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2015 Professor's Update to
ANTITRUST ANALYSIS

Problems, Text, Cases

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Chapter 1

The Setting for Antitrust Analysis

1C. Procedures for Enforcing the Antitrust Laws

At the end of ¶147, insert the following.

However, the viability of class actions has been limited by the increasing prevalence of contractual provisions mandating arbitration of federal antitrust claims. The modern trend of courts is to enforce these provisions pursuant to the Federal Arbitration Act (FAA). *See* T. Brewer, *The Arbitrability of Antitrust Disputes: Freedom to Contract for an Alternative Forum*, 66 Antitr. L.J. 91 (1997). The FAA has a judicially created exception where arbitration would prevent “effective vindication” of a right to pursue statutory remedies. In *Italian Colors*,¹ the Court considered a contract between American Express and plaintiffs who accept Amex cards. The contract required arbitration of all disputes, and in addition denied any right to arbitration on a class basis. Plaintiffs, who had alleged illegal tying by American Express, argued that the small size of each merchant’s tying claim made individual arbitration impracticable, thus denying effective vindication of their statutory rights. The Court disagreed, discerning no exception to the FAA where the claim is merely too expensive to pursue on an individual basis.

1D. The Reach of the Antitrust Laws

In ¶165(e), after the discussion of Hallie, insert the following.

By contrast, the Supreme Court has identified an acute danger where the actor is a state agency dominated by active market participants. In *North Carolina State Board of Dental Examiners*,² the defendant was a state licensing board for dentists, a majority of whose members were licensed dentists engaged in active practice. The board had interpreted the practice of dentistry to include teeth whitening, a service performed by both dentists and non-dentists, and sent cease-and-desist letters to non-dentist practitioners. The Court concluded that active supervision was required, distinguishing *Hallie* on the ground that a municipality is “electorally accountable . . . with general regulatory powers and no private price-fixing agenda.” The Court analogized the case to *Goldfarb*, where the county bar association’s conduct was not supervised by the state Supreme Court. The ruling suggests that regulatory boards for doctors, lawyers, and

1. American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013).

2. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S. Ct. 1101 (2015).

other occupations are similarly subject to antitrust scrutiny, absent active supervision.³

3. For an analysis advocating antitrust scrutiny of state occupational licensing boards, see Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093 (2014).

Chapter 2

Horizontal Restraints: Collaboration Among Competitors

2C. When Does an Agreement Exist?

Replace ¶243(e) and (f) with the following.

(e) Is Judge Posner's opinion consistent with *Twombly*?

(f) On remand, after discovery, the district judge entered summary judgment for defendants. The Seventh Circuit affirmed in an opinion by Judge Posner. 782 F.3d 867 (7th Cir. 2015). The opinion proceeded from the premise that “[e]xpress collusion violates antitrust law; tacit collusion does not.” The court concluded that the plaintiffs had failed to uncover evidence of express collusion. Plaintiffs pointed to an email by a T-Mobile employee, worrying that his firm's price increase was “collusive.” However, the court concluded that this statement failed to indicate express rather than merely tacit collusion. The court noted the evidence of a market structure conducive to collusion, discussed in the earlier opinion, but concluded that such evidence was ambiguous because it also enables tacit collusion. Similarly, the evidence of noncompetitive market performance was ambiguous because such performance could be the result of each firm's decision to exploit price-sensitive text messaging customers, without any express agreement among them.

If only express agreement is actionable, do you agree that the email is not enough for plaintiffs to survive summary judgment? What about the evidence about market structure and performance? Might these provide a basis for surviving summary judgment, even if they do not compel an inference favoring plaintiffs? Finally, is Judge Posner correct that only express agreement is actionable?

Chapter 4

Vertical Restraints

4D. Bundled Discounts and Loyalty Discounts

After ¶457, insert the following.

ZF MERITOR, LLC V. EATON CORP.
696 F.3d 254 (3d Cir. 2012)

[Defendant Eaton Corp. manufactured transmissions for heavy-duty trucks, such as 18-wheelers and cement mixers. Eaton sold transmissions to all four original equipment manufacturers (OEMs) of heavy-duty trucks in North America. Eaton's contracts with OEMs promised a rebate for purchasing a targeted percentage of its transmissions from Eaton. For three OEMs, the target ranged from 80% to 97.5%. The fourth OEM made some of its own transmissions; its target was somewhat lower, resulting in a purchase commitment that, combined with captive production, accounted for more than 85% of the OEM's needs. In most cases, the rebates escalated with higher market share. The term of each contract was at least five years. A further provision required an OEM to list Eaton as the standard or exclusive transmission in the OEM's "data book," a catalogue of product offerings used by truck buyers.

Competitor ZF Meritor and a corporate affiliate sued Eaton for antitrust violations. Following a jury verdict for plaintiffs, Eaton appealed, arguing that its conduct was per se lawful because it priced its transmissions above cost. The parties agreed that the relevant market was heavy-duty truck transmissions in North America. In this market, Eaton had a market share exceeding 80 percent, and did not contest monopoly power on appeal.

The Third Circuit affirmed, with one judge dissenting:]

The most significant issue in this case is whether Plaintiffs' allegations . . . are subject to the price-cost test or the "rule of reason" applicable to exclusive dealing claims. . . .

Eaton argues that principles from the predatory pricing case law apply in this case because Plaintiffs' claims are, at their core, no more than objections to Eaton offering prices, through its rebate program, which Plaintiffs were unable to match. Eaton contends that Plaintiffs have identified nothing, other than Eaton's pricing practices, that incentivized the OEMs to enter into the [agreements], and because price was the incentive, we must apply the price-cost test. We acknowledge that even if a plaintiff frames its claim as one of exclusive dealing, the price-cost test may be dispositive. Implicit in the Supreme Court's creation of the price-cost test was a balancing of the procompetitive justifications of above-cost pricing against its anticompetitive effects (as well as the anticompetitive effects of allowing judicial inquiry into above-cost pricing), and a conclusion that the balance always tips in favor of allowing above-cost pricing practices to stand. *See Linkline; Brooke Group*. Thus, in the context of exclusive dealing, the

price-cost test may be utilized as a specific application of the “rule of reason” when the plaintiff alleges that price is the vehicle of exclusion. . . . We do not disagree that predatory pricing principles, including the price-cost test, would control if this case presented solely a challenge to Eaton’s pricing practices.⁴ . . .

In each of the cases relied upon by Eaton, the Supreme Court applied the price-cost test, regardless of the way in which the plaintiff cast its grievance, because pricing itself operated as the exclusionary tool. . . . Here, in contrast to *Cargill*, *Atlantic Richfield*, and *Brooke Group*, Plaintiffs did not rely solely on the exclusionary effect of Eaton’s prices, and instead highlighted a number of anticompetitive provisions in the [agreements]. Plaintiffs alleged that Eaton used its position as a supplier of necessary products to persuade OEMs to enter into agreements imposing *de facto* purchase requirements of roughly 90% for at least five years, and that Eaton worked in concert with the OEMs to block customer access to Plaintiffs’ products, thereby ensuring that Plaintiffs would be unable to build enough market share to pose any threat to Eaton’s monopoly. Therefore, because price itself was not the clearly predominant mechanism of exclusion, the price-cost test cases are inapposite, and the rule of reason is the proper framework within which to evaluate Plaintiffs’ claims. . . .

We recognize that Eaton’s rebates were part of Plaintiffs’ case. . . . However, contrary to Eaton’s assertions, that fact is not dispositive. Plaintiffs presented considerable evidence that Eaton was a monopolist in the industry and that it wielded its monopoly power to effectively force every direct purchaser . . . to enter into restrictive long-term agreements, despite the inclusion in such agreements of terms unfavorable to the OEMs and their customers. Significantly, there was considerable testimony that the OEMs did not want to remove ZF Meritor’s transmissions from their data books, but that they were essentially forced to do so or risk financial penalties or supply shortages. . . . Plaintiffs also introduced evidence that not only were the rebates conditioned on the OEMs meeting the market penetration targets, but so too was Eaton’s continued compliance with the agreements. As one OEM executive testified, if the market penetration targets were not met, the OEMs “would have a big risk of cancellation of the contract, price increases, and shortages if the market [was] difficult.” . . .

Accordingly, this is not a case in which the defendant’s low price was the clear driving force behind the customer’s compliance with purchase targets, and the customers were free to walk away if a competitor offered a better price. . . .

4. [O]ur decision in *LePage’s v. 3M* does not indicate otherwise. In *LePage’s*, we declined to apply the price-cost test to a challenge to a bundled rebate scheme, reasoning that such a scheme was better analogized to unlawful tying than to predatory pricing. . . . Relying on *Brooke Group*, 3M argued that its bundled rebate program was lawful because the rebates never resulted in below-cost pricing. We disagreed, reasoning that the principal anticompetitive effect of 3M’s bundled rebates was analogous to an unlawful tying arrangement For several reasons, we interpret *LePage’s* narrowly. Most important, . . . *LePage’s* is inapplicable where, as here, only one product is at issue and the plaintiffs have not made any allegations of bundling or tying. The reasoning of *LePage’s* is limited to cases in which a single-product producer is excluded through a bundled rebate program offered by a producer of multiple products, which conditions the rebates on purchases across multiple different product lines. Accordingly, we join our sister circuits in holding that the price-cost test applies to market-share or volume rebates offered by suppliers within a single-product market.

Additionally, several of the bases on which we distinguished *Brooke Group* have been undermined by intervening Supreme Court precedent, which counsels caution in extending *LePage’s*. For example, we indicated in *LePage’s* that *Brooke Group* might be confined to the Robinson-Patman Act, but the Supreme Court has made clear that the standard adopted in *Brooke Group* also applies to predatory pricing claims under the Sherman Act. Additionally, *LePage’s* suggested that *Brooke Group* is not applicable in cases involving monopolists, but the Supreme Court has since applied *Brooke Group*’s price-cost test to claims against a monopolist, *Linkline*, and a monopsonist, *Weyerhaeuser*. . . .

Although the Supreme Court has created a safe harbor for above-cost discounting, it has not established a per se rule of non-liability under the antitrust laws for all contractual practices that involve above-cost pricing. *See PeaceHealth* (stating that the Supreme Court’s predatory pricing decisions have not “go[ne] so far as to hold that in every case in which a plaintiff challenges low prices as exclusionary conduct[,] the plaintiff must prove that those prices were below cost”). Nothing in the case law suggests, nor would it be sound policy to hold, that above-cost prices render an otherwise unlawful exclusive dealing agreement lawful. We decline to impose such an unduly simplistic and mechanical rule because to do so would place a significant portion of anticompetitive conduct outside the reach of the antitrust laws without adequate justification. . . .

Eaton argues that Plaintiffs’ claims must fail because the [agreements] were not “true” exclusive dealing arrangements in that they did not contain express exclusivity requirements, nor did they cover 100% of the OEMs’ purchases. Neither contention is persuasive because *de facto* partial exclusive dealing arrangements may, under certain circumstances, be actionable under the antitrust laws. First, the law is clear that an express exclusivity requirement is not necessary because *de facto* exclusive dealing may be unlawful. . . . Second, an agreement does not need to be 100% exclusive in order to meet the legal requirements of exclusive dealing. We acknowledge that “partial” exclusive dealing is rarely a valid antitrust theory. Partial exclusive dealing agreements such as partial requirements contracts and contracts stipulating a fixed dollar or quantity amount are generally lawful because market foreclosure is only partial, and competing sellers are not prevented from selling to the buyer. However, we decline to adopt Eaton’s view that a requirements contract covering less than 100% of the buyer’s needs can never be an unlawful exclusive dealing arrangement. . . . [J]ust as “total foreclosure” is not required for an exclusive dealing arrangement to be unlawful, nor is complete exclusivity required with each customer. *See Dentsply*. The legality of such an arrangement ultimately depends on whether the agreement foreclosed a substantial share of the relevant market such that competition was harmed.