



PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

Antitrust Law: Overview/Introduction

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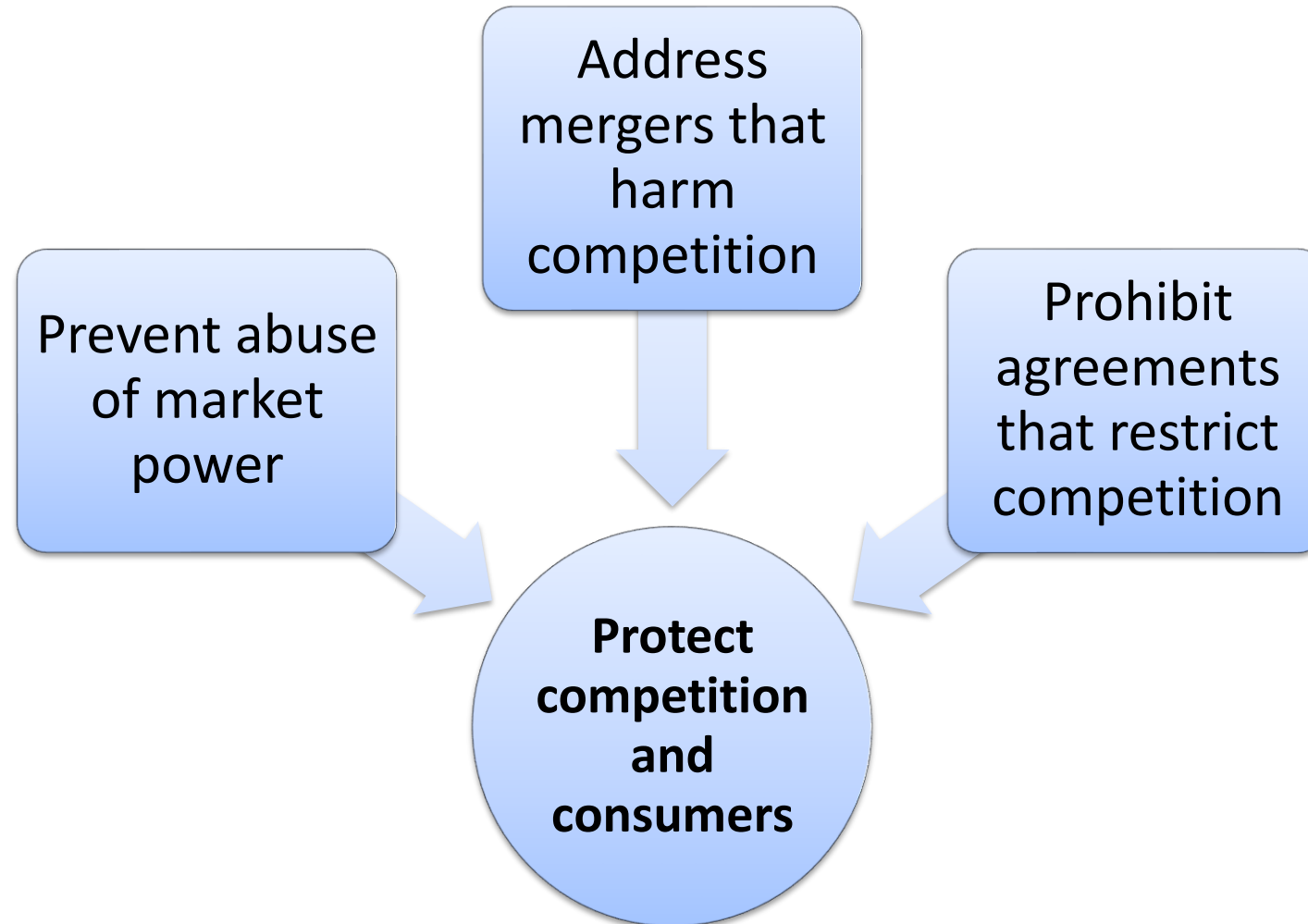
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- I. Antitrust Law Basics
- II. Key Federal Legislation and State Corollaries
- III. Antitrust Enforcement and Penalties
- IV. Notable Antitrust Trends
- V. Insurance Discussion / Q&A

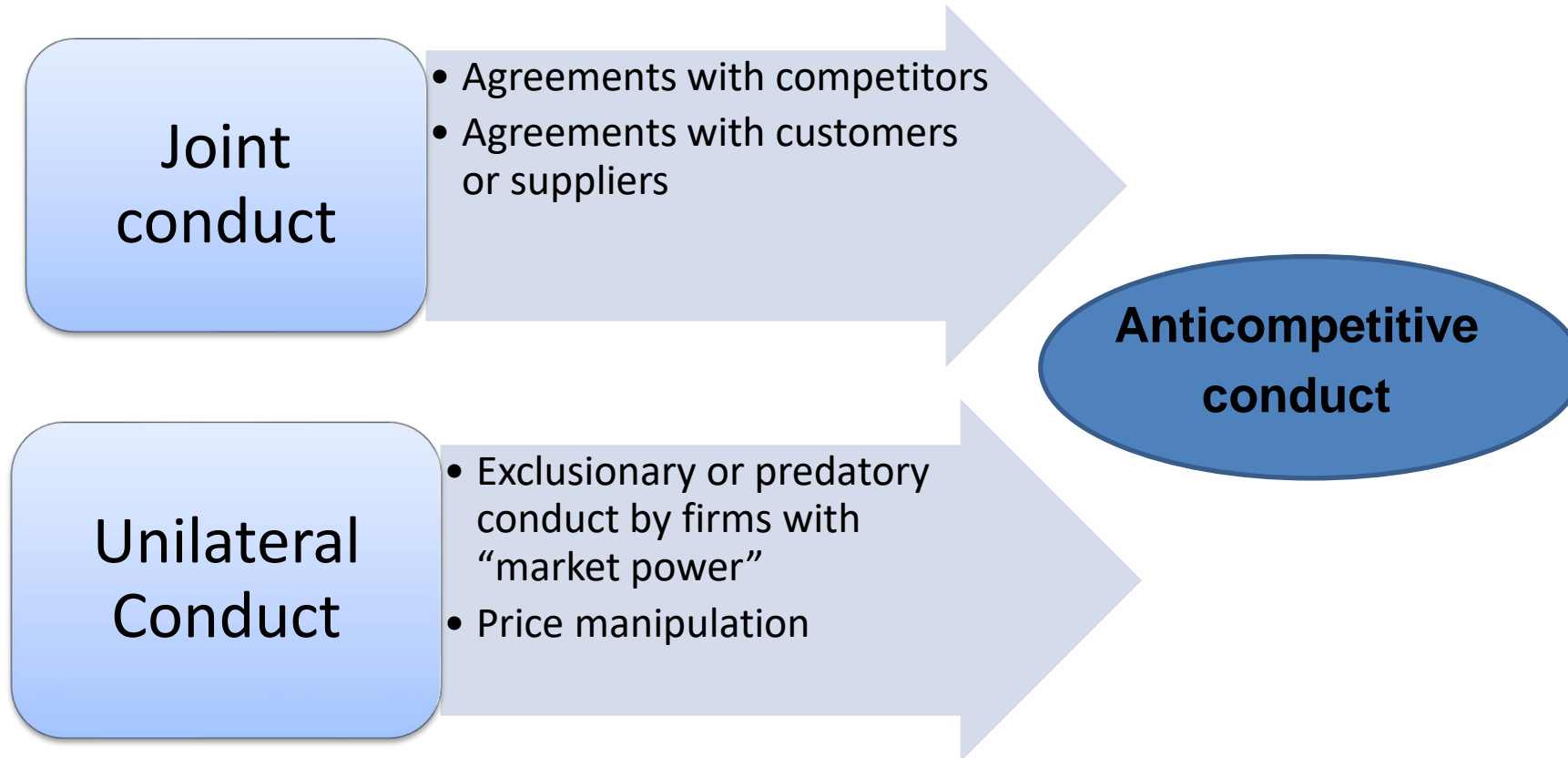


Antitrust Law Goals



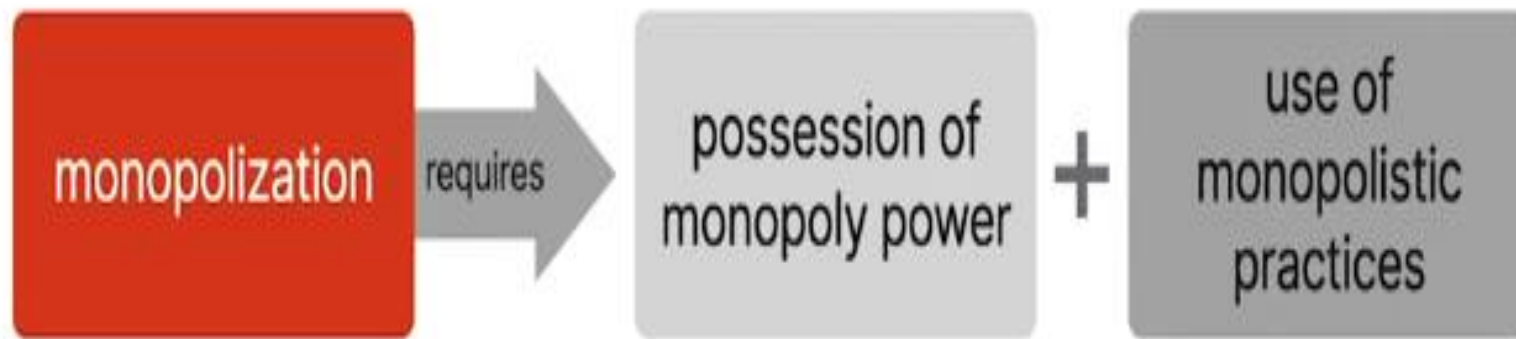
- Federal antitrust laws
 - E.g., The Sherman Act, 15 USC §§ 1-7
 - E.g., The Clayton Act, 15 USC §§ 12-27
 - E.g., Hart-Scott-Rodino Antitrust Improvements Act, 15 USC § 18a
- State antitrust laws
- Non-U.S. competition laws
 - Many regimes globally

Joint Versus Unilateral Conduct



Some Antitrust Basics: Sherman Act Section 2 (Single Firm Conduct)

- Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations"
- Section 2 establishes three offenses, commonly termed "monopolization," "attempted monopolization," and "conspiracy to monopolize."





Section 1 of the Sherman Act (Multi-Firm Conduct)

- Section 1 essentially states that: “every contract, combination or conspiracy in restraint of trade is unlawful”
- The phrase “contract, combination or conspiracy” means agreement
- Restraints are either analyzed under the “per se” rule or under the “rule of reason
- If a court has no experience with a particular restraint, then it should apply the Rule of Reason
- In addition, if there are plausible procompetitive justifications for the restraint, then the court should apply the Rule of Reason

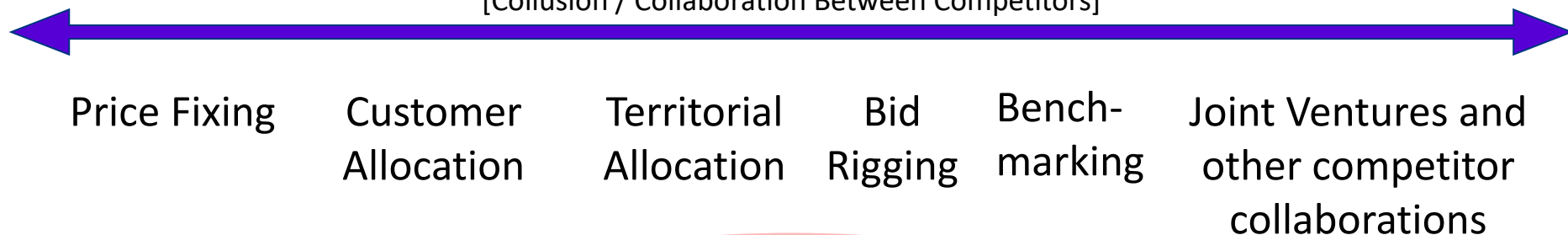


Section 1 of the Sherman Act (Multi-Firm Conduct)

- The Rule of Reason basically tests whether the anticompetitive effects of the restraint outweigh the procompetitive benefits
- Over the years, the Supreme Court developed a short-cut mode of analysis called the per se rule
- The per se rule applies when a court can say with confidence based on prior experience that the restraint will always or almost always have a net anticompetitive effect
- If there are plausible procompetitive justifications for a restraint, then a court can no longer say with confidence that the restraint will always or almost always have a net anticompetitive effect
- If the Rule of Reason applies, a restraint is not automatically lawful

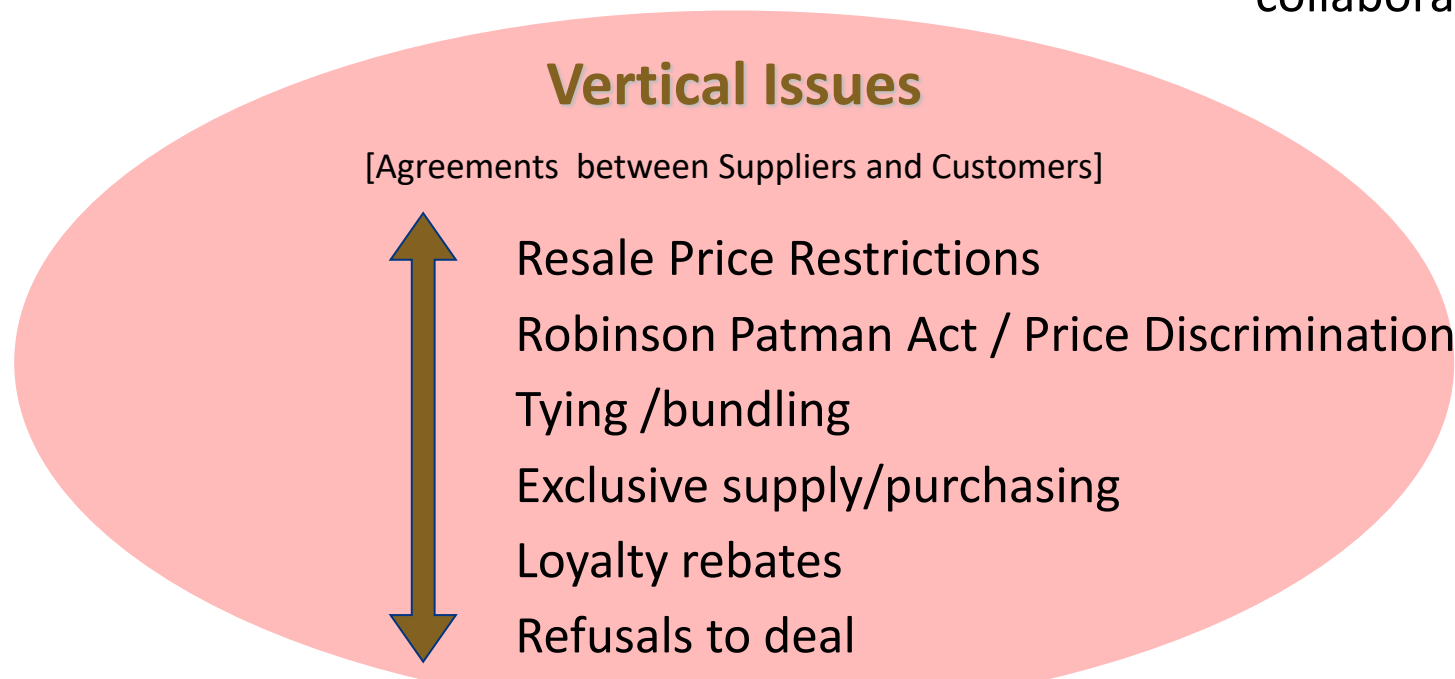
Horizontal Issues

[Collusion / Collaboration Between Competitors]



Vertical Issues

[Agreements between Suppliers and Customers]



“Hard-core” agreements between competitors are **always illegal** regardless of effects.

- **Price fixing** (including discounts or other terms)
- Agreements to **limit production levels**
- Market/territory/customer **allocations**
- **Group boycotts/concerted refusals to deal**
- **Bid-rigging**

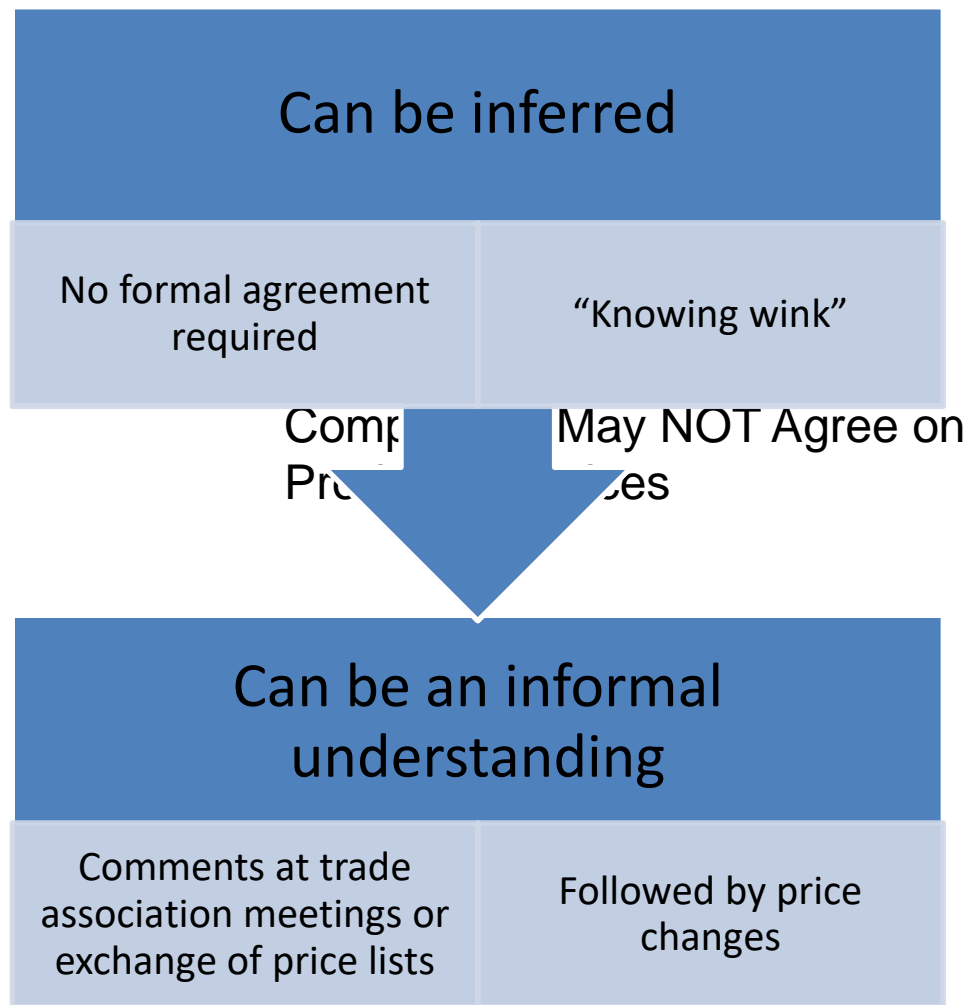


Also watch for **information exchanges** that facilitate any of above

Competitors May NOT Agree on Competing Products/Services



What is an Agreement?



- **EXAMPLE:**
- Your friend works for a competitor.
- You meet for dinner one night.
- He tells you he is planning to announce a 10% price increase next month to cover increased costs.
- You say nothing.
- Next month, your friend's company raises prices 10%, and you raise your prices to match the increase.
- **This may be enough to allege your company agreed to fix prices even though you did not verbally agree!**

Agreement Inferred via Exchanging Competitively Sensitive Information

Forward-looking price/cost information

High

Future Information

Timing of future product launches

Current Information

Aggregate prices/costs, aggregate production volumes

> 3-6 month old Information

Methods and procedures

Compliance / best practices

Ancient Information

Employee motivational tips

Low

Evidence Can Take Many Forms and Compliance Training is Everything

Emails, Texts, Slack, Social Media/Chat Rooms

- Major source of antitrust evidence
- You can't control where your emails/messages end up
- Emails (and other electronic records) last forever

Carefully Document

- Assume anything you write will be read by a regulator
- Document sources of competitively sensitive information
- Document reasons for discussions with competitors
- WSJ Rule - don't write anything you'd be embarrassed reading on front page of WSJ

Enforcement

- US FTC and DOJ and 50 State AGs
- Many International Enforcers
- Private Plaintiffs (class actions)

Many tools at disposal:

- Subpoenas and search warrants
- Body wires and phone taps

Very aggressive

Amnesty

Rewards to successful applicants:

- Zero dollars in fines
- No jail time
- Relief in private lawsuits

Only first applicant receives full amnesty

Designed to encourage whistle-blowers



What's at stake?



Harsh Penalties for Employees

Fines

Up to \$1 million for individuals

Prison



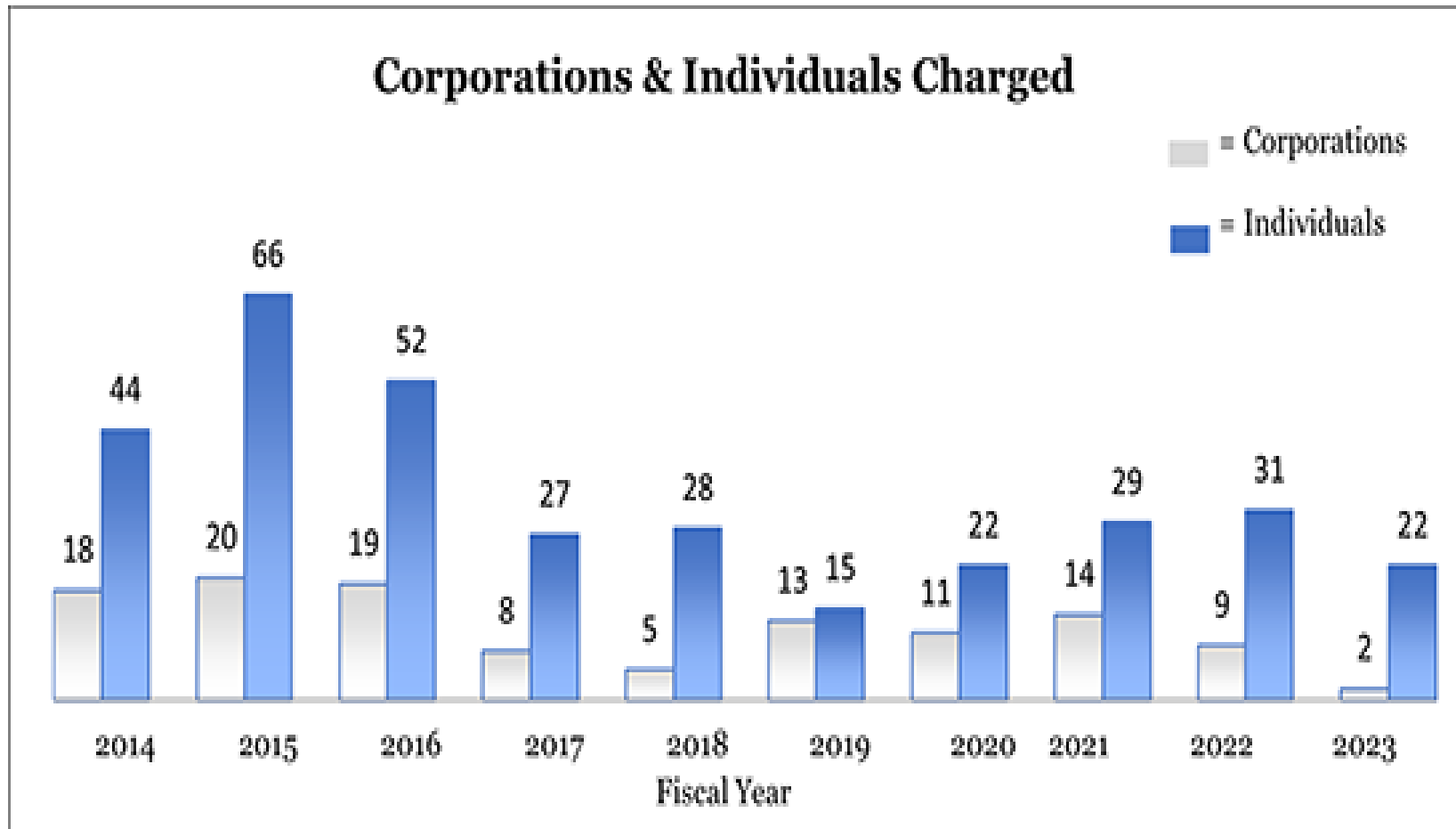
Up to 10 years (US)

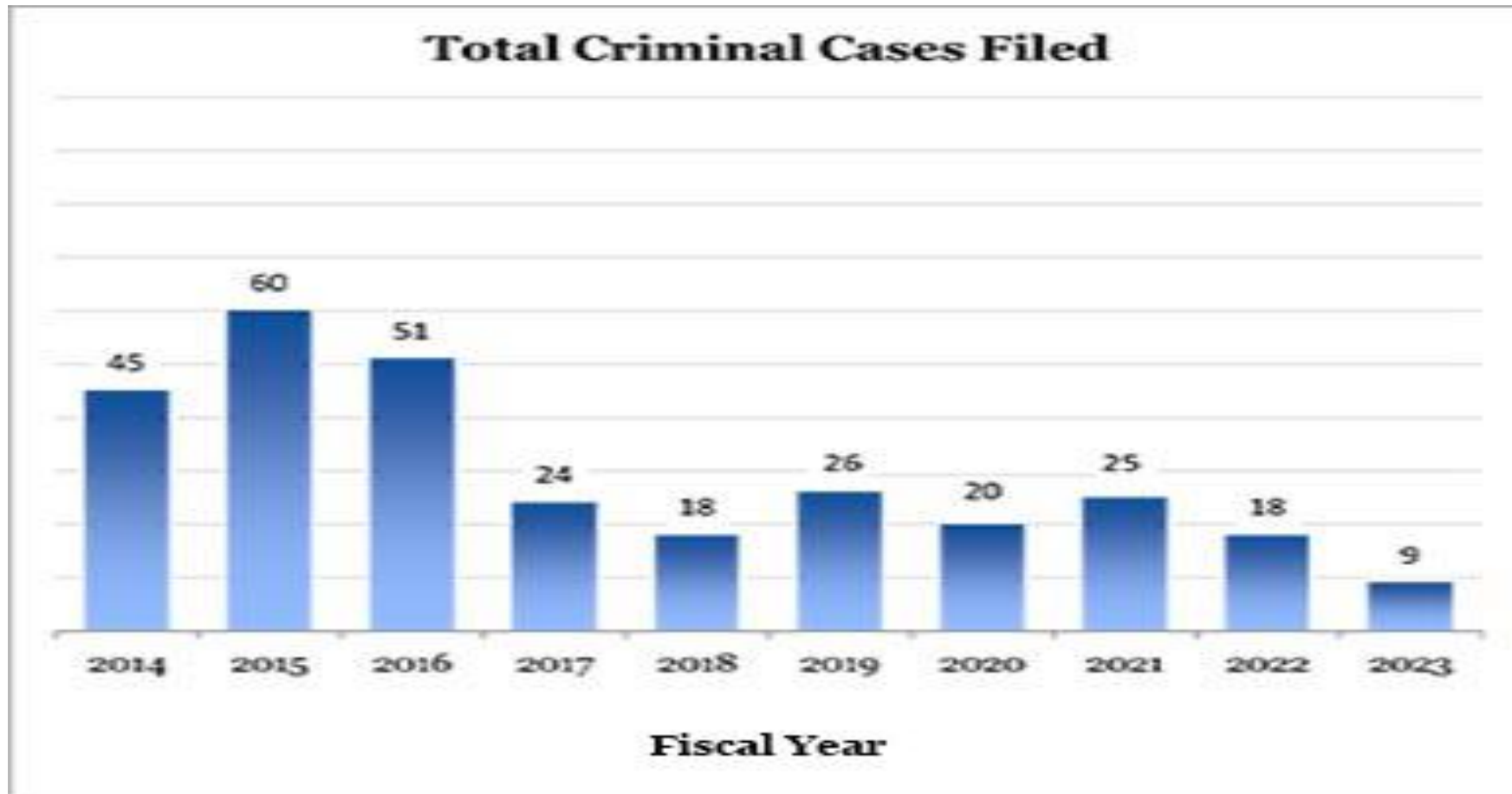
Disciplinary Action

Director disqualification

Extradition

Criminal Enforcement Trends (Typically a Precursor to Private Actions)

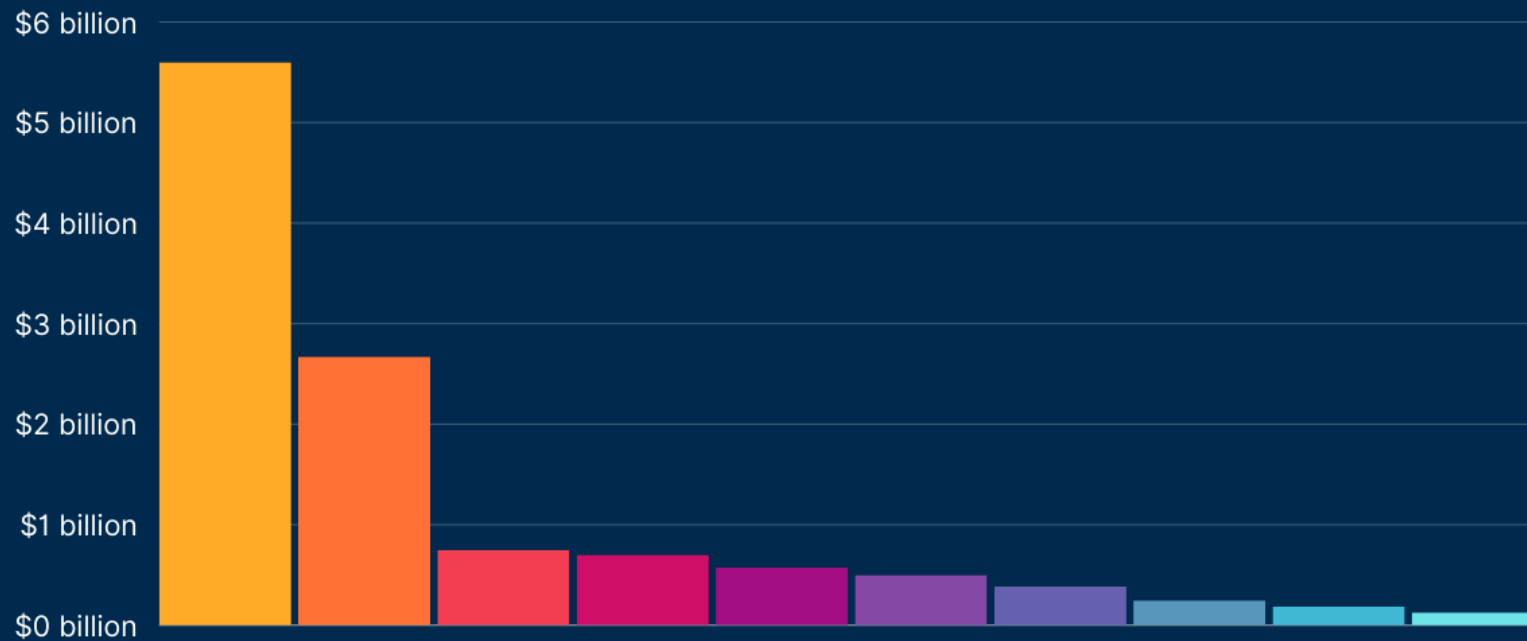






Top 10 Antitrust Class Action Settlements In 2023

Top 10 totaling \$11.74 billion in 2023 | \$3.72 billion in 2022



- Regulators view antitrust law as a tool to combat inflation, or to address other topical issues (e.g., tight labor markets post-covid)
 - For this reason you see a focus on certain sectors/categories, among others
 - Oil and Gas
 - Food
 - Big Tech
 - Labor Markets (E.g., No-Poaching Agreements / Non-Competition Agreements)

- Antitrust law is ever-evolving, and new areas of focus may arise from emergent technologies, which are already garnering attention
 - E.g., Artificial Intelligence / Large Language Models
 - Can AI facilitate entering into an illegal price-fixing conspiracy, or result in further concentration of power in the tech. industry?
 - E.g., Cryptocurrency / Smart Contracts / Pricing Algorithms
 - Can a smart contracts or pricing algorithms be used to effectuate a price-fixing scheme?
- Regulators and private Plaintiffs will be challenged with respect to applying current laws to these new technologies
 - E.g., How does one indicate intent to enter into a price-fixing agreement if a computer effectuated it?

Panel Discussion / Q&A

Thank you for attending today's session!