MEMORANDUM

To: Right to Repair Task Force
From: David P. Hall Esq., Legislative Counsel
Date: October 9, 2018
RE: Supplemental Information on Legal Considerations

This memorandum provides supplemental information to the Task Force concerning Vermont state warranties, the Magnusson-Moss Warranty Act and related FTC rules, and general antitrust principles.

I. Warranties

(a) Vermont Warranties – Uniform Commercial Code; 9A V.S.A. §§ 2-313—2-318

The Vermont adaptation of the Uniform Commercial Code includes several provisions that address express and implied warranties[1].

[1] *§ 2-313. EXPRESS WARRANTIES BY AFFIRMATION, PROMISE, DESCRIPTION, SAMPLE*

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

§ 2-314. IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE

(1) Unless excluded or modified (§ 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (§ 2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 2-315. IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§ 2-316. EXCLUSION OR MODIFICATION OF WARRANTIES

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (§ 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3) of this section, to exclude or modify the implied warranty or merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2) of this section:

As its name suggests, an "express" warranty is a specific guarantee made by the seller to the buyer concerning as part of an individual bargain. An express warranty is a promise or statement that a seller voluntarily makes about its produce or about its commitment to remedy defects and malfunctions. In Vermont an express warranty does not necessarily have to be in writing, nor must a seller use formal words such as "warrant" or "guarantee." 9A V.S.A. § 2-313.

Vermont law also recognizes "implied" warranties: the warranty of merchantability (that the goods sold are of average quality and are fit to be used for their ordinary purpose; 9A V.S.A. § 2-214); and the warranty of fitness for a particular purpose (where seller knows buyer intends to use the item for a particular purpose, that the item is fit for that purpose; 9A V.S.A. 2-315).

In Vermont, implied warranties cannot be waived for sales of new or unused consumer goods or services. 9A V.S.A. § 2-316(5).

(b) Magnusson-Moss Warranty Act - 15 U.S.C. Chapter 50; §§ 2301-2312

The Magnusson-Moss Warranty Act is the federal law that governs written warranties[2] that are made by a warrantor[3] for a consumer product[4] that actually costs a consumer $5.00 or more. The implementation of the Act is primarily through rules adopted by the Federal Trade Commission.

(a) unless the circumstances indicate otherwise, all implied warranties of fitness may be excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (§§ 2-718 and 2-719).

(5) The provisions of subsections (2), (3) and (4) of this section shall not apply to sales of new or unused consumer goods or services. Any language, oral or written, used by a seller or manufacturer of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be unenforceable. For the purposes of this section, "consumer" means consumer as defined in chapter 63 of Title 9.

§ 2-317. CUMULATION AND CONFLICT OF WARRANTIES EXPRESS OR IMPLIED

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

§ 2-318. THIRD PARTY BENEFICIARIES OF WARRANTIES EXPRESS OR IMPLIED

A seller's warranty whether express or implied extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

[2] The Act includes definitions for both written and implied warranties:

(6) The term "written warranty" means--

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(7) The term "implied warranty" means an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product.

15 U.S.C. §§ 2301(6)-(7).

The Act does not require a seller to offer a written warranty. Rather, it imposes the primary rules for written warranties if offered:

1. ***Duty to disclose warranty*** – A "warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a).

2. ***Warranty cannot be conditioned on using name-brand articles or services, unless waived***
-- "A warrantor may not condition his written or implied warranty of a product on the consumer's using, in connection with such product, any article or service (other than an article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name."
-- Exception: The FTC may waive the prohibition if:
(1) the warrantor satisfies the FTC that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and
(2) the FTC finds that such a waiver is in the public interest.
-- The FTC must identify in the Federal Register, and permit public comment on, all applications for waiver of the prohibition and publish in the Federal Register its disposition of any such application, including the reasons therefor.
15 U.S.C. § 2302(c).

3. ***Specify full or limited warranty*** **–** A warrantor must clearly and conspicuously designate a written warranty as a "full (statement of duration) warranty" or "limited warranty" depending on whether it meets the federal minimum standards for a full warranty. 15 U.S.C. § 2303(a).

4. ***Federal minimum standards for full warranty***

(a) To meet the Federal minimum standards for warranty:
(1) A warrantor must as a minimum remedy a consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with the written warranty.

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[3] The Act defines "supplier" and "warrantor":
(4) The term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.
(5) The term "warrantor" means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.
15 U.S.C. §§ 2301(4)-(5)

[4] The Act defines "consumer product" and "consumer":
(1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).
(3) The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).
15 U.S.C. §§ 2301(1);(3).

(2) A warrantor may not impose any limitation on the duration of any implied warranty on the product.

(3) A warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on the product, unless the exclusion or limitation conspicuously appears on the face of the warranty.

(4) If the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in the product, the warrantor must permit the consumer to elect either a refund for, or replacement and installation without charge of, the product or part.

(b) A warrantor shall not impose any duty other than notification upon a consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty (unless the warrantor demonstrates additional duty is reasonable).

(c) The warrantor is absolved of warranty duties if he shows that the defect, malfunction, or failure of any warranted consumer product to conform with a written warranty, was caused by damage (not resulting from defect or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance).

(d) "Without charge" means that the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product.

(e) If a supplier designates a warranty applicable to a consumer product as a "full (statement of duration)" warranty, then the warranty shall, for purposes of any action under section 2310(d) of this title or under any State law, be deemed to incorporate at least the minimum requirements of this section and rules prescribed under this section.

15 U.S.C. § 2304.

5. ***Implied warranties*** – If a warrantor offers a full warranty, it cannot disclaim or modify implied warranties. If a warrantor offers a limited warranty, it can only limit the implied warranties to the duration of the limited warranty. 15 U.S.C. § 2308.

6. ***Remedies*** **–** The Attorney General and the FTC have authority to enforce violations in federal court. Consumers also have a private right of action for damages, costs, and expenses. However, a warrantor may require that consumers first proceed with an informal dispute settlement procedure that complies with the Dispute Resolution Rule. 15 U.S.C. § 2310.

(c) The Disclosure Rule – 16 C.F.R. Part 701

The Disclosure Rule specifies the legal requirements governing a warrantor's duty to disclose the terms of a written warranty for consumer products that cost more than $15.00. Under the Rule, a warrantor must conspicuously disclose in a single document, in simple and readily understood language, the following items of information:

> (1) The identity of the party or parties to whom the written warranty is extended, if the enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other than every consumer owner during the term of the warranty;

> (2) A clear description and identification of products, or parts, or characteristics, or components or properties covered by and where necessary for clarification, excluded from the warranty;
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> (3) A statement of what the warrantor will do in the event of a defect, malfunction or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and, where necessary for clarification, those which the warrantor will not pay for or provide;
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> (4) The point in time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration;
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> (5) A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation, including the persons or class of persons authorized to perform warranty obligations. This includes the name(s) of the warrantor(s), together with: The mailing address(es) of the warrantor(s), and/or the name or title and the address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number which consumers may use without charge to obtain information on warranty performance;
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> (6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with part 703 of this subchapter;
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> (7) Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in section 108 of the Act, 15 U.S.C. 2308, accompanied by the following statement: Some States do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.
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> (8) Any exclusions of or limitations on relief such as incidental or consequential damages, accompanied by the following statement, which may be combined with the statement required in paragraph (a)(7) of this section:Some States do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.
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> (9) A statement in the following language: This warranty gives you specific legal rights, and you may also have other rights which vary from State to State.

16 C.F.R. § 701.3.

Additionally, under section 701.4 of the Rule:

> When a warrantor employs any card such as an owner’s registration card, a warranty registration card, or the like, and the return of such card is a condition precedent to warranty coverage and performance, the warrantor shall disclose this fact in the warranty. If the return of such card reasonably appears to be a condition precedent to warranty coverage and performance, but is not such a condition, that fact shall be disclosed in the warranty.

16 C.F.R. § 701.4.

(d) The Pre-Sale Availability Rule – 16 C.F.R. Part 702

The Pre-Sale Availability Rule specifies the duties for sellers and warrantors of products that cost more than $15.00 and that carry a written warranty:

(1) Sellers – display the warranty in close proximity to the product, or post signs that inform consumers that warranty language is available on request (and making it available on request).
(2) Warrantors – make warranty materials available to sellers to ensure their compliance.
(3) Catalog and mail order sales – disclose in a catalog the full text or contact information for how to obtain full text of warranty.
(4) Door-to-door sales – disclose that seller has copies that are available for inspection prior to consummation of sale.

16 C.F.R. § 702.3.

(e) The Dispute Resolution Rule – 16 C.F.R. Part 703

This Rule specifies the minimum legal and process requirements for warrantors to establish an information dispute resolution "Mechanism." Warrantors must include information about the Mechanism in their warranty language, including whether a consumer is required to use the Mechanism as a first step in dispute resolution. 16 C.F.R. § 703.2. Warrantors must ensure that a Mechanism is sufficiently resourced and independent, *id.* § 703.3, including provisions governing qualification of members. *Id*. § 703.4. The Rule specifies the minimum procedureal requirements for operation of the Mechanism, *id.* § 703.5, for recordkeeping, *id.* § 703.6. and for audits, *id.* § 703.7.

II. Constitutional Considerations

Example 1: An OEM manufactures and repairs a game console outside of Vermont. Under the R2R law, the OEM must provide independent repair providers and consumers with access to the same diagnostic tools, repair information, and parts, that the OEM uses to repair the console.

Example 2: An OEM manufactures a smartphone outside of Vermont. The OEM offers a mail-in repair service that it performs, or alternatively, offers repair through multiple authorized service providers located both within and outside of Vermont. Under the R2R law, the OEM must provide independent repair providers and consumers with access to the same diagnostic tools, repair information, and parts that the OEM provides to its authorized providers.

Example 3: An OEM manufactures a computer outside of Vermont. The OEM does not provide service directly, but offers service through authorized service providers, none of which are located in Vermont. Under the R2R law, the OEM must provide independent repair providers and consumers with access to the same diagnostic tools, repair information, and parts that the OEM provides to its authorized providers.

Example 4: An OEM manufactures a digital electronic product in Vermont. The OEM offers service directly and through a network of authorized service providers located within and outside of Vermont. Under the R2R law, the OEM must provide independent repair providers and consumers with access to the same diagnostic tools, repair information, and parts that the OEM provides to its authorized providers.

(a) Police Powers.

(1) On the one hand, compelling a manufacturer to provide repair information is arguably a legitimate exercise of the Police Powers under the Tenth Amendment. See *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980) ("In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected.")(citing *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978); *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976). Vermont has the authority to provide for the public health, safety, and general welfare of its citizens. Repair regulation arguably serves the interests of the State by facilitating lower costs of repair, protecting consumer choice, reducing environmental impacts, ensuring availability of goods to secondary users, and safeguarding the economic viability of repair providers.

(2) This is not wholly unprecedented because government regularly regulates economic activity on behalf of consumers. See 9 V.S.A. chapter 63.

(3) In a narrower sense, the type of regulation contemplated by right-to-repair legislation can be compared to laws that require a business to engage with its competitors.

(A) Under antitrust principles, a business generally has the right to compete and to choose who it does business with, absent an illegal purpose to create or maintain a monopoly. However, in those cases where courts have found an illegal purpose based on illegal tying, refusal to deal, unfair competition, etc., courts have forced the defendant to sell parts or provide

services to competitors. *See Eastman Kodak Company v. Image Technical Services*, 504 U.S. 451 (1992) and *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997).

(B) In heavily regulated markets, e.g., telecom or other utilities, statutes and regulations compel businesses to allow competitors to access infrastructure, to provide certain services, etc.

(3) On the other hand, these two examples are arguably narrow and dependent on the facts and circumstances of the regulation.

(A) Antitrust remedies are rare and are only imposed after a fact-specific analysis on a case-by-case basis.

(B) Utility provisions are part of a comprehensive regulatory scheme governing businesses "clothed with a public interest" and subject to otherwise constitutional federal and state regulation. *Nebbia v. New York*, 291 U.S. 502 (1943).

(b) Dormant Commerce Clause.

From the most recent Supreme Court decision addressing the Dormant Commerce Clause, *South Dakota v. Wayfair*, 138 S.Ct. 2080, 2090-2091 (2018):

> Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face "a virtually per se rule of invalidity." *Granholm v. Heald*, 544 U.S. 460, 476, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) (internal quotation marks omitted). State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest ... will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970); see also *Southern Pacific*, supra, at 779, 65 S.Ct. 1515. Although subject to exceptions and variations, see, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976); *Brown–Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986), these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause.

(1) Facial discrimination; Economic protectionism; Undue burden

(A) A State law that discriminates against interstate commerce on its face, e.g., the language of the statute treats similarly situated entities differently on the basis of geography, is usually found unconstitutional.

> To determine whether a law violates this so-called "dormant" aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce. *American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504

> U.S. 353, 359 (1992). In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988). Discriminatory laws motivated by "simple economic protectionism" are subject to a "virtually per se rule of invalidity," *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose, *Maine v. Taylor*, 477 U.S. 131, 138 (1986).
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> *United Haulers Ass'n., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 550 U.S. 330, at 338-339 (2007).

(B) A state law is also *per se* invalid its purpose is economic protectionism—to benefit in-state interests at the expense out-of-state interests.

"The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. See, e. g., *H. P. Hood & Sons, Inc. v. Du Mond, supra; Toomer v. Witsell*, 334 U.S. 385, 403-406, 68 S.Ct. 1156, 1165-1167, 92 L.Ed. 1460; *Baldwin v. G. A. F. Seelig, Inc*., supra; *Buck v. Kuykendall*, 267 U.S. 307, 315-316, 45 S.Ct. 324, 325-326, 69 L.Ed. 623. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. Cf. *Welton v. Missouri*, 91 U.S. 275, 23 L.Ed. 347."

City of Philadelphia v. New Jersey, 437 U.S. 617, 623-624 (1978). See also *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980)(striking Florida law that prohibited investment activities within Florida by banks, bank holding companies, and trust companies with their principal place of operations outside of Florida).

(C) Undue Burden - see *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 805-806 (1976):

> In the most recent of those cases, Pike v. Bruce Church, supra, a burden was found to be imposed by an Arizona requirement that fresh fruit grown in the State be packed there before shipment interstate. The requirement prohibited the interstate shipment of fruit in bulk, no matter what the market demand for such shipments. In H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949), a New York official denied a license to a milk distributor who wanted to open a new plant at which to receive raw milk from New York farmers for immediate shipment to Boston. The denial blocked a potential increase in the interstate movement of raw milk. Appellee also relies upon Toomer v. Witsell, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948), in which this Court found interstate commerce in raw shrimp to be burdened by a South Carolina requirement that shrimp boats fishing off its coast dock in South Carolina and pack and

> pay taxes on their catches before transporting them interstate. The requirement increased the cost of shipping such shrimp interstate. In Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928), a Louisiana statute forbade export of Louisiana shrimp until they had been shelled a beheaded, thus impeding the natural flow of freshly caught shrimp to canners in other States. Both Shafer v. Farmers Grain Co., 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909 (1925), and Lemke v. Farmers Grain Co., 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458 (1922), involved efforts by North Dakota to regulate and thus disrupt the interstate market in grain by imposing burdensome regulations upon and controlling the profit margin of corporations that purchased grain in State for shipment and sale outside the State. And in Pennsylvania v. West Virginia, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923), the Court found a burden upon the established interstate commerce in natural gas when a new West Virginia statute required domestic producers to supply all domestic needs before piping the surplus, if any, to other States.
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> The common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.

Id.

(2) Discriminatory Effect

A court may find that a law is discriminatory in effect if it provides for differential treatment of similarly situated entities based on their contacts with the state, or has the effect of providing a competitive advantage to in-state interests vis-à-vis similarly situated out-of-state interests. See *Hunt v. Washington State Apple Advertising Com'n,* 432 U.S. 333 (1977)(striking North Carolina law that in effect prohibited the display of Washington state apple grades on closed containers shipped into N.C.); *but cf. Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)(upholding Maryland statute prohibiting refiners and producers of gasoline from operating retail gas outlets, even where majority of burden appeared to fall on out-of-state interests and benefit in-state independent retailers).

(3) Indirect Regulation - Analysis Under the *Pike* Balancing Test.

The U.S. Supreme Court provided in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, at 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Thus, absent discrimination against interstate commerce, a State law may regulate commerce if it does so even-handedly to effectuate a legitimate local public interest, and its

effects on interstate commerce are only incidental—unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Id.*

An "incidental burden" is one that weighs more heavily on interstate commerce than intrastate commerce. *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 50 (2nd Cir. 2007). The Second Circuit recognizes three types of incidental burdens:

i. *Disparate impact* - laws that have a disparate impact on in- versus out-of state entities.

ii. *Extraterritoriality* - laws that regulate economic activity beyond the state's borders. (The Second Circuit treats this as a type of incidental burden under the Pike balancing test; however, the Supreme Court treats extraterritoriality as a *per se* violation).

iii. *Regulatory inconsistency* – laws that are in substantial conflict with a common regulatory scheme in place in other states. *New York Pet Welfare Ass'n. Inc. v. City of New York*, 850 F.3d 79, 91-92. (2017). In the Second Circuit a plaintiff must show more than a theoretical conflict, but rather, must demonstrate an actual conflict between state laws.

(c) First Amendment – Free Speech; Commercial Speech; Compelled Speech

Constitutional review of non-commercial free speech regulation under the First Amendment is well settled, and depends on whether the regulation under review is content-based or content-neutral. A content-neutral law may regulate speech through reasonable restrictions on the time, manner, and place of the speech, provided it restricts no more speech than necessary. The law will be subject to intermediate scrutiny, under which the law must be narrowly tailored to serve a significant governmental interest. *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017).

However, if a speech regulation is content-based, it is subject to strict scrutiny and presumptively unconstitutional. It will only be upheld if the government provides the regulation is narrowly tailored to serve a compelling government interest. *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018). This strict scrutiny standard applies both to content-based restrictions on speech, as well as to content-based laws that compel speech. *Id.* (striking a California law that required certain family planning clinics to provide notices mandated by statute).

First Amendment protection for commercial speech is a relatively recent development in U.S. Supreme Court jurisprudence, first recognized in the mid-1970's. See *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Over a series of cases the Court reasoned that commercial speech could be of value to the marketplace of ideas, and that laws impairing commercial free speech deserved at least an intermediate level of scrutiny. The Court articulated the factors when considering regulation of commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566) (1980)—whether:

(1) the regulated expression is false or misleading;
(2) the government interest is substantial;

(3) the statute directly and materially advances the governmental interest asserted; and
(4) the statute is no more extensive than necessary to serve that interest.

For laws the compel commercial speech, historically the Supreme Court has set First Amendment protection at an even lower bar. Under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 638 (1985, a law that compels commercial speech that is "purely factual and noncontroversial" will be upheld unless the challenger can demonstrate that the law is not rationally related to any governmental interest. *Id.*

At this point, given recent Supreme Court jurisprudence, it is not clear how a court might characterize the regulation of speech under right-to-repair legislation, and consequently, what standard of review the court would apply. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); *U.S. v. Stevens*, 559 U.S. 460 (2010); *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018); *CTIA-The Wireless Association v. City of Berkeley, California*, 138 S.Ct. 2708 (2018).

(d) Contracts Clause

A legislative enactment that constitutes a substantial impairment of a contractual relationship must have a significant and legitimate public purpose. *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400 (1983). Would right-to-repair legislation abrogate franchise agreements, exclusive authorized repair agreements, license agreements for use of software, etc.? Without further facts, a complete analysis is not possible.

(e) Takings Clause

Under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the Supreme Court identified factors that a court must balance to determine whether a law effects a compensable government taking of property: (1) the regulation's economic impact on the claimant; (2) the extent to which it interferes with distinct investment-backed expectations; and (3) the character of the government action. Would right-to-repair legislation affect the investment-backed expectations of authorized repair providers, manufacturers, etc.? Again, without further facts, a complete analysis is not possible.

(f) Substantive due process.

Courts have established a relatively low threshold to survive a substantive due process challenge to economic regulations. See, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978):

Appellants' substantive due process argument requires little discussion. The evidence presented by the refiners may cast some doubt on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary “to sit as a ‘superlegislature to weigh the wisdom of legislation’ . . ..” *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)(citations omitted). Responding to evidence that producers and refiners were favoring company-operated stations in the allocation of gasoline and that this would eventually decrease the competitiveness of the retail market, the State enacted a law prohibiting producers and refiners from operating their own stations. Appellants argue that this response is irrational and that it will frustrate rather than further the State's desired goal of enhancing competition. But, as the Court of Appeals observed, this argument rests simply on an evaluation of the economic wisdom of the statute, 279 Md., at 428, 370 A.2d, at 1112, and cannot override the State's authority “to legislate against what are found to be injurious practices in their internal commercial and business affairs . . ..” *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949). Regardless of the ultimate economic efficacy of the statute, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market, and we therefore reject appellants' due process claim.

III. Overview of Relevant Antitrust Regulation

A. In General

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age. Yet for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.

Here is an overview of the three core federal antitrust laws.

The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." Long ago, the Supreme Court decided that the Sherman Act does not prohibit every restraint of trade, only those that are unreasonable. For instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "per se" violations of the Sherman Act; in other words, no defense or justification is allowed.

The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the Department of Justice. Criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids. The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million.

The Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices." The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the FTC Act.

The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates (that is, the same person making business decisions for competing companies). Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." As amended by the Robinson-Patman Act of 1936, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants. The Clayton Act was amended again in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify the government of their plans in advance. The Clayton Act also authorizes private parties to sue for triple damages when they have been harmed by conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future.

In addition to these federal statutes, most states have antitrust laws that are enforced by state attorneys general or private plaintiffs. Many of these statutes are based on the federal antitrust laws.

B. Dealings in the Supply Chain

The antitrust laws also affect a variety of "vertical" relationships — those involving firms at different levels of the supply chain — such as manufacturer-dealer or supplier-manufacturer. Restraints in the supply chain are tested for their reasonableness, by analyzing the market in detail and balancing any harmful competitive effects against offsetting benefits. In general, the law views most vertical arrangements as beneficial overall because they reduce costs and promote efficient distribution of products. A vertical arrangement may violate the antitrust laws, however, if it reduces competition among firms at the same level (say among retailers or among wholesalers) or prevents new firms from entering the market. This is particularly a concern in markets with few sellers or those dominated by one seller. In these markets, manufacturer- or supplier-imposed restraints may make it difficult for newcomers or firms with innovative products to find outlets and reach consumers.

Under federal antitrust law, a manufacturer may decide how many distributors it will have and who they will be. From a competition viewpoint, a manufacturer may decide that it will use only franchised dealers with exclusive territories to compete more successfully with other manufacturers. Or it may decide that it will use different dealers to target specific customer groups.

1. Manufacturer-imposed Requirements

Reasonable price, territory, and customer restrictions on dealers are legal. Manufacturer-imposed requirements can benefit consumers by increasing competition among different brands (interbrand competition) even while reducing competition among dealers in the same brand (intrabrand competition). For instance, an agreement between a manufacturer and dealer to set maximum (or "ceiling") prices prevents dealers from charging a non-competitive price. Or an agreement to set minimum (or "floor") prices or to limit territories may encourage dealers to provide a level of service that the manufacturer wants to offer to consumers when they buy the

product. These benefits must be weighed against any reduction in competition from the restrictions.

Until recently, courts treated minimum resale price policies differently from those setting maximum resale prices. But in 2007, the Supreme Court determined that all manufacturer-imposed vertical price programs should be evaluated using a rule of reason approach. According to the Court, "Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate." Note that this change is in federal standards; some state antitrust laws and international authorities view minimum price rules as illegal, per se.

If a manufacturer, on its own, adopts a policy regarding a desired level of prices, the law allows the manufacturer to deal only with retailers who agree to that policy. A manufacturer also may stop dealing with a retailer that does not follow its resale price policy. That is, a manufacturer can implement a dealer policy on a "take it or leave it" basis.

Limitations on how or where a dealer may sell a product (that is, customer or territory restrictions) are generally legal — if they are imposed by a manufacturer acting on its own. These agreements may result in better sales efforts and service in the dealer's assigned area, and, as a result, more competition with other brands.

Antitrust issues may arise if a manufacturer agrees with competing manufacturers to impose price or non-price restraints up or down the supply chain (that is, in dealings with suppliers or dealers), or if suppliers or dealers act together to induce a manufacturer to implement such restraints. Again, the critical distinction is between a unilateral decision to impose a restraint (lawful) and a collective agreement among competitors to do the same (unlawful). For example, a group of car dealers threatened not to sell one make of cars unless the manufacturer allocated new cars on the basis of sales made to customers in each dealer's territory. The FTC found the dealers' actions unreasonable and designed primarily to stop one dealer from selling at low "no haggle" prices and via the Internet to customers all over the country.

Determining whether a restraint is "vertical" or "horizontal" can be confusing in some markets, particularly where some manufacturers operate at many different levels and may even supply important inputs to their competitors. The label is not as important as the effect: Does the restraint unreasonably reduce competition among competitors at any level? Is the vertical restraint the product of an agreement among competitors? And labeling an agreement a vertical arrangement will not save it from antitrust scrutiny when there is evidence of anticompetitive horizontal effects. For instance, the FTC has stopped exclusive distribution agreements that operated as market allocation schemes between worldwide competitors. In this situation, the competitors agree not to compete by designating one another as an exclusive distributor for different geographic areas.

2. Exclusive Dealing or Requirements Contracts

Exclusive dealing is the term used to describe vertical arrangements in which a buyer is effectively obligated to purchase most or all products or services from one seller, usually for a set period of time. Exclusive dealing arrangements are widespread and can take many forms. Some common examples include agreements forbidding a buyer from purchasing products or services from a seller's competitors, contracts preventing a distributor from selling the products of a different manufacturer, and requirements contracts obligating a buyer to purchase all, or a substantial portion of, its total requirements of specific goods or services from one supplier.

Exclusive dealing or requirements contracts between manufacturers and retailers are common and are generally lawful. In simple terms, an exclusive dealing contract prevents a distributor from selling the products of a different manufacturer, and a requirements contract prevents a manufacturer from buying inputs from a different supplier. These arrangements are judged under a rule of reason standard, which balances any procompetitive and anticompetitive effects.

Most exclusive dealing contracts are beneficial because they encourage marketing support for the manufacturer's brand. By becoming an expert in one manufacturer's products, the dealer is encouraged to specialize in promoting that manufacturer's brand. This may include offering special services or amenities that cost money, such as an attractive store, trained salespeople, long business hours, an inventory of products on hand, or fast warranty service. But the costs of providing some of these amenities — which are offered to consumers before the product is sold and may not be recovered if the consumer leaves without buying anything — may be hard to pass on to customers in the form of a higher retail price. For instance, the consumer may take a "free ride" on the valuable services offered by one retailer, and then buy the same product at a lower price from another retailer that does not offer high-cost amenities, such as a discount warehouse or online store. If the full-service retailer loses enough sales in this way, it may eventually stop offering the services. If those services were genuinely useful, in the sense that the product plus the services together resulted in greater sales for the manufacturer than the product alone would have enjoyed, there is a loss both for the manufacturer and the consumer. As a result, antitrust law generally permits nonprice vertical restraints such as exclusive dealing contracts that are designed to encourage retailers to provide extra services.

On the other hand, a manufacturer with market power may potentially use these types of vertical arrangements to prevent smaller competitors from succeeding in the marketplace. For instance, exclusive contracts may be used to deny a competitor access to retailers or distributors without which the competitor cannot make sufficient sales to be viable. For example, the FTC found that a manufacturer of pipe fittings unlawfully maintained its monopoly in domestically-made ductile iron fittings by requiring its distributors to buy domestic fittings exclusively from it and not from its competitors, who were attempting to enter the domestic market. The FTC found that this manufacturer's policy foreclosed a competitor from achieving the sales needed to compete effectively. On the supply side, exclusive contracts may tie up most of the lower cost sources of supply, forcing competitors to seek higher-priced sources. This was the scenario that led to FTC charges that a large pharmaceutical company violated the antitrust laws by obtaining exclusive licenses for a critical ingredient. The FTC claimed that the licenses had the effect of raising ingredient costs for its competitors, which led to higher retail drug prices.

In some situations, exclusive dealing may be used by manufacturers to reduce competition between them. For example, the FTC challenged exclusive provisions in sales contracts used by two principal manufacturers of pumps for fire trucks. Each company sold pumps to fire truck manufacturers on the condition that any additional pumps would be bought from the manufacturer that was already supplying them. These exclusive supply contracts operated like a customer allocation agreement between the two pump manufacturers, so that they no longer competed for each other's customers.

Exclusive dealing arrangements that potentially foreclose competitors of the supplier from the market may raise competition concerns and can give rise to liability under various antitrust and competition theories of laws. Specifically, exclusive dealing arrangements have been challenged under four provisions of the United States antitrust laws: (1) Section 1 of the Sherman Act, which prohibits contracts “in restraint of trade”[1]; (2) Section 2 of the Sherman Act, which prohibits “attempt[s] to monopolize” and monopolization[2]; (3) Section 3 of the Clayton Act, which prohibits exclusivity arrangements that may "substantially lessen competition” or tend to create a monopoly[3]; and (4) section 5 of the FTC Act, which prohibits "[u]nfair methods of competition."[4]

Rule of Reason Analysis Applies

Exclusive dealing arrangements are analyzed under the rule of reason. In Standard Oil Co. v. United States, 337 U.S. 293 (1949), the U.S. Supreme Court analyzed the exclusive dealing arrangements between gasoline refiners and service stations and introduced what became known as the “quantitative substantiality” test, which measured whether the foreclosure of competition was substantial by looking almost entirely at the percentage of the market foreclosed to competitors as a result of the arrangement. In Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961), the Court changed course and introduced what became known as the “qualitative substantiality” test, which requires a more detailed analysis of the market and the particular circumstances surrounding the arrangement. Modern “rule of reason” analyses of exclusive dealing arrangements focus on a number of factors, including: the defendant’s market power; the degree of foreclosure from the market; barriers to entry; the duration of the contracts; whether exclusivity has the potential to raise competitors’ costs; the presence of actual or likely anticompetitive effects; and legitimate business justifications.

Dominant Firms May Be Held to a Higher Standard Under Section 2

While the analysis of exclusive dealing arrangements is generally the same whether the arrangements are challenged under Section 1 or 2 of the Sherman Act or Section 3 of the Clayton Act, there is growing support for the view that conduct that does not constitute an illegal exclusive dealing arrangement under Section 1 of the Sherman Act or Section 3 of the Clayton Act can still violate Section 2 of the Sherman Act. Courts have held that a monopolist may be held to a different standard than a non-dominant firm in the context of exclusive dealing arrangements. This view finds support in the Supreme Court’s decision in Tampa Electric, 365 U.S. at 329, which states that the “relative strength of the parties” is a factor to consider in determining whether there is substantial foreclosure from the market. In United States v.

Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), the D.C. Circuit addressed the differences between exclusive dealing under Section 1 and Section 2, and held that the “basic prudential concerns relevant to §§ 1 and 2 are admittedly the same… [but] a monopolist’s use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.” Courts have subsequently held that exclusive dealing arrangements upheld under Section 1 or Section 3 of the Clayton Act may still violate Section 2. See, e.g., LePage’s Inc. v. 3M Co., 324 F.3d 141 (3d Cir. 2003);

United States v. Dentsply Int’l, 399 F.3d 181 (3d Cir. 2005); and NicSand, Inc. v. 3M Co., 457 F.3d 534 (6th Cir. 2006).

3. Refusal to Supply

In general, a seller has the right to choose its business partners. A firm's refusal to deal with any other person or company is lawful so long as the refusal is not the product of an anticompetitive agreement with other firms or part of a predatory or exclusionary strategy to acquire or maintain a monopoly. This principle was laid out by the Supreme Court more than 85 years ago:

> The purpose of the Sherman Act is to... preserve the right of freedom of trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.
>
> *U.S. v. Colgate & Co.*, 250 U.S. 300, 307 (1919)

This remains a fundamental rule of federal antitrust law and draws a line between legal independent decision-making on the one hand and illegal joint or monopolistic activity on the other.

C. Single Firm Conduct

Some companies succeed in the marketplace to the point where their behavior may not be subject to common competitive pressures. This is not a concern for most businesses, as most markets in the U.S. support many competing firms, and the competitive give-and-take prevents any single firm from having undue influence on the workings of the market.

Section 2 of the Sherman Act makes it unlawful for a company to "monopolize, or attempt to monopolize," trade or commerce. As that law has been interpreted, it is not illegal for a company to have a monopoly, to charge "high prices," or to try to achieve a monopoly position by what might be viewed by some as particularly aggressive methods. The law is violated only if the company tries to maintain or acquire a monopoly through unreasonable methods. For the courts, a key factor in determining what is unreasonable is whether the practice has a legitimate business justification.

1. Monopolization Defined

The antitrust laws prohibit conduct by a single firm that unreasonably restrains competition by creating or maintaining monopoly power. Most Section 2 claims involve the conduct of a firm with a leading market position, although Section 2 of the Sherman Act also bans attempts to monopolize and conspiracies to monopolize. As a first step, courts ask if the firm has "monopoly power" in any market. This requires in-depth study of the products sold by the leading firm, and any alternative products consumers may turn to if the firm attempted to raise prices. Then courts ask if that leading position was gained or maintained through improper conduct—that is, something other than merely having a better product, superior management or historic accident. Here courts evaluate the anticompetitive effects of the conduct and its procompetitive justifications.

Market Power
Courts do not require a literal monopoly before applying rules for single firm conduct; that term is used as shorthand for a firm with significant and durable market power — that is, the long term ability to raise price or exclude competitors. That is how that term is used here: a "monopolist" is a firm with significant and durable market power. Courts look at the firm's market share, but typically do not find monopoly power if the firm (or a group of firms acting in concert) has less than 50 percent of the sales of a particular product or service within a certain geographic area. Some courts have required much higher percentages. In addition, that leading position must be sustainable over time: if competitive forces or the entry of new firms could discipline the conduct of the leading firm, courts are unlikely to find that the firm has lasting market power.

Exclusionary Conduct
Judging the conduct of an alleged monopolist requires an in-depth analysis of the market and the means used to achieve or maintain the monopoly. Obtaining a monopoly by superior products, innovation, or business acumen is legal; however, the same result achieved by exclusionary or predatory acts may raise antitrust concerns. Exclusionary or predatory acts may include such things as exclusive supply or purchase agreements; tying; predatory pricing; or refusal to deal.

Business Justification
A monopolist may have a legitimate business justification for behaving in a way that prevents other firms from succeeding in the marketplace. For instance, the monopolist may be competing on the merits in a way that benefits consumers through greater efficiency or a unique set of products or services. In the end, courts will decide whether the monopolist's success is due to "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966).

Example: The Microsoft Case
Microsoft was found to have a monopoly over operating systems software for IBM-compatible personal computers. Microsoft was able to use its dominant position in the operating systems market to exclude other software developers and prevent computer makers from installing non-Microsoft browser software to run with Microsoft's operating system software. Specifically,

Microsoft illegally maintained its operating systems monopoly by including Internet Explorer, the Microsoft Internet browser, with every copy of its Windows operating system software sold to computer makers, and making it technically difficult not to use its browser or to use a non-Microsoft browser. Microsoft also granted free licenses or rebates to use its software, which discouraged other software developers from promoting a non-Microsoft browser or developing other software based on that browser. These actions hampered efforts by computer makers to use or promote competing browsers, and discouraged the development of add-on software that was compatible with non-Microsoft browsers. The court found that, although Microsoft did not tie up all ways of competing, its actions did prevent rivals from using the lowest-cost means of taking market share away from Microsoft. To settle the case, Microsoft agreed to end certain conduct that was preventing the development of competing browser software.

2. Exclusive Supply or Purchase Agreements

Exclusive contracts can benefit competition in the market by ensuring supply sources or sales outlets, reducing contracting costs, or creating dealer loyalty. As discussed in section I.B.2 above, exclusive contracts between manufacturers and suppliers, or between manufacturers and dealers, are generally lawful because they improve competition among the brands of different manufacturers (interbrand competition). However, when the firm using exclusive contracts is a monopolist, the focus shifts to whether those contracts impede efforts of new firms to break into the market or of smaller existing firms to expand their presence. The monopolist might try to impede the entry or expansion of new competitors because that competition would erode its market position. The antitrust laws condemn certain actions of a monopolist that keep rivals out of the market or prevent new products from reaching consumers. The potential for harm to competition from exclusive contracts increases with: (1) the length of the contract term; (2) the more outlets or sources covered; and (3) the fewer alternative outlets or sources not covered.

Exclusive supply contracts prevent a supplier from selling inputs to another buyer. If one buyer has a monopoly position and obtains exclusive supply contracts so that a newcomer may not be able to gain the inputs it needs to compete with the monopolist, the contracts can be seen as an exclusionary tactic in violation of Section 2 of the Sherman Act.

Exclusive purchase agreements, requiring a dealer to sell the products of only one manufacturer, can have similar effects on a new manufacturer, preventing it from getting its products into enough outlets so that consumers can compare its new products to those of the leading manufacturer. Exclusive purchase agreements may violate the antitrust laws if they prevent newcomers from competing for sales. Newcomers may face significant additional costs and time to induce dealers to give up the exclusive agreements with the leading firm, or to establish a different means of getting its product before consumers. The harm to consumers in these cases is that the monopolist's actions are preventing the market from becoming more competitive, which could lead to lower prices, better products or services, or new choices.

3. Tying

Offering products together as part of a package can benefit consumers who like the convenience of buying several items at the same time. Offering products together can also reduce the

manufacturer's costs for packaging, shipping, and promoting the products. Of course, some consumers might prefer to buy products separately, and when they are offered only as part of a package, it can be more difficult for consumers to buy only what they want. For competitive purposes, a monopolist may use forced buying, or "tie-in" sales, to gain sales in other markets where it is not dominant and to make it more difficult for rivals in those markets to obtain sales.

A tying arrangement is an agreement between a seller and a buyer under which the seller agrees to sell a product or service (the tying product) to the buyer only on the condition that the buyer also purchases a different (or tied) product from the seller or the buyer agrees not to purchase the tied product from any other seller. Tying arrangements can be used to tie together not only different products but also services, leases, franchises, licenses to intellectual property, or combinations of any of those things.

Tying arrangements may be challenged under Section 1 of the Sherman Act, which prohibits “contracts in restraint of trade,” Section 3 of the Clayton Act, which prohibits exclusivity arrangements that may “substantially lessen competition,” and Section 5 of the FTC Act, which prohibits “[u]nfair methods of competition.” Tying may also constitute conduct supporting a monopolization claim under Section 2 of the Sherman Act.

In one example, the FTC challenged a drug maker that required patients to purchase its blood-monitoring services along with its medicine to treat schizophrenia. The drug maker was the only producer of the medicine, but there were many companies capable of providing blood-monitoring services to patients using the drug. The FTC claimed that tying the drug and the monitoring services together raised the price of that medical treatment and prevented independent providers from monitoring patients taking the drug. The drug maker settled the charges by agreeing not to prevent other companies from providing blood-monitoring services.

For many years tying arrangements were thought worthy of per se condemnation without examination of any actual competitive effects. But strong disapproval of tying claims has waned over the past few decades, as courts have recognized that tying arrangements may have procompetitive benefits. Tying currently is generally deemed per se unlawful only if:

Separate Products: Two separate products or services are involved;
Coercion: The sale or agreement to sell one product or service is conditioned on the buyer’s agreement to purchase another product or service;
Market Power: The seller has sufficient power in the market for the tying product to enable it to restrain competition in the market for the tied product; and
Not Insubstantial Amount of Commerce Affected: The tying arrangement affects a “not insubstantial” amount of commerce.[1]

In addition, some courts have stated that proof of an anticompetitive effect in the market for the tied product is required for per se liability.

Separate Products
In order to have a tying arrangement in the first place, there must be two products that the seller can tie together. In many cases it may be easy to determine whether there are two distinct

products capable of being tied together. For instance land and transport services[2] or projectors and motion pictures.[3] But sometimes the actual analysis of the two separate products or services issue proves much more complex. For example, other combination sales—the car with a preinstalled radio, a washing machine sold at a price including a service contract, or a remote control airplane sold with batteries included—are more ambiguous.

The U.S. Supreme Court has held that “the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of demand for the two items.”[4] Thus, the most important factor in determining whether two distinct products are being tied together is whether customers want to purchase the products separately. If customers are not interested in purchasing the products separately, there is little risk the tie could foreclose any separate sales of the products.

Coercion

A key element of tying is the forced purchase of a second distinct commodity; in other words, purchasing the tied product is mandatory when purchasing the tying product. What distinguishes illegal tying from legal bundling is the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms. Where the buyer is given the option to purchase products individually or as a bundle, and the option to purchase individual products is economically feasible, no tying occurs.

Market Power

For a tying arrangement to be per se unlawful, the seller must have “sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product.”[5] Under recent jurisprudence, “sufficient economic power” exists only when the defendant has market power.[6] Market power may be present when a seller has a large market share or offers a unique product that competitors are unable to provide. However, no court has inferred the requisite market power from a market share below 30 percent.

Not Insubstantial Amount of Commerce Affected

For a tying arrangement to be illegal under the per se approach, "a 'not insubstantial' amount of interstate commerce" in the tied product must be affected.[7] The Supreme Court has said that the relevant question is "whether a total amount of business substantial enough in terms of dollar volume so as not to be merely de minimis, is foreclosed to competitors by the tie-in."[8] In one case, the Supreme Court held that as little as $60,000 was not insubstantial.[9] On the other hand, lower courts have found that the requisite effect on commerce was not established where there was no market for the tied product,[10] where the tied market involved commonly used products such as nuts and bolts,[11] or where the amount affected was merely $12,000 in a multibillion dollar market.[12]

Justifications and Defenses

Even assuming that all of the foregoing elements of an affirmative case have been met, a tying arrangement may still be defended on competitive grounds. That is, notwithstanding its development of a "per se" rule against tying, the Supreme Court is, at present, almost always willing to consider a defendant's offered justifications for a tying arrangement. For example, a

tie may be justified where bundling reduces production costs, improves product quality or distribution,[13] enables buyers to finance their purchases,[14] or is necessary to meet a buyer's preferences.[15] Ties have also been found competitively justifiable where a small market entrant requires limited duration ties to facilitate its market entry. This is known as the fledgling industry defense.

The law on tying is changing. Although the Supreme Court has treated some tie-ins as per se illegal in the past, lower courts have started to apply the more flexible "rule of reason" to assess the competitive effects of tied sales. Cases turn on particular factual settings, but the general rule is that tying products raises antitrust questions when it restricts competition without providing benefits to consumers.

4. Predatory or Below-Cost Pricing

Can prices ever be "too low?" The short answer is yes, but not very often. Generally, low prices benefit consumers. Consumers are harmed only if below-cost pricing allows a dominant competitor to knock its rivals out of the market and then raise prices to above-market levels for a substantial time. To demonstrate predatory pricing, a plaintiff must prove: (1) below-cost retail pricing; and (2) a dangerous probability that the defendant will recoup any lost profits. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 222-224 (1993).

A firm's independent decision to reduce prices to a level below its own costs does not necessarily injure competition, and, in fact, may simply reflect particularly vigorous competition. Instances of a large firm using low prices to drive smaller competitors out of the market in hopes of raising prices after they leave are rare. This strategy can only be successful if the short-run losses from pricing below cost will be made up for by much higher prices over a longer period of time after competitors leave the market. Although the FTC has the authority to regulate claims of predatory pricing, courts, including the Supreme Court, have been skeptical of such claims.

5. Refusal to Deal

In general, any business — even a monopolist — may choose its business partners. However, under certain circumstances, there may be limits on this freedom for a firm with market power. As courts attempt to define those limited situations when a firm with market power may violate antitrust law by refusing to do business with other firms, the focus is on how the refusal to deal helps the monopolist maintain its monopoly, or allows the monopolist to use its monopoly in one market to attempt to monopolize another market.

Sometimes the refusal to deal is with customers or suppliers, with the effect of preventing them from dealing with a rival: "I refuse to deal with you if you deal with my competitor." For example, in a case from the 1950's, the only newspaper in a town refused to carry advertisements from companies that were also running ads on a local radio station. The newspaper monitored the radio ads and terminated its ad contracts with any business that ran ads on the radio. The Supreme Court found that the newspaper's refusal to deal with businesses using the radio station

strengthened its dominant position in the local advertising market and threatened to eliminate the radio station as a competitor.

One of the most unsettled areas of antitrust law has to do with the duty of a monopolist to deal with its competitors. In general, a firm has no duty to deal with its competitors. In fact, imposing obligations on a firm to do business with its rivals is at odds with other antitrust rules that discourage agreements among competitors that may unreasonably restrict competition. But courts have, in some circumstances, found antitrust liability when a firm with market power refused to do business with a competitor. For instance, if the monopolist refuses to sell a product or service to a competitor that it makes available to others, or if the monopolist has done business with the competitor and then stops, the monopolist needs a legitimate business reason for its policies. Courts will continue to develop the law in this area.

For industries that are regulated, companies may be required by other laws to deal on non-discriminatory terms with other businesses, including competitors and potential competitors. Here, the obligations of a regulated firm to cooperate may be spelled out in a statute or regulations that are enforced by a local, state, or federal agency. The Supreme Court recently found that, for firms that are obliged to share assets with competitors under a regulatory scheme at regulated rates, the antitrust laws do not impose additional duties. That case involved a local telephone company that was required by federal law to provide access to its system, including support services, in a reasonable manner to firms wanting to enter the business of providing local phone service. The Supreme Court dismissed an entrant's antitrust claims, finding that the antitrust laws do not impose additional duties to share assets beyond those required by a comprehensive set of regulations.

The elements of a refusal to deal:

1. A request or demand for a deal or product is refused.
2. The refusal was not for a legitimate business purpose ~ was an illegal restraint on trade.

Notwithstanding the availability of a refusal to deal claim, the majority of cases are resolved under the “Colgate Rule,” which provides that absent a purpose to create or maintain a monopoly, a merchant has the right to deal, or refuse to deal, with whomever it pleases.