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Legal Concerns Clients Are Having About COVID-19

Staying Aware of U.S. Competition Legal Issues at a Time of Economic Upheaval

April 6, 2020

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I. Introduction

At a time of crisis and economic upheaval, there is a natural tendency for people to pull together. Currently, many are isolating in their homes, yet communities and businesses everywhere are coming together to face a common enemy: COVID-19. One might say this is the best of humanity revealing itself. But when that "pulling together" crosses into the economic and legal realm, businesses should realize that even well-intentioned steps might later be questioned by regulators or civil plaintiffs. History has shown that economic crises often motivate incumbent competitors to act in anticompetitive ways. Regulators in the United States, Europe, Australia, and elsewhere have all signaled they are aware of these dangers and have, in several instances, explicitly promised to apply increased antitrust scrutiny during and after the COVID-19 pandemic. In some cases, regulators are already seeking out informants regarding any anticompetitive schemes.[1]

Companies facing the current crisis, as well as those yet to come, should understand when and how they face potential competition law violations. The types of conduct giving rise to liability under antitrust laws are many and complex, and the line between legal and illegal behavior is often blurry. Conduct that may in some cases be permissible may not be in others. It is critical for businesses to be on the lookout for all such conduct (and consult with appropriate in-house and external counsel) to ensure they do not fall victim to anticompetitive harms, and to avoid missteps that could unwittingly result in significant antitrust liability.

This memorandum provides an overview of one of the most important competition regimes in the world—the United States—and how to assess potentially anticompetitive behavior during and after a time of economic crisis. Its intent is to give those who do not regularly practice competition law a practical guide on (a) how businesses can help minimize their own exposure to antitrust liability, (b) understand the antitrust laws' applicability during times of crisis, and (c) how to spot competitors', suppliers', and purchasers' potentially anticompetitive behavior (and seek appropriate legal advice). Although there is a substantial body of law regarding anticompetitive mergers and acquisitions, this memorandum focuses on conduct-oriented behavior, because that behavior is more likely to create immediate problems for market participants in the face of economic upheaval.

II. Antitrust Liability At a Glance

1. What statutes govern antitrust liability in the United States?

In the U.S., the primary federal antitrust statute is the Sherman Act (15 U.S.C. § 1, *et seq.*).[2] The Department of Justice ("DOJ") and Federal Trade Commission ("FTC") are both empowered to enforce the antitrust laws, as are private plaintiffs. In regulatory actions, defendants face fines and other monetary and non-monetary penalties while, in criminal cases, the individuals responsible may face jail time. In private antitrust litigation, damages are automatically trebled and successful plaintiffs are entitled to reasonable attorneys' fees.

Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies (otherwise known as "concerted action") that *unreasonably* restrain competition. Two or more separate entities must reach agreement in order for this Section to apply.

Section 2 of the Sherman Act prohibits monopolization and attempted monopolization. Violations may stem from a dominant firm's abuse of market power or its willful acquisition or maintenance of such power.

2. Is it always illegal to reach agreements with competitors?

Sometimes yes, sometimes no. *Per se* illegal conspiracies (as the title implies) are always against the law. Such conspiracies are agreements between competitors at the same level of the supply chain involving practices that are deemed inherently anticompetitive, including, most notably, price fixing, bid rigging, group boycotts, and market allocation. But this is a limited category of agreements. The "Rule of Reason" applies to the vast majority of commercial agreements and requires weighing the anticompetitive effects of a restraint against its s procompetitive benefits. If the anticompetitive effects unreasonably outweigh the procompetitive benefits, the restraint is illegal.

3. When are joint ventures between competitors illegal?

Joint ventures are usually analyzed under the Rule of Reason, and often have demonstrable procompetitive benefits. That said, even joint venture conduct can cross the line and be deemed unlawful if the joint venture devolves into a front for price-fixing, group boycotts, or otherwise generate anticompetitive harms. Joint venture participants should be careful not to engage in such conduct, and stay current with recent FTC and DOJ guidance regarding the operation of joint ventures.

4. When are vertical agreements (*i.e.*, agreements between firms at different levels of the supply chain) illegal?

Vertical agreements are subject to the Rule of Reason, so they are illegal only when their anticompetitive effects unreasonably outweigh their procompetitive benefits.

5. Do any special collusion concerns arise in times of crisis?

Yes. Times of crisis often lead to the desire or perceived need for competitors to increase coordination, whether for public health or other reasons. While some of this is benign, it also presents opportunities for anticompetitive behavior that calmer times do not. Governments sometimes provide limited exceptions to the antitrust laws in such situations, but not always. At the same time, governments have been quick in past crises—as well as in the current COVID-19 pandemic—to emphasize that competition laws remain in effect.

Given the turbulence surrounding an economic or other crisis, there is typically a higher chance of collusion among competitors. Some of this is government-mandated and some of it is undeniably beneficial. But it can create breeding grounds for cartels that flourish after the crisis subsides. Joint ventures or other traditionally permissible collaborations among competitors may similarly morph into illegal combinations that are *per se* illegal or subject to Rule of Reason scrutiny. Competitors navigating their way through a crisis should be aware of these risks.

6. What is monopolization / attempted monopolization?

Monopolization is when a firm with "monopoly power"—typically defined as the ability to unilaterally raise prices and/or exclude competition in a market—engages in anticompetitive or

exclusionary conduct to obtain, bolster, or maintain that power. Attempted monopolization occurs when a firm engages in exclusionary practices with the intent to obtain monopoly power, and is dangerously likely to succeed unless stopped by a court or other authority.

7. What is exclusionary conduct and how does it relate to a monopolization or attempted monopolization claim?

Acts are exclusionary (and, therefore, potentially illegal) when they help create, enlarge, or prolong monopoly power by impairing competitors' opportunities, *and* are either anti-consumer or generate relatively few pro-consumer benefits in light of the competitive harms. Importantly, acts of a monopolist may be anticompetitive even though the same acts may be lawful if done by a smaller company.

8. How does one know when practices cross the line into anticompetitive/exclusionary practices?

There is no hard-and-fast rule, and there is wide latitude in how to define what practices are actually exclusionary. Nevertheless, courts have developed a number of doctrines to assess recurring categories of conduct. Some doctrines narrow antitrust liability for certain exclusionary practices. Others are more flexible, but provide an analytical framework that courts can use to sift through legal and illegal behavior. Some of the more well-known of these doctrines are discussed below:

- Exclusive dealing
- Tying
- Lock-up arrangements
- Abusive patent practices
- Predatory pricing
- Bundled discounting
- Aftermarket policy changes
- Unilateral refusals to deal
- Denial of access to "essential facilities"
- Business torts

9. Is price gouging considered an antitrust problem?

Not usually, but with a caveat. The antitrust laws do not explicitly cover price gouging; that is usually addressed by state consumer protection laws. Price gouging can become an antitrust concern, however, when it is the result of collusion or other anticompetitive conduct by the price gouger. Such determinations are case-specific.

III. Liability for Collusion—Sherman Act Section 1

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[3] In lay terms, Section 1 prohibits multiple entities from agreeing to harm competition.[4] Section 1 violations can be enforced civilly or criminally by the FTC or DOJ, and they can also provide the basis for private civil suits by competitors or customers harmed by the

alleged conspiracy. For any Sherman Act violation, private litigants may seek treble damages caused by the anticompetitive conduct, as well as their reasonable attorneys' fees.[5]

A. Types of Collusive Conduct Under Section 1—*Per Se* Illegal v. "Rule of Reason" Violations

Although Section 1 of the Sherman Act applies to all "contracts," "combinations," or "conspiracies," courts divide Section 1 offenses into two basic categories: (i) *per se* illegal conduct; and (ii) conduct that is subject to a more nuanced "Rule of Reason" analysis.[6] This distinction reflects the understanding that certain conduct is so obviously anticompetitive it can be easily condemned (such as price-fixing agreements among direct competitors), but also that there is a wide swath of conduct that may have redeeming procompetitive qualities (even if it does have some anticompetitive effects), and thus warrants more detailed analysis.[7]

The following types of agreements are generally *per se* illegal:

(i) price-fixing
(ii) bid rigging
(iii) group boycotts
(iv) market divisions/allocations

These agreements, however, are *per se* illegal only if agreed between "horizontal" competitors; *i.e.*, firms at the same level in the chain of distribution. For example, if two oil companies conspire to fix oil prices, that would likely constitute a *per se* illegal price fixing agreement.[8] Similarly, if a group of manufacturers of the same or similar products all agreed not to sell their goods to a specific store, that is likely a *per se* illegal group boycott.[9] And an agreement among grocery stores to divide up a market geographically, with each store to only sell certain products in specific areas, was found to be a *per se* illegal market-division scheme.[10]

The vast majority of commercial agreements are analyzed under the Rule of Reason.[11] This standard weighs the anticompetitive effects[12] of a restrictive practice against its procompetitive benefits in order to decide whether it "constitutes an *unreasonable* restraint on competition."[13] The focus is ultimately on *unreasonable* restraints of trade because only those are illegal. Technically, every commercial contract is a restraint of trade; courts have therefore recognized that reasonable restraints are clearly legal. Examples of agreements subject to potential liability under the Rule of Reason include, among others, agreements among competitors to exchange certain types of information,[14] restrictions on pricing between vertically related companies (such as manufacturers and distributors),[15] exclusive dealing contracts,[16] and many others.

B. Proving an Anticompetitive Conspiracy Under Section 1

In all collusion cases—whether brought by regulators or private plaintiffs—a key requirement is that the challenged conduct result from an *agreement*, rather than independent action. For example, if a group of manufacturers agree to raise prices, that is almost certainly *per se* illegal. But if the same manufacturers all independently raise their prices without coordinating, that is likely permissible under the law, no matter which analytical framework is applied. Collusion cases thus often turn on whether parallel conduct between competitors results from an agreement, or from unilateral conduct and decisions.

Companies must be aware of these methods so they do not accidentally act in ways that suggest or imply they reached a conspiratorial agreement. Similarly, for those who suspect their suppliers or competitors are colluding, understanding what types of evidence can be used to prove a conspiracy, and where to look for it, is useful for identifying red flags. If one suspects their suppliers are conspiring, for example, knowing where to look is half the problem.

Sometimes (although seldom), proving an agreement is relatively straightforward due to direct, "smoking gun" evidence. For example, an anticompetitive agreement may be reflected in a recorded telephone call.[17] But, more commonly, an agreement can only be established through indirect, circumstantial evidence. In such cases, an antitrust plaintiff must generally establish an agreement by showing *parallel conduct* among competitors and *plus factors* ruling out the possibility of unilateral action.[18]

To establish collusion based on parallel conduct and plus factors, a party must put forward "evidence tending to exclude the possibility of independent action."[19] Such parallel conduct could include "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason."[20] Common "plus factors" include the following:[21]

- A common motive to conspire, such as a common motive to elevate prices or thwart a new market entrant;[22]
- Evidence showing that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, such as declining to exploit opportunities to compete against co-conspirators;[23] and
- Evidence of a high level of interfirm communications, such as repeated conversations or meetings between the alleged conspirators.[24]

An example of a recent antitrust case allowing a claim to proceed based on allegations of "parallel conduct" and "plus factors," consider *Alaska Electrical Pension Fund v. Bank of America Corp.*[25] That case concerned the process by which a group of banks set the "ISDAfix" rate—a global benchmark rate used in many financial products, including interest rate derivatives. The plaintiffs alleged that the defendants had conspired to rig the ISDAfix rate for their own benefit. Among other things, the plaintiffs alleged that the defendants engaged in parallel conduct by submitting identical rates during the ISDAfix rate-setting process, and by "coordinating" their trades in order to manipulate ISDAfix rates.[26] In terms of "plus factors," the plaintiffs alleged that the defendants "were jointly motivated by a desire to maximize profits by manipulating the ISDAfix benchmark," that the defendants acted against their unilateral self-interest by sharing sensitive price information with each other, and that defendants suspiciously altered their ISDAfix rate submissions once the government began investing their conduct.[27] Based on these allegations, which did not include any "smoking gun" evidence, the court denied the defendants' motion to dismiss.[28]

C. Section 1 Violations at a Time of Crisis

Businesses should remain attuned to potential Section 1 issues as the COVID-19 pandemic or any future economic crisis unfolds. These include the possibility of: (i) collusion among competitors during crisis situations; (ii) cartels or other permitted anticompetitive arrangements that begin during

the crisis, but then continue afterward due to the coordination the crisis originally facilitated; and (iii) liability attaching to joint ventures or other collaborations among competitors.

1. Collusion Among Competitors During Crisis Situations

Competitors may try to take advantage of an economic crisis by raising prices, thwarting new entrants, or engaging in other anticompetitive behavior. They might do so because such conduct preserves their collective competitive position and helps them weather the economic storm. Businesses should not assume that courts will give them "leeway" simply because there exists an economic crisis.[29]

Apart from increased collusion, crises can also expose pre-existing conspiracies. Crises can foster an "every person for themselves" mentality that causes existing cartels to change their behavior. For example, in the *ISDAfix* litigation, the defendants allegedly began altering their pricing patterns once the government began investigating, which the plaintiffs alleged provided evidence that the conspiracy had broken apart at that point. Businesses should keep an eye out for suspicious changes in marketplace behavior, such as difficult-to-explain pricing. This might suggest that prior behavior was the result of a cartel (and thus that your business may have been injured by elevated prices or other anticompetitive harms).

Of particular relevance now are competitive issues arising from the COVID-19 pandemic. Shortly after COVID-19 began to spread, the FTC and DOJ issued a joint statement saying they would expedite virus-related requests to no more than seven calendar days.[30] The agencies also provided examples of acceptable collaborative practices to respond to the crisis:

- "As a general matter, the Agencies have stated that when firms collaborate on research and development this 'efficiency-enhancing integration of economic activity' is typically procompetitive."
- "The Agencies have expressed that sharing technical know-how, rather than company-specific data about prices, wages, outputs, or costs, may be 'necessary to achieve the procompetitive benefits of certain collaborations.'"
- "The Agencies have explained that they will not challenge, absent extraordinary circumstances, providers' development of suggested practice parameters—standards for patient management developed to assist providers in clinical decision-making—that also may provide useful information to patients, providers, and purchasers."
- "The Agencies have also explained that most joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs, do not raise antitrust concerns."
- "The antitrust laws would generally permit private lobbying addressed to the use of federal emergency authority, including private industry meetings with the federal government to discuss strategies on responding to COVID-19, 'insofar as those activities comprise[] mere solicitation of governmental action with respect to the passage and enforcement of laws.'"[31]

Companies considering coordination at this time should ensure they operate within the bounds specifically laid out by the regulatory agencies.

2. Groundwork for Future Unlawful Agreements

During a crisis, regulators sometimes permit competitors to coordinate in order to provide a better framework for helping out those in need. The DOJ and FTC, for example, recently released a statement emphasizing that the response to COVID-19 "will require unprecedented cooperation between federal, state, and local governments and *among private businesses to protect Americans' health and safety*."[32] The sentiment encouraging such cooperation is undoubtedly laudable; it helps open lines of communication at a time when the urgent needs of the general public override many concerns of anticompetitive harm.

But businesses must ensure that collaborations temporarily permitted today do not give rise to collusion tomorrow. To the extent a business is considering collaboration with a competitor to help address COVID-19, or other crises in the future, it is important to secure any necessary regulatory approvals. Such businesses should also regularly consult with counsel to ensure that the collaboration remains focused on COVID-19 or other legitimate purposes and never comes close to crossing the line into potentially anticompetitive conduct.

A corollary to the dangers of collaborating is that companies whose suppliers or purchasers are allowed to coordinate at a time of crisis should be on the lookout for collusive behavior that continues later the crisis is over. It is often difficult for businesses to stop coordinating, once they begin, because anticompetitive behavior is typically profitable for those involved.

3. Joint Ventures and Other Competitor Collaborations

As the business community responds to a crisis, manufacturers, hospitals, service providers, and others may opt to collaborate with their competitors to help serve their communities. Such competitor collaborations must be consistent with current guidance from the DOJ and FTC related to the crisis at hand (*e.g.*, those noted above regarding the COVID-19 crisis), as well as with the DOJ and FTC's longstanding Guidelines for Collaboration Among Competitors.[33] Any joint venture must also be careful to act in a manner that enhances competition and/or creates products or services that might not otherwise exist.[34] If the joint venture appears to simply be a cover for anticompetitive conduct that would otherwise be impermissible (*e.g.*, a conduit of information that permits the joint venture members to fix prices at their respective businesses), it may draw regulatory scrutiny or private lawsuits.

With respect to COVID-19 specifically, U.S. antitrust authorities have stated that although certain joint conduct among competitors will, in fact, be permissible during the crisis, conduct traditionally viewed as *per se* illegal is not be permitted.[35] Be sure to consult with counsel if you have any questions about the operation of any joint venture, whether your own or one that impacts your business.

IV. Liability for Monopolization Or Attempted Monopolization—SHERMAN ACT Section 2

Collusion between competitors is not the only type of anticompetitive conduct prohibited by the antitrust laws. Where a single firm has or is likely to obtain unrivaled dominance in a market, it can often stray into illegal behavior even without colluding with others. Such conduct is governed by Section 2 of the Sherman Act, which states that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize . . . shall be deemed guilty of a felony . . . ."[36]

Monopolization occurs when a company with "monopoly power" uses "exclusionary" or anticompetitive conduct to bolster or maintain that power. Attempted monopolization is when a company uses anticompetitive conduct with the specific intent to monopolize, and there is a dangerous likelihood that the company will achieve monopoly power if it is successful in its scheme. (As the name of the violation implies, the attempted scheme need not be complete before an aggrieved plaintiff sues.)

A. Monopoly Power Under Section 2—What Does It Look Like?

In economic terms, a monopoly typically means that a firm has total control over the market; *i.e.*, 100% ownership. But "monopoly power" in the legal context does not require 100% market share; instead, it refers to the ability unilaterally to raise prices or exclude competition in a market. To achieve this, a "monopolist" need only have "substantial" market power.[37] What constitutes "substantial" share is assessed case-by-case. But market shares that exceed 70–75% generally indicate monopoly power; shares under 50% usually indicate a lack of such power; and shares in between require additional facts to support an inference of such power.[38]

Often, defining the market within which the alleged monopolist operates is a key point of contention. This is because in a narrow market where the alleged monopolist is one of very few competitors (or the only competitor), the chance it will dominate the market is high. In contrast, a broader market definition may negate a finding of monopoly power, since the alleged monopolist may simply be one of many competitors, or one of several competitors with relatively similar market shares. Section 2 claims therefore often rise and fall on market definition issues.

D. Anticompetitive Conduct Under Section 2

Possessing and enjoying the benefits of monopoly power is not itself an antitrust violation.[39] The alleged monopolist must also engage in anticompetitive (or "exclusionary") conduct. Acts are exclusionary when they help create, enlarge, or prolong monopoly power by impairing competitors' opportunities. But such acts must *also*: (a) not benefit consumers; (b) be unnecessary to achieve claimed consumer benefits; or (c) produce harms that are disproportionate to any resulting benefits.[40] In other words, there is no hard-and-fast rule as to what is anticompetitive/exclusionary, but, generally speaking, the conduct must either be anti-consumer, or generate relatively few pro-consumer benefits in light of the competitive harms it causes. Notably, what a monopolist does may be anticompetitive even though the same practice by a smaller company is not.

Despite this flexibility, courts have developed several doctrines about key categories of such practices based on long experience. The following discusses some of the most notable examples of such doctrines. But it merits emphasis that this is are not a comprehensive list, because courts are empowered to assess each alleged anticompetitive scheme on a case-by-case basis. Furthermore, an anticompetitive scheme may involve several different types of behavior that do not alone lead to

anticompetitive harm, but together do. Courts generally assess such behavior in the aggregate to determine its legality.

Exclusive Dealing: An exclusive dealing arrangement occurs "when a manufacturer and dealer agree that the dealer will sell only the manufacturer's brand of a product."[41] Exclusive deals are often pro-competitive, because they encourage competitors to offer better products or services. However, when a firm with monopoly power is able to foreclose competitors from at least 30-40% of a market, then the practice starts to stray into anticompetitive territory, because it forecloses competitors' ability to gain market share through ordinary competition. One famous example of exclusive dealing involved Microsoft in the 1990s, when it entered into exclusive deals with the majority of computer original equipment manufacturers ("OEMs") and foreclosed its operating-system competitors through those deals and other exclusionary practices.[42]

Lock-Up Agreements: Relatedly, locking up distribution channels can itself violate the Sherman Act, regardless of whether such lock-up occurs through exclusive dealing or other means. Generally, whether these types of lock-up practices are anticompetitive comes down to a question of degree. Locking up some distribution channels is often fine and procompetitive for similar reasons as exclusive dealing—it can promote stronger competition and better benefits for consumers. But, if a dominant player—or one that could be dominant—forecloses access to a substantial portion of the market by locking up distribution channels, it may be illegal.

Tying: This anticompetitive practice occurs when a seller with market power over one product (the "tying" product) announces it will sell that product only on the condition that customers also buy another—"tied"—product from the seller, or forego buying the tied product from the seller's competitors. This can effectively foreclose the customer as a potential patron of "rival sellers of the second product, who might thereby be excluded from the market or fatally weakened."[43]

Abusive Patent-Related Practices: Dominant firms have used a number of different patent-related practices over the years to try to forestall competition. The tension in assessing such practices is that patents are technically a government-granted monopoly, arising under the U.S. Constitution, that provides a right to exclude others from making, selling or using a specific invention. Therefore, there is a strong public policy that favors permitting patent holders to assert their patent rights without fear that they will run afoul of the antitrust laws. Where antitrust liability potentially arises is when the patent holder abuses those rights, or seeks to extend them beyond the scope of the patent grant.

Several potentially problematic practices may arise in the context of standard setting organizations ("SSO"). These organizations serve a public good by allowing companies to collaborate to set technical standards to ensure that products made by different manufacturers can work with each other. Nevertheless, because competitors will necessarily interact through the collaborative standard setting process, a risk of improper collusion can follow with a consequent impact on competition and consumer choice. For example, if agreements among competitors, rather than market forces, result in adoption of a standardized technology, consumers may suffer, particularly if alternative solutions that might have competed with that standard are arbitrarily foreclosed. Such agreements may therefore violate the antitrust laws and subject the companies that participated to scrutiny by regulators and lawsuits by those who were injured.

With respect to patents, SSOs typically have Intellectual Property Rights (IPR) Policies that require participants in the standard-setting process to agree to license any patents they have that might

be essential for the practice of a standard (so-called standard-essential patents or SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms and conditions or even for free. Failure to comply with these contractual licensing obligations can subject the patent owner to a claim for breach of contract. Moreover, in certain instances, antitrust regulators and private litigants have also charged those who seek to extract unreasonably high royalties on SEPs with violation of the antitrust laws; specifically, attempted monopolization of "technology markets" defined by the patented technology adopted into the standard based on a theory of patent holdup. Such theories, however, are controversial and have recently been criticized by the current DOJ.[44] At the very least, companies that participate in standard-setting should be alert to these issues and vigilantly monitor the conduct of their representatives to ensure that the antitrust laws are not violated.

Another potentially problematic practice is when dominant competitors create patent pools covering the key aspects of industry technology in order to control competition in the market. Such pools do have pro-competitive purposes, but also pose a risk for abuse, and so are analyzed for their potential effect on stifling competition more broadly than the patent pool members.

Still other competition concerns may arise in connection with patent infringement litigation. In general, courts are loathe to chill such litigation, because of First Amendment concerns (petitioning courts without fear for undue repercussions) and that the grant of a patent confers on the patent holder the right to exclude others from the market via litigation. Nevertheless, antitrust liability can arise in two specific situations. First, if a patent holder brings or threatens litigation with the intent to monopolize (or the effect of monopolizing) a market based on a fraudulently-obtained patent, that may constitute a *Walker Process* fraud violation (named after the Supreme Court opinion articulating the theory).[45] Second, if a patent holder brings or threatens objectively baseless patent infringement litigation—whether due to a bogus infringement theory, or on a patent the company knows is invalid—then that can constitute sham litigation. In either case, antitrust liability can attach if the patent holder's claim are not only objectively baseless, but also asserted with a subjective intent to misuse the patent suit as a way to interfere with competitors.[46]

Predatory Pricing: Predatory pricing is when a company sells its products or services at less-than-competitive prices with the intent to drive all (or most) competitors out of the market, and then raise its prices and recoup all the profits it lost. A plaintiff alleging predatory pricing must demonstrate three things. First, that the defendant engaged in an immediate sacrifice of profits through unreasonably low prices. Second, that those prices destroyed the defendant's rivals and drove them out of the market (or posed a real danger of doing so). Third, that the defendant "recouped" the profits they lost—*i.e.*, levied monopoly prices or profits after destroying competition.[47] Under modern antitrust jurisprudence, this is one of the hardest liability theories to establish, because low prices are typically viewed as pro-consumer and courts are hesitant to second guess aggressive pricing strategies, even if they might result in slim-to-nonexistent profit margins for a significant period of time.

Bundled discounting: Also known simply as "bundling," this practice addresses a dominant firm's discounted pricing on a bundle of products or services. Potential competition concerns occur when a dominant firm offers "bundled" discounts that its smaller competitors are unable to profitably match, because they do not have market power over one or more of the products in the bundle (but the dominant firm does). Sometimes, this means a bundle of two or more products. Other times, this means the same product is discounted in two different time periods or geographic regions. For example, suppose a company manufactures three products and offers customers a progressive discount aggregated across the three. By contrast, a rival sells only one of those same products. In

order to purchase from the rival, the customer might have to forego the discount on the other two products as well. Thus, the monopolist could deprive an equally efficient rival of its sales, simply by virtue of its dominance in one of the bundled products.[48] This is where potential antitrust liability arises.

Aftermarket Policy Changes: In some industries, consumers will make an initial purchase that then "locks" them into that product and an aftermarket of products or services related to that initial product. In that case, the original seller may have monopoly power over the aftermarket due to consumer lock-in. If the sellers lures consumers into the initial purchase with the promise (or implication) of a robust aftermarket, but, after they are locked in, changes policies to dominate the aftermarket, that potentially constitutes anticompetitive conduct.[49] Also known as the *Kodak* doctrine (after the Supreme Court opinion that articulated this theory), this practice can be problematic where aftermarket competitors are effectively excluded due to consumers' inability to choose following lock-in.[50]

Unilateral Refusals to Deal: As a general matter of public policy, "any business—even a monopolist—may choose its business partners."[51] Implicit in this policy is that companies can typically choose not to deal with competitors. However, there are limits to such refusals, as the Supreme Court first recognized in its *Aspen Skiing* opinion and later clarified in *Trinko*.[52] Although courts differ on what exactly constitutes an anticompetitive refusal to deal, facts typically supporting a finding of exclusionary conduct include a prior course of profitable dealing between the dominant and smaller competitor, and that, despite selling the same product to others, the dominant firm refuses to sell to their smaller competitor. Other circumstances that clearly demonstrate anticompetitive intent and effect may also be considered in cases asserting this type of liability theory.

Denial of Access to Essential Facilities: Several Circuit Courts of Appeal—although not the Supreme Court—have held that it can be exclusionary if a dominant firm denies its competitors access to an "essential facility." An "essential" facility is one that is either completely unique (and necessary) to participate in a market, or is extremely difficult to replicate. Denying access to that facility is potentially problematic from a competition perspective when it effectively cripples rivals' ability to compete.[53]

Business Torts: Business torts, although typically not a competition problem, can nevertheless constitute exclusionary conduct in certain situations. The first instance occurs when acts improperly harm competition *and* one or more competitors "either directly or by improperly winning a customer."[54] Such instances are likely to be few and far between, so by far a more common situation in which business torts are anticompetitive is when they are part of a larger scheme and pattern of exclusionary conduct. In those situations, the broader scheme is assessed for anticompetitive effect.

V. Price Gouging—Is it Anticompetitive?

In many economic crises, there is a concern that sellers will engage in price gouging; *i.e.*, charge excessive prices due either to abnormally high demand, or a suddenly reduce supply.[55] In the United States, price gouging is typically governed by state laws, which vary, and investigated by state consumer protection authorities, because there is no federal anti-price-gouging statute.[56]

Competition law is largely inapplicable to price gouging because, absent collusion or exclusionary conduct, the antitrust laws allow companies to price products and service however they want.[57] Nevertheless, price gouging *can* present an antitrust problem if competitors collude over the

prices they set. Just the same as at any other time, absent specific permission from the government or relevant regulators, competitors may not agree on the prices they charge, how markets are allocated, or any other type of collusion prohibited by law. Furthermore, even if not obviously the result of collusion, price gouging can be indicative of other anticompetitive conduct as well. For example, companies with monopoly power could simply charge monopoly prices after having established their power in a given market.

VI. Who Can Sue to Enforce the Antitrust Laws?

At the U.S. government level, both the FTC and the DOJ can bring antitrust claims. Typically, the FTC focuses on consumer-spending segments of the economy like health care, pharmaceuticals, and food.[58] But the two agencies usually consult with each other in investigating antitrust violations.[59] Then there are 56 "state" attorneys general (including the District of Columbia and five U.S. territories), which also enforce state and federal antitrust laws.[60] Finally, competitors, as well as a company's direct and indirect purchasers, can bring individual or class actions (although indirect purchasers can only seek money damages under state law, whereas competitors and direct purchasers can seek such damages under federal law).[61]

Section 4 of the Clayton Act permits treble damages for any injured person who sues, which includes states and local governments.[62] It also mandates that a defendant pay a successful plaintiff's reasonably attorney fees.[63] The Sherman Act imposes criminal penalties of up to $100 million for a corporation, and the fine may be increased to twice the amount the conspirators gained or twice the money lost by the victims.[64]

As might be clear, the antitrust laws' damages provisions are inherently punitive in nature. They are intended to punish bad behavior, and to dissuade similar conduct by others by setting an example of those that violate competition laws. This, in turn, reflects a strong policy under U.S. law to preserve competition at all costs, given the societal harms that anticompetitive conduct creates.

VII. Practical tips For Spotting Potential Antitrust Violations

As the above discussion indicates, the ways in which companies can violate U.S. antitrust laws are many and varied. For ordinary businesspeople, the trick is to learn how to spot such conduct before it occurs, or, if they are the victim of such conduct, as it occurs. Courts encourage strenuous competition and are fine with there being winners and losers in the market. After all, the policy behind the antitrust laws is not to protect competitors, but competition itself.

So, what is an ordinary market participant to do? Here are some tips for spotting potentially anticompetitive practices from a larger rival (or which may indicate that you, the larger rival, should rethink certain competitive strategies):

- The firm engaged in the conduct in question is the dominant player in one or more markets, or will be if it succeeds in excluding competitors through the conduct that worries you;

- The potentially problematic practices seem to derive from the larger firm's incumbent power in one or more markets, rather than the quality of its products or services;

- The practices exclude a smaller competitor (or group of competitors) from all or a substantial portion of the market due to factors other than the quality of their products or services;

- The practices remove a smaller competitor's (or group of competitors') access to a substantial amount of customers (or to key customers), regardless of the quality of their products or services;

- No matter what a smaller competitor (or a group of competitors) tries, there is no realistic way to get around the practices without losing money;

- The practices threaten to cripple a smaller competitor's (or group of competitors') business through means they cannot control.

In addition to problematic practices from a larger competitor, companies must also be vigilant about potential liability from agreements with horizontal competitors or companies at different levels of the supply chain. As noted, in times of crisis, dealing with a competitor might be necessary. Therefore, in order to help avoid antitrust liability, companies should never agree regarding horizontal competitive issues without first getting advice from legal counsel.

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[1] *See, e.g.*, *Justice Department seeks informants on coronavirus antitrust schemes*, REUTERS (Mar. 9, 2020), https://www.reuters.com/article/us-health-coronavirus-antitrust/justice-department-seeks-informants-on-coronavirus-antitrust-schemes-idUSKBN20W2BE.

[2] Most states have analogues to the Sherman Act. This memorandum, however, focuses on federal law, because the state laws, with few minor exceptions, generally track its substantive prohibitions.

[3] 15 U.S.C. § 1.

[4] *See Mayor & City Council of Balt., Md. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013) ("The crucial question in a Section 1 case is . . . whether the challenged conduct 'stems from independent decision or from an agreement, tacit or express.'" (citation omitted)).

[5] *See* 15 U.S.C. § 15(a).

[6] *See, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("Section 1 of the Sherman Act prohibits [e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. This Court has not taken a literal approach to this language, however. Instead, this Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." (citation and internal quotes omitted)).

[7] *See, e.g.*, *id.* ("Per se liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." (citations and internal quotation marks omitted)).

[8] *See Dagher*, 547 U.S. at 5–6 (explaining that "[p]rice-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are per se unlawful"; concluding that challenged agreement was not *per se* illegal because oil companies "did not compete with one another in the relevant market").

[9] *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (holding that agreement among manufacturers and distributors not to sell products to a specific appliance store was a *per se* illegal group boycott).

[10] *See United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972) ("One of the classic examples of a per se violation of [Section] 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.").

[11] *See Dagher*, 547 U.S. at 5 (explaining that courts "presumptively appl[y] rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful").

[12] As you might expect, Rule of Reason violations do not create antitrust liability unless they in fact create anticompetitive harm. In other words, the liable parties have to possess market power in a well-defined market. Otherwise, they simply will not have an anticompetitive effect on the market overall. For example, two mom–and-pop

coffee shops that agreed to exchange sales information could not have the same effect on the coffee market as Starbucks and Dunkin' Donuts would were they to do the same.

[13] *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012) (citation omitted) (emphasis added).

[14] *Todd v. Exxon Corp.*, 275 F.3d 191, 199 (2d Cir. 2001) (explaining that there is a type of Section 1 violation "where the violation lies in the information exchange itself—as opposed to merely using the information exchange as evidence upon which to infer a price-fixing agreement" and that "[t]his exchange of information is not illegal per se, but can be found unlawful under a rule of reason analysis").

[15] *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) ("Vertical price restraints are to be judged according to the rule of reason.").

[16] *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.) ("It is not surprising, then, that courts have judged the lawfulness of contracts to purchase not under per se rules but under a 'rule of reason.' And this is so whether those contracts involve a buyer's promise to buy 'exclusively' from the seller, a promise to buy all his 'requirements' from the seller for a specified time, or a promise to buy a large dollar amount." (citations omitted)).

[17] *Mayor & City Council of Balt., Md.*, 709 F.3d at 136 (noting that direct evidence of a conspiracy "would consist, for example, of a recorded phone call in which two competitors agreed to fix prices at a certain level").

[18] *Id.* ("[E]ven in the absence of direct 'smoking gun' evidence, a horizontal agreement, such as the one alleged in the case before us, may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors." (citation omitted)).

[19] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *see also Monsanto Co. v. Spray–Rite Serv. Corp.*, 465 U.S. 752 , 768 (1984) (holding that to prevail on a Section 1 antitrust claim, "there must be evidence that tends to exclude the possibility of independent action").

[20] *Twombly*, 550 U.S. at 556 & n.4.

[21] *Mayor & City Council of Balt., Md.*, 709 F.3d at 136.

[22] *See, e.g.*, *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 781-82 (2d Cir. 2016) (finding plaintiffs alleged plausible antitrust conspiracy to rig LIBOR benchmark rate in part due to allegations that defendants had a common motive to conspire: "increased profits and the projection of financial soundness").

[23] *See In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476 (DLC), 2014 WL 4379112, at *4–10 (S.D.N.Y. Sept. 4, 2014) (plaintiffs stated antitrust boycott claim in part by alleging that it was in the individual interest of each conspirator to deal with the boycotted entity, because doing so would increase their market share at the expense of their competitors).

[24] *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 65 (2d Cir. 2012) (in antitrust case, summary judgment was inappropriate in part due to evidence of "private phone calls and meetings—for which no social or personal purpose has been persuasively identified" between alleged conspirators at which pricing information was exchanged).

[25] 175 F. Supp. 3d 44 (S.D.N.Y. 2016).

[26] *Id.* at 54.

[27] *Id.* at 55–56.

[28] For a recent example to the contrary, see *In re Pork Antitrust Litig.*, No. 18-1776 (JRT/LIB), 2019 WL 3752497, at *9 (D. Minn. Aug. 8, 2019) (dismissing Section 1 claim against pork producers where plaintiffs failed to allege parallel conduct, and instead only alleged isolated and sporadic individual price increases by certain defendants).

[29] For example, in *In re Credit Default Swaps Antitrust Litigation*, the plaintiffs alleged that a group of Wall Street banks and their co-conspirators secretly agreed to boycott an exchange-trading platform for credit default swaps that attempted to enter the market during fall 2008, in the midst of the financial crisis. No. 13-md-2476 (DLC), 2014 WL 4379112, at *4–10 (S.D.N.Y. Sept. 4, 2014). Although the defendants argued that their allegedly concerted actions were consistent with "independent, self-interested conduct in reaction to the global financial crisis," the court rejected this excuse. *Id.* at *11. The court explained that "[t]he financial crisis hardly explains the alleged secret meetings and coordinated actions," and denied defendants' motion to dismiss.[29] The case later settled for a total of more than $1.86 billion. The *CDS* case demonstrates that a crisis situation will not justify allegedly anticompetitive conduct, and confirms that competitors should exercise caution to ensure they do not run afoul of the antitrust laws as the COVID-19 pandemic unfolds.

[30] *Joint Antitrust Statement Regarding COVID-19*, DEP'T OF JUSTICE, https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19.

[31] *Id.*

[32] *See Joint Antitrust Statement Regarding COVID-19*, DEP'T OF JUST. (Mar. 24, 2020), https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19?utm_medium=email&utm_source=govdelivery/.

[33] *Antitrust Guidelines for Collaborations Among Competitors*, FED. TRADE COMMISSION (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[34] *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.").
[35] *See id.* ("For example, health care facilities may need to work together in providing resources and services to communities without immediate access to personal protective equipment, medical supplies, or health care. Other businesses may need to temporarily combine production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies they may not have traditionally manufactured or distributed. These sorts of joint efforts, limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19 and its aftermath, may be a necessary response to exigent circumstances that provide Americans with products or services that might not be available otherwise.").
[36] 15 U.S.C. § 2.
[37] *See generally* AREEDA & HOVENKAMP, ANTITRUST LAW § 801.
[38] *See generally id.*
[39] *Microsoft*, 253 F.3d at 51.
[40] AREEDA & HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 6.04.
[41] AREEDA & HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 18.1.
[42] *Microsoft*, 253 F.3d at 68.
[43] AREEDA & HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 17.01.
[44] *See Assistant Attorney General Makan Delrahim Delivers Remarks at the Organisation for Economic Co-Operation and Development in Paris*, DEP'T OF JUST. (June 6, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-organisation-economic-co and other recent pronouncements.
[45] *See generally Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).
[46] *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1992).
[47] AREEDA & HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 7.03.
[48] AREEDA & HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 7.05.
[49] *See generally Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992).
[50] *Id.* at 477–78.
[51] *Refusal to Deal*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal.
[52] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 416 (2004).
[53] AREEDA & HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 7.07.
[54] AREEDA & HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 7.08.
[55] Recall the accusations of price gouging in the aftermath of Hurricane Katrina and Hurricane Harvey. *See* Michael Kunzelman, *Post-Katrina Price Gouging?*, CBS NEWS (Apr. 18, 2006), https://www.cbsnews.com/news/post-katrina-price-gouging/; Dan Solomon, *Hurricane Harvey Price Gouging Cases Are Still Being Settled*, TEX. MONTHLY (Dec. 6, 2018), https://www.texasmonthly.com/the-culture/hurricane-harvey-price-gouging-cases-continue-to-get-settled/.
[56] In California, for example, the state attorney general enforces the price-gouging laws. Violations can result in up to one year of imprisonment or a fine of up to $10,000, plus civil enforcement actions with penalties of up to $2,500 per violation. *Attorney General Becerra Calls on Online Marketplaces to Up Their Game to Combat COVID-19 Price Gouging on Their Platforms*, ST. OF CAL. DEP'T OF JUST. (Mar. 20, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-calls-online-marketplaces-their-game-combat-covid-19. Similarly, in Texas, the state attorney general recently sued an auction company for price gouging medical masks related to the COVID-19 crisis. Billy Gates, *Texas Attorney General Sues Auction Company for Price Gouging*, KXAN (Mar. 30, 2020), https://www.kxan.com/news/coronavirus/texas-attorney-general-sues-auction-company-for-price-gouging/. The bidding for N95 respirator masks reached $180 for a pack of 16 on the website. And despite advance warnings from local police and the Texas Attorney General, the company held the auction anyway. *Id.* Outside the United States, authorities in at least five countries have begun investigating possible anticompetitive conduct associated with COVID-19 supplies—higher prices for goods like face masks and hand sanitizer.
[57] *See, e.g.*, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 454 (2009) ("How is a judge or jury to determine a 'fair price?' Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition 'would have set' were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price 'gap?' Must it be large enough for all independent competing firms to make a 'living profit,' no matter how inefficient they may be? And how should the court respond when costs or demands change over time, as they inevitably will?" (cleaned up)).
[58] *The Enforcers*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers.

[59] *Id.*
[60] Deborah Platt Majoras, Deputay Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Antitrust Remedies in the United States: Adhering to Sound Principles in a Multi-Faceted Scheme (Oct. 4, 2002), available at https://www.justice.gov/atr/speech/antitrust-remedies-united-states-adhering-sound-principles-multi-faceted-scheme.
[61] 15 U.S.C. § 1.
[62] 15 U.S.C. § 15(a).
[63] *Id.*
[64] *The Antitrust Laws*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.