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US: Vertical Restraints

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The overall outlines of vertical restraint law are settled. Within a few years of the Supreme Court’s 1977 decision in GTE Sylvania,1 standards for evaluation of territorial restraints and dealer terminations were definitively formulated, and, except for price restraints, all vertical restraints were subject to the rule of reason. The Court approved rule of reason treatment for maximum resale price maintenance in State Oil Co2 in 1997 and for minimum resale price maintenance in 2007 in Leegin.3 Applying a market power screen similar in most respects to the European Commission’s Block Exemption Regulation for vertical restraints,4 the federal courts make no inquiry into the competitive effects of a restraint unless a manufacturer has economic power in a relevant market, either at the manufacturing level or downstream at the distributor or dealer level.

Despite this ostensible doctrinal clarity, a number of vexing issues remain. Some states continue to view agreements on minimum resale pricing as per se illegal under their state antitrust law. Until recently, most-favoured nation clauses were considered presumptively pro-competitive, but the US Department of Justice has challenged their use by firms with monopoly power. The test for exclusive dealing arrangements has long been a matter of black-letter law, but significant differences exist over evaluation of partial exclusive dealing arrangements, involving market share discounts or product bundling, by firms with monopoly power.

We will confine attention to restraints unilaterally imposed by a manufacturer on dealers or distributors5 or, in the case of most-favoured nation clauses, by buyers on suppliers.

Price restraints
Vertical price restraints have long been viewed sceptically, starting with the Supreme Court’s 1911 Dr Miles Medical Co6 holding that resale price restraints are illegal on their face.

Maximum resale price maintenance
The Supreme Court excepted price restraints from its GTE Sylvania ruling that vertical restraints are subject to the rule of reason, noting that the per se illegality of price restrictions ‘has been established for many years and involves significantly different questions of analysis and policy’ than non-price restraints.7 It had earlier held in Albrecht v Herald Co8 that an agreement between a newspaper publisher and its distributors capping the price at which the distributors could resell the paper was per se illegal, but it overruled the holding in 1997 in State Oil Co v Khan.9 Maximum resale price maintenance (RPM) has since been subject to the rule of reason.

Minimum resale price maintenance
Relying on economic literature supporting the view that minimum RPM may be pro-competitive, the Supreme Court in 2007 overruled Dr Miles Medical Co and held in Leegin that the legality of an agreement setting a floor on the price at which goods can be resold is subject to the rule of reason.10 Whether such agreements are so harmful to competition that they should always be illegal had long been a matter of debate. Despite the Leegin holding, rule of reason treatment for minimum RPM has not been universally embraced.

The California Attorney General has repudiated Leegin and insisted that minimum RPM remains per se illegal under the state’s antitrust statute, the Cartwright Act.11 Maryland amended its antitrust statute in April 2009 to continue per se illegal treatment for minimum RPM.12 The New York Attorney General has taken the position that New York’s antitrust statute, the Donnelly Act, makes minimum RPM per se illegal, but courts have so far rejected the argument.13

Following a 2012 holding by the Kansas Supreme Court that minimum RPM was per se illegal under the Kansas antitrust statute, the state legislature amended the law to repeal the holding.14 Many state antitrust laws expressly provide that they are to be interpreted consistently with the federal antitrust laws as interpreted by the federal courts, or it has been judicially held that they are to be so interpreted.15 It remains to be seen how other states will deal with Leegin, but the patchwork of jurisdictions rejecting rule of reason treatment for minimum RPM means that a firm engaged in distribution of products nationally must structure its pricing policies as if RPM were still per se illegal.16

Restrictions on price advertising
A manufacturer may limit a dealer’s price advertising if the manufacturer bears some part of the cost. As long as the manufacturer has a cooperative advertising programme, it can condition payment for advertising on the dealer’s compliance with minimum advertised pricing (MAP) guidelines. This type of pricing restraint has long been subject to rule of reason evaluation.17 Rule of reason treatment is appropriate because the dealer remains free to sell at the price of its choosing and to post discounted pricing in advertising outside the manufacturer’s cooperative advertising programme.18

It has been argued that a MAP policy applied to internet advertising effectively regulates retail pricing, because an internet retailer does not, unlike a brick-and-mortar retailer, have the ability to post pricing at point of sale. The website pricing is, according to this argument, understood by the customer to be the actual sale price.19 The argument has been rejected in post-Leegin rulings. An internet retailer remains free, despite MAP policy restrictions on advertised prices, to communicate with customers about actual sales prices by inviting telephone inquiries (‘call for price’) or other means.20

Non-price restraints on distribution
Outside of pricing restraints, a manufacturer is comparatively free to impose restrictions on product distribution. We will look at the principal types of non-price distribution restraints.

Exclusive appointments
In the interest of securing brand loyalty and a commitment to invest in marketing and promotion of its products, a manufacturer may choose to appoint a single dealer or distributor to a given geographic
territory. This differs from other vertical restraints because it is a promise by the manufacturer to refrain from exercising rights otherwise available to it. It does not limit a dealer's or distributor's resale activities. Exclusive appointments are subject to evaluation under the rule of reason, and they are presumptively legal. While they have the effect of reducing intrabrand competition, they can be expected in the usual case to strengthen a firm's position against rivals.

Geographic restrictions
A manufacturer may choose to control the locations from, or the territory in, which a dealer or distributor can sell its products.

Sales within a defined territory
A manufacturer can require a dealer or distributor to sell its products only to customers in a specified territory. This kind of restraint reduces intrabrand competition by confining resellers to their own territory. Outside of the Second Circuit, courts have universally approved the use of restricted territories when the manufacturer lacks market power.

When a manufacturer has market power and territorial restraints have been shown to limit interbrand competition without producing any countervailing competitive benefits, liability has been established under Section 1.

Territorial restrictions may be absolute, or they may be conditional. If they are absolute, or outright, a dealer or distributor cannot sell to a customer outside the territory. This poses problems, obviously, if a customer is buying goods for use at locations outside the territory, and even the mostdraconian system has to make accommodation for this possibility. Conditional restrictions permit a dealer or distributor to sell outside of its territory, but they may require it to forego part of the selling price if the customer is in another territory. In a profit pass-over arrangement, as it is called, the manufacturer will make a payment or issue a credit to the dealer or distributor in the customer's territory to compensate it for the cost of post-sale service, debiting the selling dealer or distributor. If the manufacturer lacks market power, a profit pass-over arrangement poses no issues under the rule of reason.

Location clauses
A manufacturer may choose to specify the location from which a retailer can sell its goods. Consumers can usually be expected to shop at the nearest store having the needed goods, and, as long as the market area of one store does not overlap that of another, a location clause confers de facto exclusivity. If a manufacturer lacks market power, imposition of location clauses will raise no issues under Section 1.

Areas of primary responsibility
In lieu of any restriction on where a dealer or distributor can sell products, a manufacturer may require it to use best efforts to promote and sell products, assigning what is often referred to as an area of primary responsibility (APR). This is a weak restraint, at best, and challenges to APR clauses have typically failed because the plaintiff could show no restriction by the manufacturer on out-of-territory sales.

Customer and channel restrictions
Customer and distribution channel restrictions have been approved under the rule of reason. Where a manufacturer of cosmetic supplies, for example, lacked market power, it could limit distributors to resale of its products to retailers meeting the manufacturer's criteria for a professional beauty salon. Customer restrictions have survived challenge under Section 1, without regard to market power, where the manufacturer has been able to point to legitimate justifications.

A policy barring dealers from the mail-order sale of goods has been approved where the manufacturer has valid business reasons for the prohibition. Analogously, a manufacturer may bar dealers and distributors from selling its goods over the internet. Channel restraints such as these may be necessary to prevent free riding by internet retailers for goods requiring significant dealer services, such as start-up or installation service, customer instruction and post-sale support; or on safety, health or product liability grounds for certain classes of consumer goods. Restraints on internet sales are viewed differently by the European Commission, and vertical restraints on internet selling in the European Union are subject to the Commission’s Guidelines on Vertical Restraints.
Power in the tying product market

The Supreme Court held in United States Steel Corp v Fortner Enterprises Inc[44] that a plaintiff must demonstrate that the defendant has market power in the market for the tying product, and it stressed in Illinois Tool Works Inc v Independent Ink Inc[42] that market power must be proved and will not be presumed, even when the tying product is protected by a patent.

Market power cannot be proved without first defining the relevant market, and market definition can be dispositive.[43] The case law suggests that, at a minimum, there can be no market power unless the defendant has more than a 30 per cent market share.[44]

Adverse effect in the market for the tied product

A plaintiff seeking to prove a per se illegal tie-in must also show that the tying arrangement has affected a ‘not insubstantial’ volume of commerce in the tied product.[45] This is measured in dollars, not market share, and it is sufficient if the amount of commerce foreclosed by the tie is not ‘merely de minimis.’[46]

Exclusive dealing arrangements

A manufacturer may prohibit dealers and distributors from handling competing brands, or it may provide pricing and other incentives to induce them to concentrate on its brand. For convenience, we will refer to the former as a pure exclusive dealing arrangement and the latter as a de facto or partial exclusive dealing arrangement.

Pure exclusive dealing arrangements

A manufacturer may require dealers or distributors to refrain from handling competitive lines. Exclusive dealing gives the manufacturer assurance that dealers or distributors will concentrate sales efforts on its brand and guards against interbrand free riding. Exclusive dealing arrangements are tested for legality under the rule of reason,[47] and courts have focused on the degree of market foreclosure caused by the arrangement, taking into account a range of factors. The factors include the duration of an exclusive dealing contract, whether it is terminable by the distributor or dealer at will, market share of the manufacturer, height of entry barriers, whether competitors have alternate avenues by which to access customers, and pro-competitive benefits of the arrangement.[48] If the manufacturer has monopoly power in the relevant market and its contracts with distributors have the effect of blocking competitor access to end-users, exclusive dealing arrangements have been held to violate Section 2 of the Sherman Act as conduct in furtherance of unlawful monopolisation.[49]

Partial exclusive dealing arrangements

In lieu of an absolute contractual prohibition against handling lines of competitors, a manufacturer may offer pricing incentives to persuade dealers or distributors to concentrate their purchases on its brand. When offered by a dominant firm, the incentives may have exclusionary effects.

One type of incentive is the market share discount, in which a dealer or distributor receives a discount in proportion to the percentage of its purchases of a product category sourced from the manufacturer. As the percentage increases, so does the discount. Under one such programme, for example, a manufacturer of marine engines offered boat builders a 1 per cent discount if they purchased at least 60 per cent of all of their engine needs from the manufacturer, 2 per cent if they purchased at least 65 per cent, and 3 per cent if they purchased at least 70 per cent.[50]

If a manufacturer has monopoly power, distribution agreements embodying market share discounts can function, in practical effect, as exclusive dealing arrangements. They are subject to evaluation under the same factors applied in weighing the legality of pure exclusive dealing arrangements under the rule of reason.[51] It has been argued that market share discounts should be deemed lawful as long as a manufacturer is pricing goods above cost, but this price-cost test has not yet been explicitly approved in any case challenging market share discounts by a firm with monopoly power.[52] There is no bright line separating lawful competitive from exclusionary conduct, and dominant firms will continue to face some antitrust risk in implementing a market share discount programme.[53]

A second type of pricing incentive that may have the effect of an exclusive dealing arrangement is product bundling. Bundling occurs when a firm with monopoly power over a product (Product A) offers a discount on Product A if it is purchased in combination with other products (Products B, C and D). This may put a rival at a competitive disadvantage if the rival only competes against Product A. The Court of Appeals for the Third Circuit observed in LePage’s Inc v 3M[54] that the principal anti-competitive effect of bundled discounts offered by a monopolist is that ‘they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.’[55] The court affirmed a jury verdict of liability under Section 2 of the Sherman Act without explaining why bundling of this type was exclusionary.

The Ninth Circuit rejected the LePage’s liability formulation in Cascade Health Solutions v PeaceHealth,[56] holding that a plaintiff seeking to prove a violation of Section 2 for a package discount, or bundling, must demonstrate how the discounting was allocated among the defendant’s products. This is called the attribution test. The plaintiff must prove that, when the full amount of the discounts given by the defendant is allocated to Product A, ‘the resulting price of the competitive product or products is below the defendant’s incremental cost to produce them.’[57] This test ensures that ‘the only bundled discounts condemned as exclusionary are those that would exclude an equally efficient producer of the competitive product or products.’[58] There is, thus, a split among the federal circuit courts on how bundling is to be evaluated.

Most-favoured nation clauses

A promise by a seller to give a customer the best price or terms it gives to any other customer – most-favoured nation treatment – had long been viewed as competitively benign. The Court of Appeals for the Seventh Circuit observed that most-favoured nation clauses are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favourably as any of their other customers ... [and this] is the sort of conduct that the antitrust laws seek to encourage.[59] When used by a monopolist, a most-favoured nation clause may have anti-competitive effects, however.

The Department of Justice’s 2010 complaint against Blue Cross Blue Shield of Michigan (Blue Cross) alleged that the insurer’s practice of securing such promises from hospitals in Michigan had the effect of restraining trade in violation of Section 1 of the Sherman Act.[60] Blue Cross required hospitals in smaller communities to provide health-care services to its competitors at prices at least equal to what they would charge Blue Cross. It required, by means of what the complaint called MFN–plus clauses, that hospitals in larger communities provide services to its competitors at prices above what they would charge Blue Cross, some by as much as 40 per cent above the price charged Blue Cross.[61] The complaint alleged
that the MFN-plus clauses had the effect of excluding Blue Cross' competitors from the market by guaranteeing that they 'cannot obtain hospital services at prices comparable to the prices Blue Cross pays.' Aetna Inc has sued Blue Cross for the same conduct, and the district court has held that its allegations state a claim under Section 1.5

Notes
2  State Oil Co v Khan, 522 US 3 (1997).
6  Dr Miles Med Co v John D Park & Sons Co, 220 US 373 (1911).
11  In announcing settlement of a complaint against a cosmetics company for setting a floor on prices charged by online retailers, the Attorney General stated that Leegin had 'sharply curtailed federal antitrust law pertaining to vertical price-fixing, but did not affect California's strict state antitrust law.' The 14 January 2011 press release can be found on the Attorney General's website at http://ag.ca.gov/newsalerts/print_release.php?id=2028.
12  Md Com Law Code Ann § 11-204a(1).
13  See New York v Tempur-Pedic Int'l Inc, 95 AD3d 539 (App Div 1st Dep't 2012) (holding that NY Gen Bus Law § 369-a does not make RPM agreements illegal or unlawful but only makes them unenforceable in the courts).
14  SB 124, 58th Leg, Reg Sess (Kan 2013).
15  See, eg, Worldhomecenter.com Inc v PLC Lighting Inc, 851 FSupp 2d 494, 502 (SDNY 2011) (holding that, under Leegin, plaintiff's Donnelly Act claim would be evaluated under rule of reason; noting that Donnelly Act is 'modeled on the Sherman Act and generally construed in light of federal precedent'); Johnson v Microsoft Corp, 834 NE2d 791, 794-95 (Ohio 2005) (noting that 'Ohio has long followed federal law in interpreting the Valentine Act' because it is patterned after the Sherman Act).
16  Michigan and Illinois joined New York in suing a manufacturer for limiting price advertising by its retailers and thereby allegedly effectively controlling resale prices in State of New York v Herman Miller Inc, No. 08-CV-02977 (SDNY filed 25 March 2008). The complaint, filed after Leegin was decided, was settled by consent decree. There have been no subsequent enforcement initiatives by either the Illinois or Michigan attorneys general that would indicate whether they continue to view minimum RPM as per se illegal.
18  Cf Sony Music Entm't Inc, No. 97l-0070, Analysis to Aid Public Comment (FTC May 5, 2000) (noting that MAP policy was unlawful because it prohibited retailers from advertising discounts in all advertising, including point of sale and other advertising paid for entirely by retailers), available at www.ftc.gov/os/2000/05/mapanalysis.htm.
21  Elecs Commc'n's Corp v Toshiba Am Consumer Prods, 129 F3d 240, 245 (2d Cir. 1997).
22  See, eg, In re Sulphuric Acid Antitrust Litig, 703 F3d 1004, 1013 (7th Cir. 2012) (noting that 'exclusive territories reduce competition at the distributor level but can increase it at the producer level').
23  See, eg, Ryko Mfg Co v Eden Servs, 823 F2d 1215, 1232 (8th Cir 1987) (holding that territorial restrictions imposed by firm with only 8-10 per cent of market could not violate § 1 of Sherman Act). Focusing solely on a territorial restraint's effect on interbrand competition, the Court of Appeals for the Second Circuit held in Eiberger v Sony Corp, 622 F2d 1068, 1075 (1980), that the restraint violated Section 1 even though the manufacturer, a new entrant, had only a 12 per cent market share.
24  See Graphic Prods Distribrs v Itek Corp, 717 F2d 1560, 1578 (11th Cir 1983) (affirming judgment for terminated distributor on the basis of airtight territorial restraints imposed by manufacturer with 70 per cent market share).
25  See, eg, id (distributor terminated for selling to customers outside of its assigned territory).
26  See, eg, Cranfill v Scott & Fetter Co, 773 FSupp 943, 952-53 (ED Tex 1991) (upholding profit pass-over arrangement where manufacturer had a 6-8 per cent market share). But see Eiberger, 622 F2d at 1075 (affirming judgment against manufacturer for profit pass-over arrangement despite lack of market power).
27  See, eg, Muenster Butane Inc v Stewart Cos, 651 F2d 292, 298 (5th Cir 1981) (holding that location clauses implemented by firm lacking market power could not have had the effect of causing prices to rise).
28  See, eg, Santa Clara Valley Disttrb Co v Fabst Brewing Co, 556 F2d 942, 945 (9th Cir 1977) (rejecting claim that assignment of APR violated antitrust laws where plaintiff failed to identify any instance of manufacturer reprisal for sales outside of APR).
30  See, eg, Trans Sport Inc v Starter Sportswear Inc, 964 F2d 186, 190 (2d Cir 1992) (finding policy barring dealers from reselling to other retailers to be a reasonable intra.brand restraint where sports jacket manufacturer alleged to have monopoly power sought to control quality and image of the goods by appointing as authorised dealers only retailers committed to advertising and promoting the goods according to its specifications).
31  See, eg, OSC Corp v Apple Computer, 601 FSupp 1274, 1290-97 (CD Cal 1985) (finding that policy was implemented to encourage dealers to offer consumers pre- and post-sale support for personal computers and to minimize free riding by mail-order dealers), aff'd, 792 F2d 1464 (9th Cir 1986).
32  See Worldhomecenter.com Inc v KWC Am, Inc, 2011 US Dist LEXIS 104496, at *18 (SDNY 15 Sept 2011) (observing that manufacturer's restrictions on price advertising by internet sellers may have provided 'an incentive for display room distributors to continue devoting energy, expense, and floor space' to manufacturer's goods; applying New York Donnelly Act).
33  Guidelines on Vertical Restraints, 2010 OJ (C 130) 1, parapara 50-53.
34  See, eg, PSKS Inc v Leegin Creative Leather Prods, 615 F.3d 412, 421 n.8 (5th Cir 2010) (observing that ‘eight other circuits have applied the traditional rule of reason to dual distribution systems’); AT&T Corp v JMC Telecom, 470 F3d 525, 531 (3d Cir 2006) (‘[v]ertical restraints
are generally not per se violations of the Sherman Act, even where a distributor and manufacturer also compete at the distribution level, ie, have some form of horizontal relationship (aka dual distributor arrangement)\(')\); Elecs Commcn'ns Corp v Toshiba Am Consumer Prods, 129 F3d 240, 243 (2d Cir 1997) (holding that dual distribution restraints are vertical and subject to rule of reason).

35 See, eg, Cascade Health Solutions v PeaceHealth, 515 F3d 883, 913 (9th Cir 2008). For criticism of the per se label as applied to tying arrangements, see generally 9 Phillip E Areeda & Herbert Hovenkamp, Antitrust Law para 1720 (3d ed. 2011).

36 See, eg, Brantley v NBC Universal Inc, 675 F3d 1192, 1202 (9th Cir 2012) (noting that not all tying arrangements are anti-competitive).

37 See, eg, Eastman Kodak Co v Image Tech Servs, 504 US 451, 462 (1992) (‘for [two items] ... to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide [one item] ... separately from [the other] ...').


39 See, eg, Ungar v Dunkin' Donuts of Am Inc, 531 F2d 1211, 1224 (3d Cir 1976); Mozart Co v Mercedes-Benz of N Am Inc, 593 F Supp 1506, 1517 (ND Cal 1984), aff'd, 833 F2d 1342 (9th Cir 1987).

40 Marts v Xerox Inc, 77 F3d 1109, 1113 (8th Cir 1996).


44 See generally Areeda & Hovenkamp, supra note 38, para 1736e.

45 See generally ABA Section of Antitrust Law, Antitrust Law Developments 199-200 (7th ed. 2012).


47 Eg, Roland Mach Co v Dresser Indus, 749 F2d 380, 393 (7th Cir 1984).


49 See, eg, United States v Dentsply Int'l Inc, 399 F3d 181, 197 (3d Cir 2005). The Federal Trade Commission recently entered into a consent decree with IDEXX Laboratories Inc banning it from using exclusive dealing contracts with distributors of diagnostic products for veterinarians. The Commission charged that IDEXX had monopoly power and that its exclusive dealing agreements with distributors had blocked rivals from 85 per cent of the available sales opportunities in the relevant market. See IDEXX Labs Inc, Analysis of Proposed Consent Order to Aid Public Comment, 78 Fed Reg 300, 303 (3 Jan 2013).

50 The example is based on the facts in Concord Boat Corp v Brunswick Corp, 207 F3d 1039, 1044 (8th Cir 2000).

51 See, eg, ZF Meritor LLC v Eaton Corp, 696 F3d 254, 281-89 (3d Cir 2012) (market share rebates as part of long-term supply agreements with OEMs), cert denied, No. 12-1045 (US 29 April 2013); Concord Boat Corp, 207 F3d at 1059 (‘The principle [sic] criteria used to evaluate the reasonableness of a contractual arrangement include the extent to which competition has been foreclosed in a substantial share of the relevant market, the duration of any exclusive arrangement, and the height of entry barriers.'); Masimo Corp v Tyco Health Care Group, 2006 US Dist LEXIS 29977, at *13-19 (CDCal March 22, 2006), aff'd, 350 F App'x 95 (9th Cir 2009).

52 See ZF Meritor LLC, 696 F3d at 281 (‘Although prices are unlikely to exclude equally efficient rivals unless they are below-cost, exclusive dealing arrangements can exclude equally efficient (or potentially equally efficient) rivals, and thereby harm competition, irrespective of below-cost pricing.'); Concord Boat Corp, 207 F3d at 1062 (noting that district court had questioned defendant's per se legality argument for above-cost discounts but affirming finding of no § 2 liability on basis of failure of proof of exclusionary effects).

53 Eaton Corporation argued in its unsuccessful certiorari petition in ZF Meritor that the price-cost test is a safe harbor for price competition. It urged that the court of appeals' refusal to approve Eaton's discounting under the price-cost test would, if not reversed by the Supreme Court, 'create a glaring loophole that will destroy the clarity and predictability of the price-cost test's safe harbour, making it impossible for leading companies to engage in aggressive above-cost price competition with confidence that their conduct will not subject them to treble-damage liability in antitrust suits brought by less successful competitors.' Petition for Writ of Certiorari, at 3, No. 12-1045 (US filed 25 Feb 2013).

54 324 F3d 141 (3d Cir 2003).

55 Id. at 155.

56 515 F3d 883 (9th Cir 2008).

57 Id at 906.

58 Id at 909.

59 Blue Cross & Blue Shield United v Marshfield Clinic, 65 F3d 1406, 1415 (7th Cir 1995).


61 Id, Complaint para 4(A).

62 Id. Following passage by the Michigan legislature of a law to prohibit healthcare insurers from using MFN clauses in contracts with healthcare providers, the Department of Justice dismissed its complaint on 25 March 2013.

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Tom heads the antitrust, competition and distribution practice of Thompson Hine LLP. He handles antitrust and other litigation in federal and state courts throughout the US and is admitted to practice before the US Supreme Court, the US Courts of Appeals for the Sixth, Seventh, Eighth, Tenth and Eleventh Circuits, and US District Courts for the Northern and Southern Districts of Ohio. He has represented clients under investigation for antitrust violations by the US Department of Justice, the Federal Trade Commission and state attorneys general. Counseling is an important part of his practice, and Tom regularly advises on compliance with antitrust and competition laws, particularly as they bear upon pricing and distribution.

Tom has written and spoken extensively on antitrust, distribution and competition matters. He is active in the leadership of the Section of Antitrust Law of the American Bar Association (ABA), and he has edited ABA publications on antitrust law, including Antitrust Law and Economics of Product Distribution (2006). A member of the Ohio Bar, Tom is ranked in the 2013 edition of Chambers USA as a leading Ohio lawyer in antitrust litigation.

After graduating from Georgetown University Law Center, Tom clerked on the US Court of Appeals for the Eighth Circuit.