sources of Law

- Benefits to Plaintiffs
 - cessation of the unlawful conduct
 - treble damages
 - attorney's fees and costs
 - limited burden of proof on damages
- But note: Twombly raised the federal pleading standard and Twombly was a Sherman Act Sec. 1 case.

Key Concepts – Relevant Market

- Product and geographic
- Determined by consumers based on the effect of a raise in price on the products purchased
- SSNIP – Small but Significant Non-transitory Increase in Price

Key Concepts – Protection of Competition NOT Competitors

- Elimination of a competitor through fair competition is not the subject of the antitrust laws
- Focus on competitive pricing and promoting innovation not harm to individual market participants

Key Concepts – Antitrust Injury



Key Concepts – Antitrust Injury

- An injury in fact
- Caused by the violation
- That is the type of injury the antitrust laws were designed to prevent

Key Concepts – Indirect Purchaser



Key Concepts – Indirect Purchaser

- The plaintiff must have experienced the effects of the antitrust violation directly
- Purchases through a contractor or as part of a package of goods or goods and services are indirect

Key Concepts - Tests

- Per Se – includes horizontal price fixing, market allocation and agreements not to compete
 - Harm is presumed
 - Change to exclude vertical fixed minimum prices from per se consideration
- Rule of Reason – balance pro-competitive and anti-competitive effects of restraint

What is a Monopoly?

Sec. 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce



What is a Monopoly?

Examples:

- Predatory pricing – below cost pricing with ability to recoup
- Tying – using monopoly in one market to compel purchase of product in another market
- Barriers to entry – essential facility; standard setting
- Supracompetitive pricing – based on profit margin

What is an Unreasonable Restraint on Trade?

Sec. 1: Every 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.

- Limited by courts to “unreasonable” restraints with the focus on the restraint’s impact on competition.
- Horizontal versus vertical

What is an Unreasonable Restraint on Trade?



What is an Unreasonable Restraint on Trade?

Examples:

- refusals to deal/exclusive dealing
- price fixing (horizontal and vertical)
- market allocation (geographic or product)
- group purchasing

Conscious parallelism is NOT a restraint

What is a Combination Likely to Reduce Competition?

Clayton Sec. 7: No person engaged in commerce ... shall acquire, directly or indirectly, the whole or any part of the stock or other share capital ... or assets of another person ... [where] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

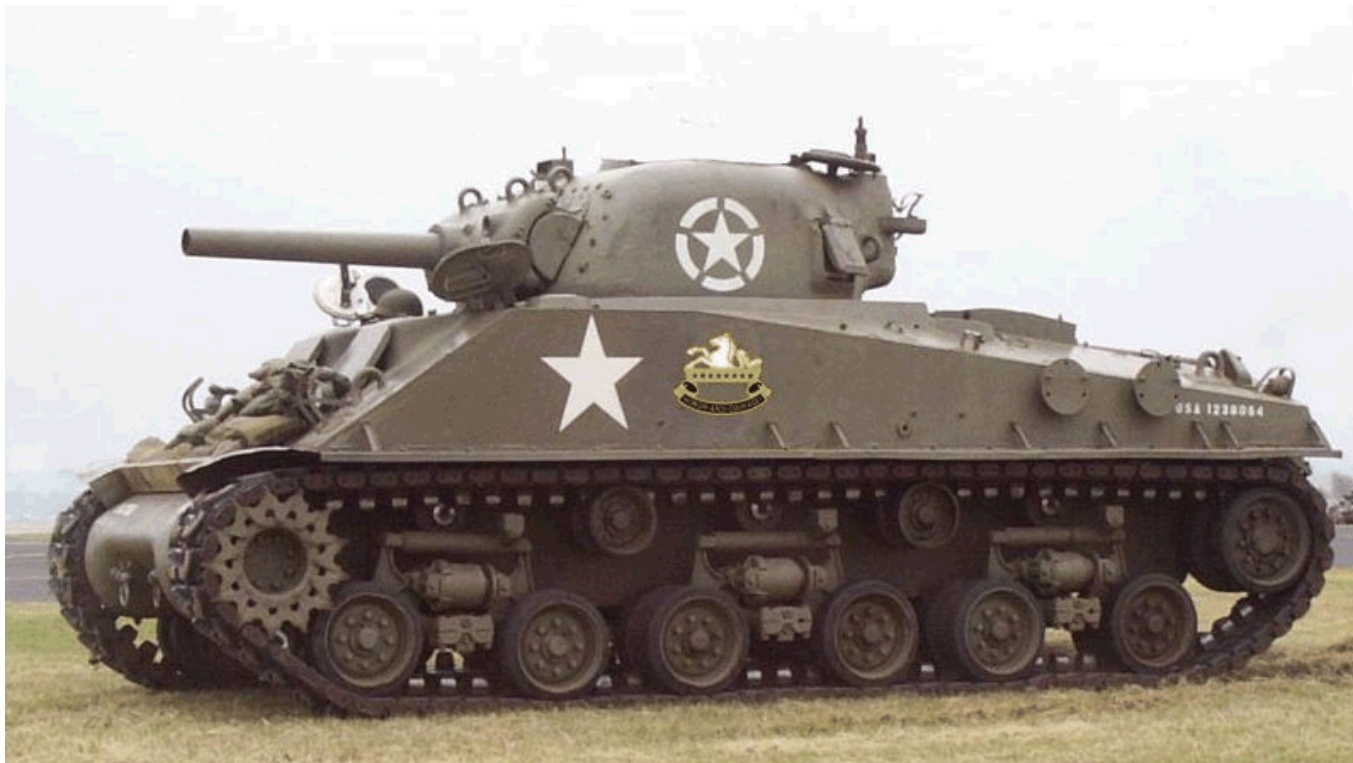
- Focus is to prevent economic concentration by keeping small competitors in business
- Divestiture is available as a remedy

What is Price Discrimination?

Robinson Patman: It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality

- Must be competing purchasers
- Must be at the same time
- Volume discount must be justified by cost savings or competitive situation not of seller's own making

Nevada Unfair Trade Practice Act



Nevada Unfair Trade Practice Act

NRS 598A.050: The provisions of this chapter shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes.

What to Look For



What to Look For

- Supracompetitive prices
- Below cost prices
- Limitations on sources of goods
- Limitations on purchasers of goods
- Group Purchasing Organizations
- Industry Associations

What to Look For

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No.

(Antitrust)

COMPLAINT

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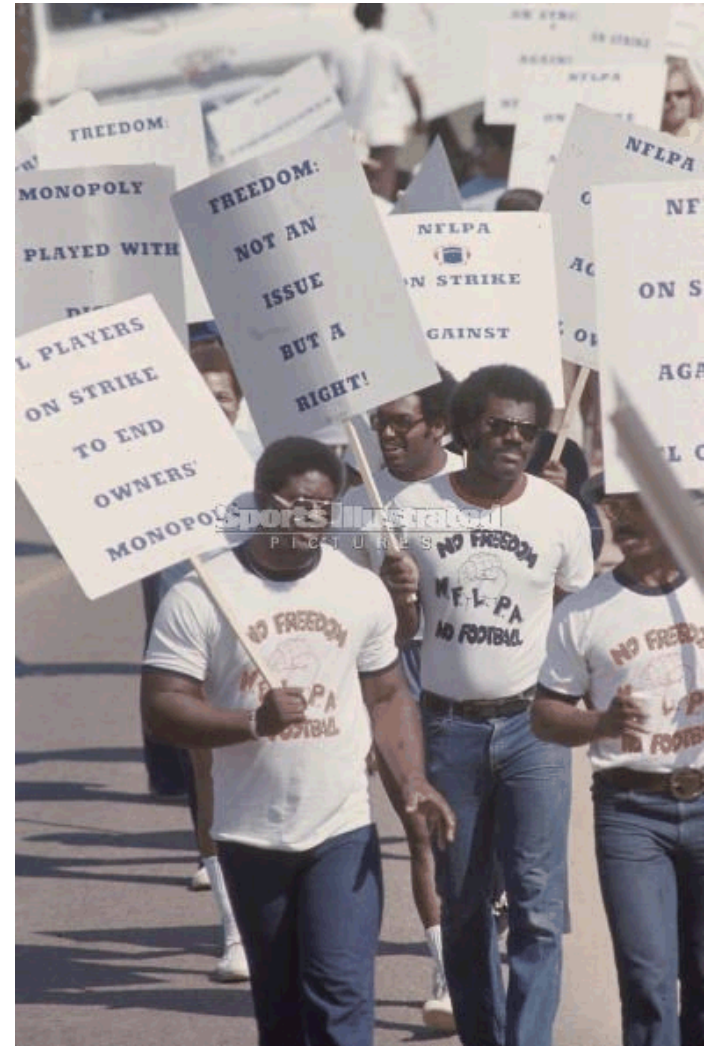
David Boies
Special Trial Counsel

What to Look For

- Refusals to deal
- Tying of goods
- Price commonality across sellers
- Common brokerage of purchases
- Regulatory action

What is Not a Violation?

- Conscious parallelism
- Noerr Pennington
- Below cost pricing without ability to recoup
- Collective bargaining
- Major League Baseball



Thank You For Attending Any Questions?

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