



Exceptions and Immunities

Antitrust
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The biggest real-world takeaways here are: (1) exceptions and immunities play a HUGE role in antitrust, (2) the doctrines and provisions are complicated and not always intuitive, so (3) you should look this stuff up when encountering a real-world situation!

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The biggest real-world takeaways
... (1) exceptions and ...
**What's in the book
and what follows gives
you a sampling ...**
...
encountering a real-world
situation!

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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

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)

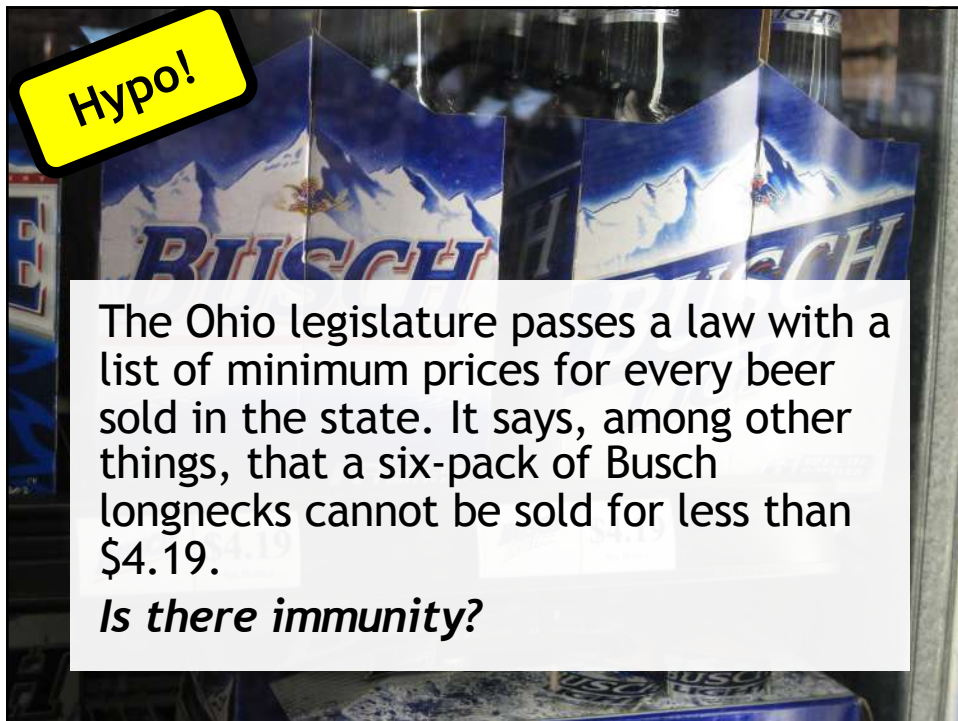
Realothetical

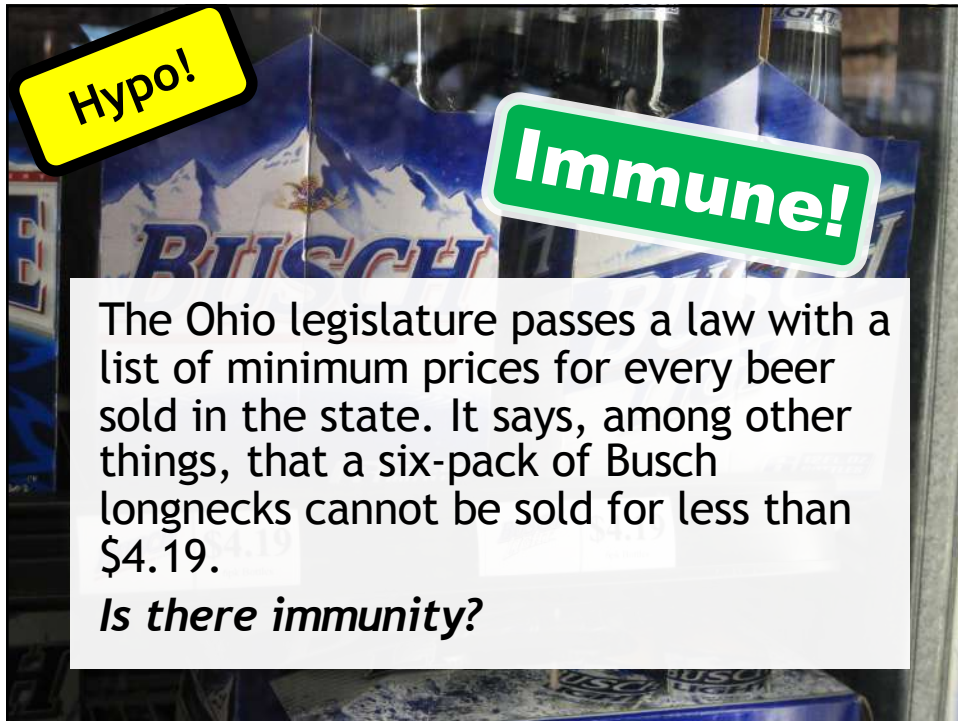
"[A]lthough the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, the court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona. Thus, the conduct 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)







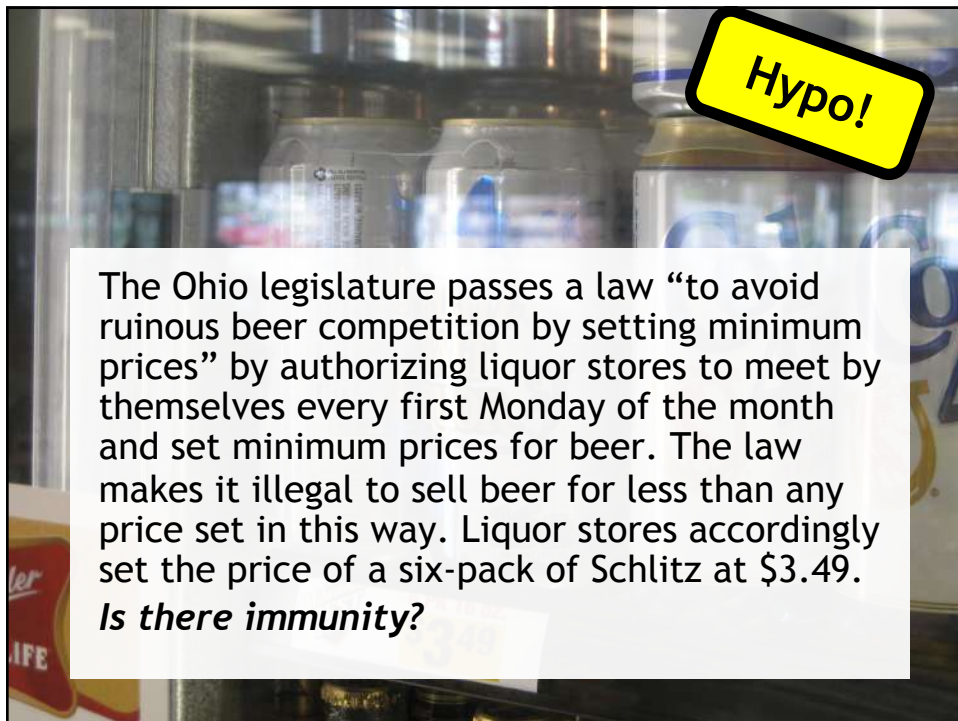


Hypo!

Immune!

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?



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.

Is there immunity?

Not immune!

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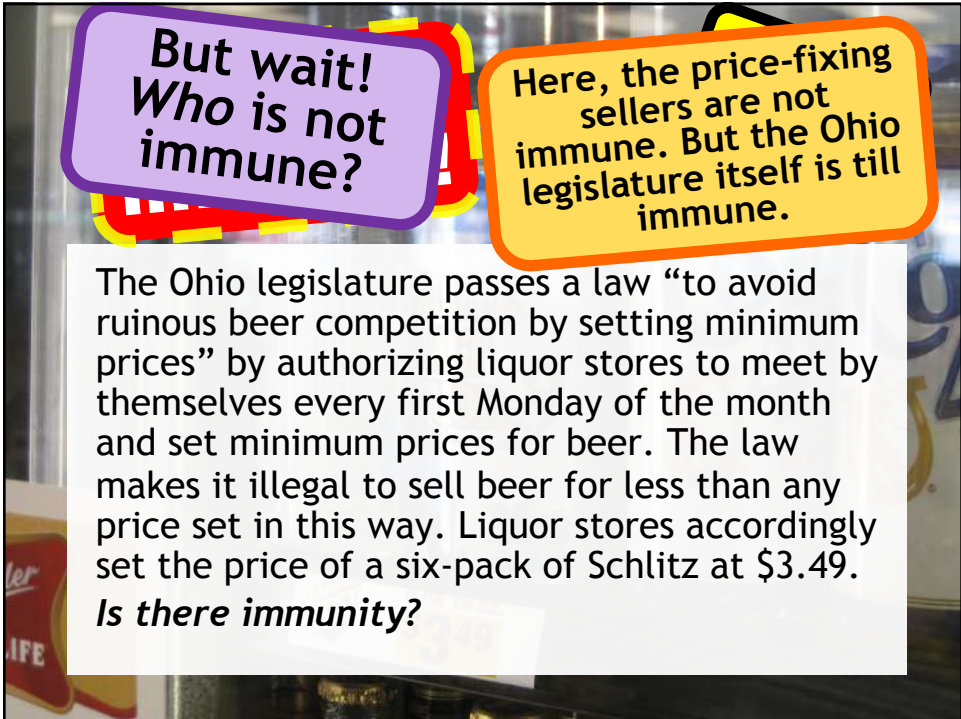
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**But wait!
Who is not immune?**

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

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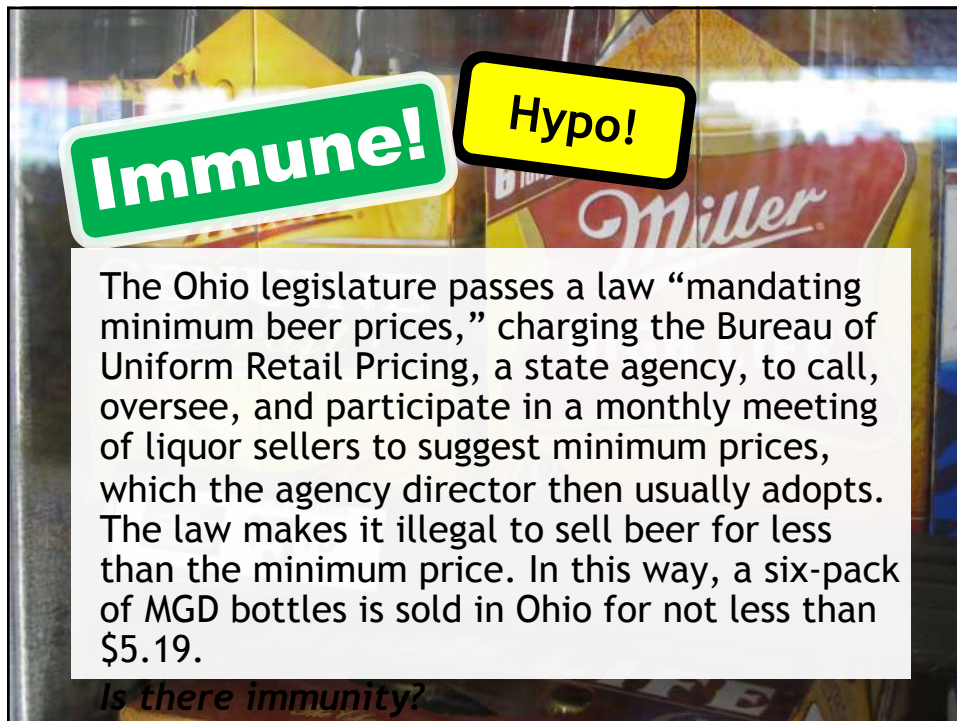
Is there immunity?



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.

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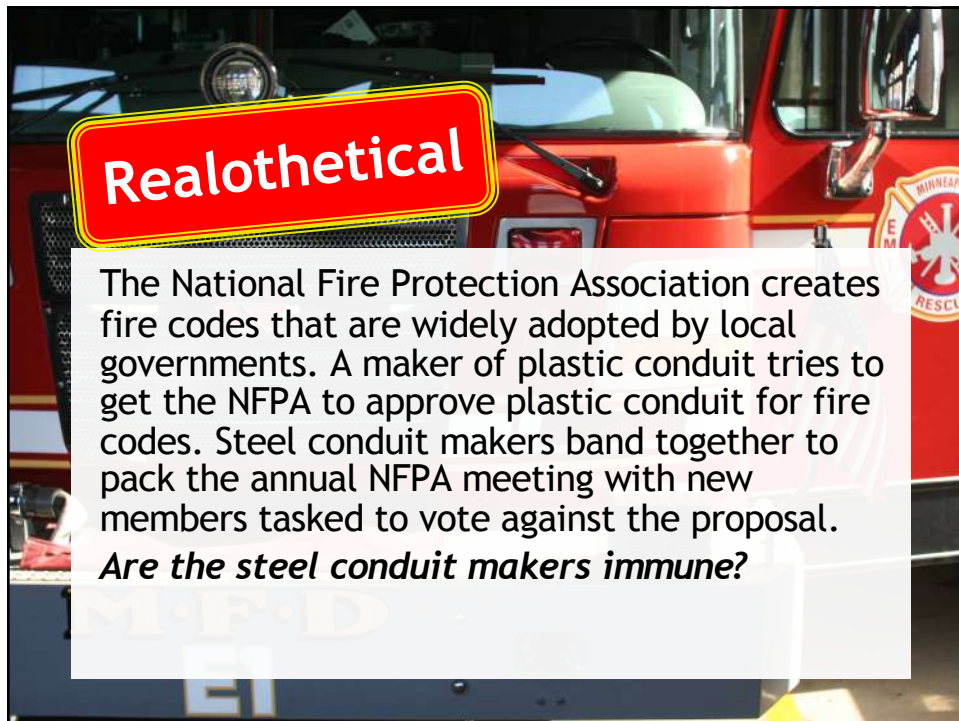
Is there immunity?

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 creates fire codes that are 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?

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

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

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

