



# Remedies, Standing, Jurisdiction, Enforcement

Antitrust  
Eric E. Johnson  
ericejohnson.com



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## Jurisdiction

- Federal courts have exclusive jurisdiction over federal antitrust claims.
- States have their own similar antitrust law.
  - Suits in state court may have preclusive effect for later federal court actions.
- Certain provisions make it easier to get personal jurisdiction against corporate antitrust defendants.

## Remedies/Consequences

- Criminal
- Damages
- Injunctions
- Consent decrees

## Criminal Enforcement

- Fines of up to \$100 million for corporations, up to \$1 million for individuals. (15 U.S.C. § 1&2)
  - Alternatively, if larger, twice wrongful gain or victims loss. (18 U.S.C. § 3571(d))
- Imprisonment up to 10 years. (15 U.S.C. § 1&2)
- Nearly all criminal prosecutions are for per-se illegal horizontal restraints like price fixing.
  - But there is no technical hurdle to prosecuting rule-of-reason violations, and this has happened!
- Criminal intent must be proved. This requires either:
  - conduct had "anticompetitive effects" and was "undertaken with knowledge of its probable consequences" OR
  - even if anticompetitive effects didn't happen, defendant had "the purpose of producing anticompetitive effects"

## Civil Enforcers

- Private plaintiffs, as individuals
- Class actions
- Federal government
  - DOJ can enforce Sherman Act, and FTC can't.
  - FTC can enforce FTC Act.
  - But anything actionable under the Sherman Act is actionable as unfair competition under FTC Act § 5.
  - So FTC and DOJ work cooperatively to split workload.
  - FCC, Federal Reserve Board, DOT, and Surface Transportation Board have special industry-specific jurisdictions.
- State governments as *parens patriae*

## Damages

- Treble damages
  - Many believe this compensates for difficulty of proof and for lack of pre-suit interest so as to roughly properly calibrate deterrence.
- To get damages, must show:
  - actual causation (“material but-for cause” of P’s injury)
  - P’s injury flowed from anticompetitive effects
  - proximate causation
  - an amount of damages

## **National Government Immunity**

- Foreign nations, in general, have sovereign immunity against U.S. antitrust law
  - Possible exception: foreign government engaged in a commercial activity
- U.S. government agencies are immune from antitrust laws
  - unless very explicitly waived by statute
  - federal employees, as well, are generally immune when acting in the scope of their employment

## **State Action Immunity**

- Here we are talking about states as in “the 50 states”
- Acts of state legislatures and courts are immune
- State-created regulatory schemes are immune if:
  - there is a “clearly articulated” state policy and
  - it is “actively supervised” by the state



**Realothetical**



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The Supreme Court of Arizona appoints a committee to conduct a bar examination and administer the admission of candidates to the bar - while the court retains plenary authority over admission to the bar.

*Is there immunity?*

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*Is there immunity?*

Yes. *Hoover v. Ronwin* (U.S. 1984)

## Realothetical

"[A]lthough the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, the court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona. Thus, the conduct that Ronwin challenges was, in reality, that of the Arizona Supreme Court. ... It therefore is exempt from Sherman Act liability under the state action doctrine[.]"

*Hoover v. Ronwin* (U.S. 1984)













**Hypo!**

The Ohio legislature passes a law with a list of minimum prices for every beer sold in the state. It says, among other things, that a six-pack of Busch longnecks cannot be sold for less than \$4.19.

*Is there immunity?*

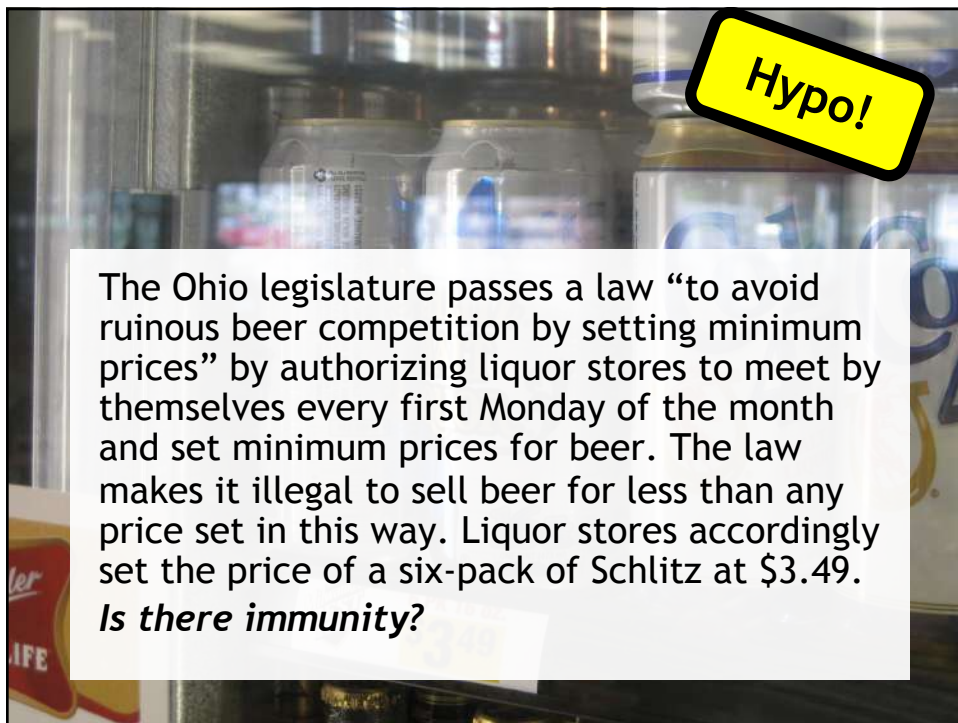


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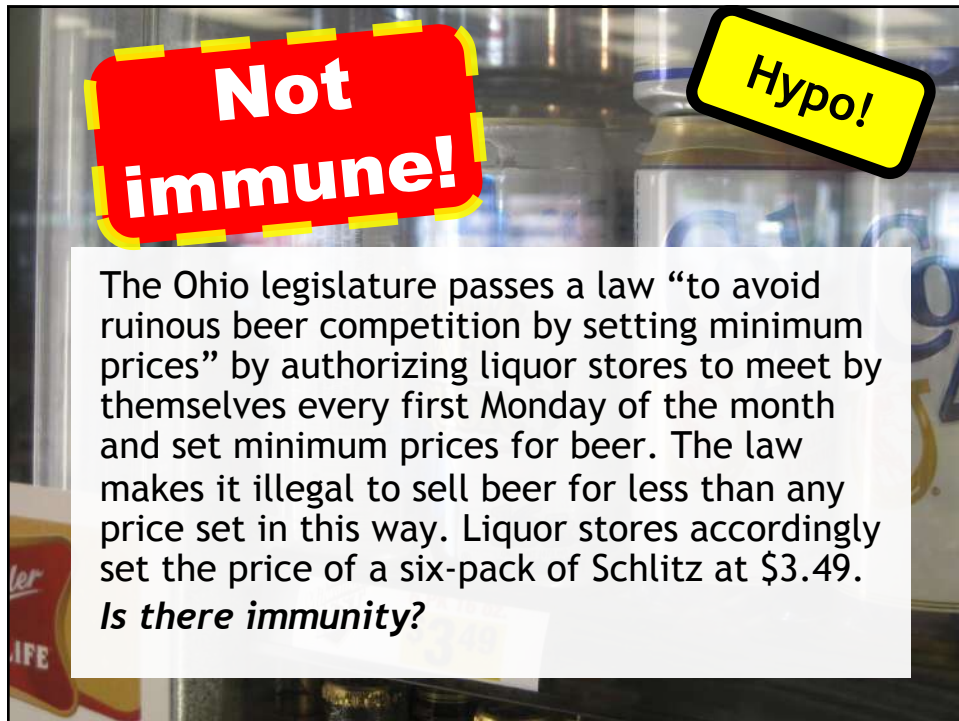


**Hypo!**

The Ohio legislature passes a law “to avoid ruinous beer competition by setting minimum prices” by authorizing liquor stores to meet by themselves every first Monday of the month and set minimum prices for beer. The law makes it illegal to sell beer for less than any price set in this way. Liquor stores accordingly set the price of a six-pack of Schlitz at \$3.49.

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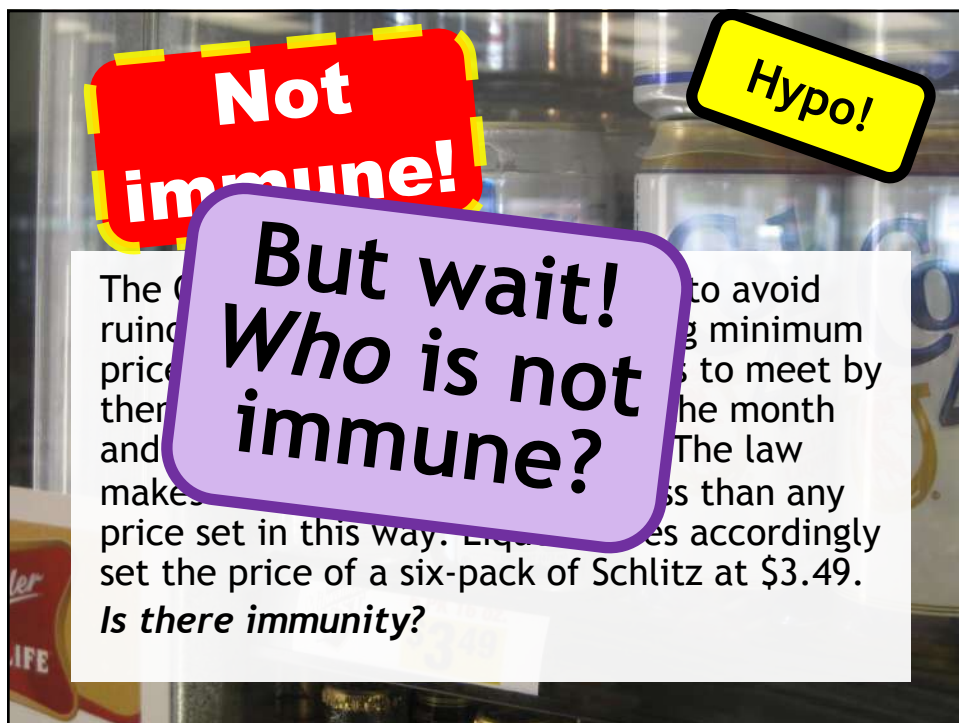


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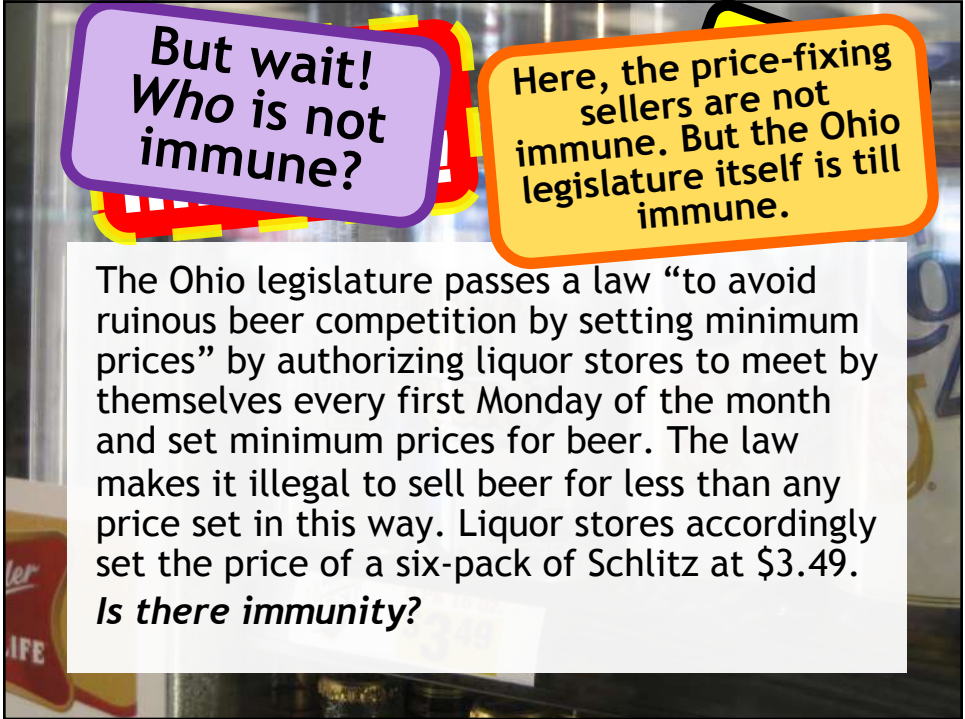
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**But wait!  
Who is not immune?**

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*Is there immunity?*



**But wait!  
Who is not  
immune?**

**Here, the price-fixing  
sellers are not  
immune. But the Ohio  
legislature itself is till  
immune.**

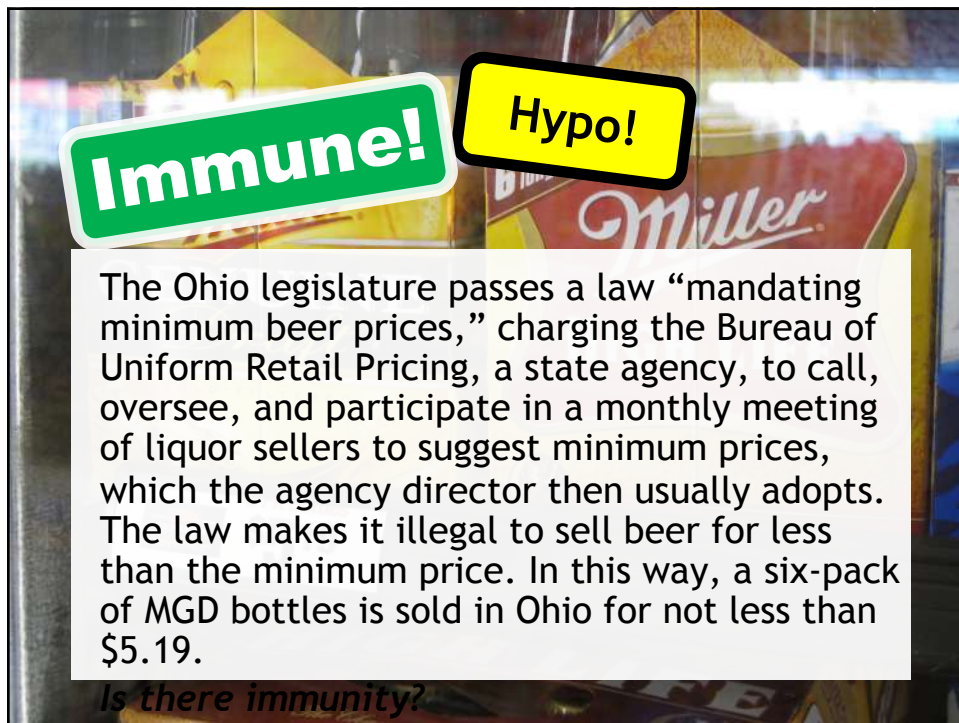
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**Hypo!**

The Ohio legislature passes a law “mandating minimum beer prices,” charging the Bureau of Uniform Retail Pricing, a state agency, to call, oversee, and participate in a monthly meeting of liquor sellers to suggest minimum prices, which the agency director then usually adopts. The law makes it illegal to sell beer for less than the minimum price. In this way, a six-pack of MGD bottles is sold in Ohio for not less than \$5.19.

*Is there immunity?*



**Immune!**

**Hypo!**

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*Is there immunity?*

## Petitioning Immunity

- Petitioning the government to impose anticompetitive restraints is protected by immunity.
- This is called “Noerr-Pennington doctrine” after two key SCOTUS cases.
- It includes attempts to influence:
  - legislatures
  - courts
  - administrative agencies

## Petitioning Immunity

- Immunity clearly applies where defendant complained to a disinterested lawmaker for the imposition by law of an anticompetitive restraint.
- Immunity clearly does not apply to trying to persuade a non-state-action immune market participant to impose an anticompetitive restraint.
- “Dual effect” cases are harder. Anticompetitive effects that are incidental to genuine petitioning by valid means are protected. But it can’t be a sham to obtain an anticompetitive restraint.



### Realothetical

The National Fire Protection Association makes fire codes widely adopted by local governments. A maker of plastic conduit tries to get the NFPA to approve plastic conduit for fire codes. Steel conduit makers band together to pack the annual NFPA meeting with new members tasked to vote against the proposal. *Are the steel conduit makers immune?*





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*Are the steel conduit makers immune?*

**No.** *Allied Tube & Conduit Corp v. Indian Head Inc* (U.S. 1988)

## Various Exemptions and Limitations

- Filed-rate doctrine
  - Damages cannot be collected for an overcharge where the rate was approved by a federal regulatory body.
  - “Rubberstamp” approval is okay here, unlike with state-action immunity.
  - But this doesn’t stop injunctions.
- Farmer cooperatives
  - But this is limited: setting prices amongst themselves is okay, but non-farmers can’t be brought in without losing immunity
- State-regulated insurance activities

## **Various Exemptions and Limitations**

- Labor
  - Includes multi-employee associations to hold out for minimum prices - or else there couldn't be labor unions!
  - Also includes multi-employer associations for participating in collective bargaining.
- Medical resident matching program
- Agreements vital to national defense as determined by the president
- Baseball

## **Various Exemptions and Limitations**

- Various actors get more generous treatment:
  - Newspapers wanting to merge
  - Banks wanting to merge
  - Sports leagues in mergers and television deals
  - NCAA

## Effect on U.S. Interstate Commerce Requirement

- Must affect commerce.
  - Applies to non-profits engaging in commercial activities.
  - But wouldn't apply just to asking for donations.
- Must affect interstate commerce.
  - This is an incredibly low bar.
- Must affect U.S. commerce.
  - This has a little more bite, to avoid having foreigners doing things off in foreign countries unwittingly expose themselves to U.S. antitrust criminal and civil liability.

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ericejohnson.com

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Some of the text closely tracks *United States Antitrust Law and Economics*, 3rd Edition, by Einer Elhauge.