### Contention One: Commodified Sovereignty

#### In 2017, the pharma company Allergan attempted to extend the life of one of its patents and evade a process called inter pares review that would cause an early termination of the patent. It did so by giving its patent to the Saint Regis Mohawk Tribe and agreeing to pay the Tribe millions of dollars each year if the Tribe agreed to invoke its sovereign immunity in any patent review cases. Ultimately, the Patent Office, the Federal Circuit, and the Supreme Court ruled that tribal sovereign immunity did not protect the patent, so the deal failed. But…the courts did not rule on the legality of the scheme itself.

ALARIC DEARMENT ’19 “Supreme Court rejects Allergan, Saint Regis Mohawk appeal in patent case” https://medcitynews.com/2019/04/supreme-court-rejects-allergan-saint-regis-mohawk-appeal-in-patent-case/

A novel attempt by a drugmaker to protect market exclusivity on its drug by transferring the patents to a Native American tribe has officially failed. On Monday, the Supreme Court denied a petition by Dublin-headquartered Allergan to appeal their case, which the company and the Saint Regis Mohawk Tribe of New York filed in December after the US Court of Appeals for the Federal Circuit ruled against them. In September 2017, Allergan transferred the patents covering the dry-eye drug Restasis (cyclosorine) to the Mohawk and then licensed them back from the tribe in exchange for an upfront payment and royalties. The thinking was that tribal sovereignty would allow the Mohawk to invoke sovereign immunity to petition the Patent Trial and Review Board to dismiss an Inter Partes Review challenging the patents that was filed by generic drugmakers Mylan and Akorn. However, the PTAB denied the tribe’s motion to dismiss the IPR, and the Federal Circuit court upheld the decision. The court agreed with the generic drugmakers’ view that a federally recognized Native American Tribe that owned a patent could not assert sovereign immunity because the proceeding bore more similarity to an agency enforcement action than a civil suit by a private party.

#### However, in resolving the suit this way, the federal circuit reached a decision that constrained the reach of tribal sovereignty. It did so in a way that left the doctrine confused and murky.

Samantha Roth ‘19, Tribal Sovereign Immunity as a Defense at the Patent Trial and Appeal Board Or a Violation of U.S. Antitrust Laws, 23 MARQ. INTELL. PROP. L. REV. 57 (2019).

As previously established, tribal sovereign immunity can only be abrogated by Congress or through an express waiver by the tribe.52 There are quite a few areas where Congress has used its authority to limit tribal immunity (e.g., murder, kidnapping, arson),5 3 but intellectual property is not one of them. However, Congress did pass two acts attempting to abrogate state sovereign immunity with respect to patents and trademarks: the Trademark Remedy Clarification Act of 1992 (TRCA)54 and the Patent and Plant Variety Protection Remedy Clarification Act (PRCA)." Prior to the TRCA, individuals did not have a private right of action against a state that misrepresented its product in violation of section 43(a) of the Trademark Act of 1946.56 By enacting the TRCA, Congress intended to extend the phrase "[a]ny person" in section 43(a) to include state entities, thus abrogating the immunity of the states with regard to trademark infringement." Similarly, the PRCA was enacted to abrogate state immunity with regard to patent infringement." In two sister cases, the Supreme Court addressed the validity of these acts after a claim that a Florida state entity falsely represented its product in violation of section 4359 and infringed on College Savings Bank's patent.o In both of these instances, the Court held that Congress did not have the power to abrogate the state's sovereign immunity. 6 1 These cases seemed to suggest that where intellectual property rights had been infringed, sovereign immunity would prevail. Even more recently, in Covidien, the PTAB held that state entities were protected from IPR due to their state sovereign immunity. 62 Covidien filed petitions requesting IPR on patents held by the University of Florida Research Foundation (UFRF) .6 3 The UFRF filed a motion to dismiss, alleging its sovereign immunity was a defense to the IPR petition.The PTAB held that the Eleventh Amendment "limit[ed] not only the judicial authority of the federal courts to subject a state to an unconsented suit, but also preclude[d] certain adjudicative administrative proceedings."' The holding in Covidien applied not only to the state of Florida proper but also extended to any state agents or instrumentalities, which included the University of Florida's research foundation.6 5 To come to this conclusion, the PTAB focused on the Supreme Court case, Federal Maritime Communication v. South Carolina State Ports Authority (FMC), which was a Supreme Court case that considered whether state sovereign immunity precluded the FMC from "adjudicating a private party's complaint that a state-run port ha[d] violated the Shipping Act of 1984."66 The Court held that the similarities between agency adjudications bared such strong similarities to civil litigation that the states could not be subjected to such proceedings due to their state sovereignty.6 ' The PTAB held that proceedings before the PTO were much like the adjudications considered in FMC, and therefore, the state had a sovereign immunity defense against any IPR.68 It seems that Allergan was emboldened by the PTAB's decision in Covidien because less than a year after that decision came out, Allergan put out its press release announcing the transfer of its patent to the Regis Mohawk Tribe. 69 This may have been a gamble that was not worth its initial $13.75 million price tag (not to mention the additional $15 million per year in royalties) 70 because the PTAB rejected the Regis Mohawk Tribe's argument that tribal sovereign immunity applied to the inter partes review proceedings and declared that Allergan was still the owner for purposes of the proceedings." In coming to this decision, the PTAB recognized that a tribe was a "'domestic dependent nation[]' that exercise[s] 'inherent sovereign authority"' and that a tribe can only be subjected to suit when explicitly authorized by Congress or when immunity has been waived by the tribe.72 However, despite a lack of express abrogation by Congress or waiver by the Regis Mohawk Tribe, the PTAB held that tribal sovereign immunity did not apply in the same manner as state sovereign immunity.7 While recognizing the doctrine of tribal immunity, the PTAB considered a line of cases that indicated that Congress could impliedly abrogate immunity when a statute was of general applicability. The Supreme Court held in Federal Power Commission v. Tuscarora Indian Nation, that "a general statute in terms applying to all persons includes Indians and their property interests."74 The Court further noted that acts of general applicability will apply to tribes unless there is "a clear expression [of Congress] to the contrary."" This case looked at whether licensees of the Federal Power Commission had the authority to "take lands owned by Indians, as well as those of all other citizens, when needed for a licensed project, upon the payment of just compensation."76 While the Supreme Court appeared to only hold with reference to actual property rights, the PTAB took this ruling, applied it to intellectual property rights," and held that the Patent Act was a general act with which the tribe was required to comply.7 8 A prominent case extending the holding of Federal Power Commission beyond property rights is Donovan v. Coeur d'Alene Tribal Farm7.9 In this case, an Occupational Safety and Health Administrator (OSHA) compliance officer found twenty-one health and safety violations at the Coeur d'Alene Tribal Farm, which was wholly owned and operated by the Coeur d'Alene Indian Tribe.so The Tribe did not argue the validity of the violations but instead argued that they had tribal immunity from any liability under the Occupational Safety and Health Act." The Ninth Circuit Court of Appeals held that Congress limited the Tribe's immunity when it created this Act because it was of general applicability to all "employers."82 The court noted three exceptions to this rule that general acts should apply to tribes equally as to any other body: (1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations. 83 This reasoning has been applied with mixed results in different circuits. 84 The PTAB's decision that patent laws are generally applicable, and thus abrogate the tribe's sovereign immunity, is not entirely novel. However, this argument has not been addressed in a patent law context by the Supreme Court, and the lower courts that have heard such claims have typically found the argument lacking. For example, in Microlog Corp. v. Continental Airlines, Inc., the court held that "[t]he Patent Act, though authorizing civil actions for infringement, does not unequivocally abrogate an Indian Tribe's immunity from suit for patent infringement."" The court in Specialty House of Creation, Inc. v. Quapaw Tribe of Oklahoma took the analysis one step further and argued that the fact that Congress did not include tribes as possible infringing parties in the PRCA "[d]espite providing specifically for waiver of state sovereign immunity" demonstrated that Congress had not unequivocally waived any tribal sovereign immunity.16 The Regis Mohawk Tribe was also unsuccessful on appeal to the Federal Circuit, although the Federal Circuit did not directly address the PTAB's "implied abrogation" argument. 7 Rather, the court used a similar analysis to the one used by the PTAB in Covidien, which looked at the Supreme Court's decision in FMC. However, the Federal Circuit came to the opposite conclusion that the PTAB came to in Covidien. In FMC, the Supreme Court held that immunity exists where adjudication proceedings are brought against a state by a private party, and there is no immunity where proceedings are an agency-initiated enforcement proceeding." In its review, the Federal Circuit determined that the IPR system is a hybrid of these two proceedings, but there were several factors that made the court decide that IPR "is more like an agency enforcement action than a civil suit brought by a private party."" Namely, the USPTO Director (rather than a private party) had broad discretion in instituting reviews, the PTAB could continue its review even if the private party petitioner decided not to participate, the USPTO proceedings did not mirror Federal Rules of Civil Procedure, which would suggest a civil proceeding, and the USPTO's authority was often more inquisitorial than adjudicatory.9 0 The court concluded that because the IPR system is more like an agency enforcement action than a civil suit, sovereign immunity was not available as a defense to IPR." The Federal Circuit's opinion is confusing for a few reasons. First, the court ignored the fact that the PTAB had reached an opposite conclusion in Covidien and made no attempt to clarify how the two cases were distinguishable. Similarly, the court failed to address the PTAB's implied abrogation theory or any other prior case law that established guidelines for when to give tribes immunity in federal proceedings. It is also unclear why the court decided to use a case that discussed state immunity rather than one of the many existing approaches for tribal immunity.9 2 With its opinion, the court added another layer of confusion to the tribal sovereignty doctrine.

#### In fact, the federal circuit refused the rule on the validity of the arrangement itself. It only ruled the immunity didn’t apply in the case of IPR review.

Alma Orozco 18, The Dark Side of Tribal Sovereign Immunity: The Gap between Law and Remedy, 19 NEV. L.J. 689 (2018).

The Federal Circuit's decision, however, is narrow and does not resolve the issue. The Federal Circuit did not address Mylan's arguments that the Mohawk tribe's use of tribal immunity is an attempt to "market an exception" and that the assignment was a "sham."3'39 Now, Allergan and the Mohawk tribe are asking the Federal Circuit to reconsider its decision en banc.340 The Federal Circuit's decision is correct in that sovereign immunity is not implicated where the federal government is acting through an agency. Nonetheless the decision unfortunately leaves us with unanswered questions. The contours of tribal immunity remain murky.

#### This decision leaves open the possibility the future parties will seek to join with Tribes in order to evade legal scrutiny.

Cecilia Cheng & Theodore T. Lee ‘18, When Patents Are Sovereigns: The Competitive Harms of Leasing Tribal Immunity, 127 YALE L.J. F. 848 (2017-2018).

While this most recent iteration of the battle has offered consumers and generic companies a respite, a key question remains unresolved: what would have happened if the tribe had invoked its tribal sovereign immunity in federal court? Although Judge Bryson's district court opinion noted that tribal immunity "should not be treated as a monetizable commodity that can be purchased by private entities as part of a scheme to evade their legal responsibility"' 9 future parties in suits against tribes will still have to face this challenge. Tribal sovereign immunity has been used in other contexts, such as payday lending, to shield companies from liability.4 0 Moreover, a number of patent-holding entities (known colloquially as "patent trolls" for their practice of extracting rents by accumulating patents and claiming infringement) have partnered with tribes to sue major tech companies such as Amazon, Apple, and Microsoft for patent infringement.4 1In the words of one industry insider, "[t]here are dozens and dozens of tribes talking to law firms about this structure.

#### This unprecedent tactic attempts to commodify Native Sovereignty for nefarious purposes. Although it appears to give Tribes economic gains, it should be viewed as an attempt by private corporations to rent sovereign immunity for their own profits. The arrangements undermine the core premise of sovereign immunity protections and subvert them for unethical ends.

Luke McDonagh 19 is a Senior Lecturer in Law at City University of London “How a Native American Tribe Came to Own Some of the World’s Most Valuable Patents” https://www.thefashionlaw.com/how-a-native-american-tribe-came-to-own-some-of-the-worlds-most-valuable-patents/

Allergen is using an unprecedented tactic to protect its valuable patents, including the ones for its more than $4 billion-grossing Botox, the popular wrinkle-erasing injectable. The clever legal move that is being employed by the Irish-domiciled pharmaceutical giant that is the business of developing, manufacturing, and marketing brand name drugs and medical devices has been angering lawyers and politicians, alike, and keeping the price of its sweeping roster of medicines high. An existing debate over patents and the rights of indigenous peoples, one that has focused on the ethics of the exploitation of indigenous traditional knowledge, has taken a bizarre new twist in recent months. It started when Allergan transferred the ownership of the patents for one of its most valuable medicines – Restasis, a treatment for chronic dry eyes that had $1.5 billion in sales in 2016, alone – to the Saint Regis Mohawk Tribe of New York State. Shortly after the formal assignment of rights, the pharma giant revealed plans to lease back the rights to the drug from the Saint Regis Mohawk Tribe. The debate over patents and the rights of indigenous peoples has taken a bizarre new twist in recent months. While this may seem like a case of the pharmaceutical industry seeking to right historical wrongs by giving something back to an indigenous group that has long suffered from discrimination and dispossession, it is anything but that. In reality, it is a sly maneuver by a leader in big pharma to protect its valuable intellectual property rights. So, how did the deal come about? Well, U.S. law grants Native American tribes “sovereign immunity” in relation to their reservations, shielding them from some U.S. federal laws. Since 2012, there has also been a system of challenging patents at the U.S. Patent and Trademarks Office (“USPTO”), a process known as “Inter-partes Review” (“IPR”). IPR proceedings enable companies (oftentimes, a patent holder’s competitors) to initiate legal action on the basis that a granted patent should to be invalidated because it actually fails to meet the prerequisites for patentability, namely, it is not novel, useful, or non-obvious. The IPR process – which was enacted on September 16, 2012 as part of the America Invents Act, and applies to any patent issued before, on, or after that date – is quicker and more cost-effective than challenging a patent in court. With such an accessible and relatively less expensive system in mind, and given the high stakes nature of the pharmaceutical industry, the IPR process has been used to invalidate many pharmaceutical patents. By transferring their patents to the Saint Regis Mohawk Tribe and leasing them back from for an annual fee of up to $15 million, Allergan is effectively paying the tribe to take advantage of its sovereign immunity, which also shields the patents from IPR challenges. As for the Saint Regis Mohawk Tribe, it is quoted in the relevant Allergan press release, saying that it views the deal as a way to benefit from the patent system, and asserting that it would use the money for good causes in the community. If this unprecedented legal strategy succeeds, it could prolong Allergan’s limited patent-created monopoly on its various drugs. Unsurprisingly, there has been a great deal of opposition to this tactic. Shortly after the deal was announced in September 2017, several U.S. senators asked the senate judiciary committee to investigate Allergan’s alleged “anti-competitive attempt to shield its patents from review and keep drug prices high.” All the while, there is also an ongoing court challenge that may yet lead to a ruling that this strategy is an abuse of the sovereign immunity process. Yet if the Allergan-Saint Regis agreement survives legal challenge it will encourage further deals between U.S. Native American tribes and pharmaceutical companies. There’s no doubt that Allergan’s ownership move is an ingenious one. Yet, even if we consider it a good thing that the tribe has found a new source of revenue, the deal should give us all pause for thought. In addition to the competition concerns, this tactic arguably subverts the protection given to Native American tribes under U.S. law, in part to account for their historical dispossession. In other words, it uses the tribe’s status to boost corporate power and control of patented medicines. It also, of course, does nothing to help other indigenous groups around the world, particularly those in developing countries, all while turning the classic debate over patents and indigenous peoples on its head in something of a previously unimaginable way.

#### Any economic benefit received by the Tribes represents a failed attempt to correct for a much longer process that deprived the Tribes of economic power in the first place: a legacy of colonial oppression. The pharma companies are not actually helping any Tribes – they are using the destitution of Tribes created by federal policy in order to protect their own profits. This undermines and subverts the very purpose of sovereign immunity.

Katrina Grace Geddes 19, Sovereign Immunity for Rent: How the Commodification of Tribal Sovereign Immunity Reflects the Failures of the U.S. Patent System, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 767 (2019).

The Tribe's willingness to rent its sovereign immunity to patent holders in exchange for upfront payments reflects the financial strain of a legacy of colonial oppression of American Indians through federal policy and judicial decisions. 16 8 The effective promotion of tribal self-sufficiency, sovereignty, and political selfdetermination relies in large part on economic independence from federal funds. And despite popular misconceptions, Indian gaming revenue is unevenly distributed and largely insufficient.1 69 Of the 562 federally recognized Indian Nations, less than half operate gaming facilities. 170 And on the thirtieth anniversary of the Indian Gaming Regulatory Act,171 billions of dollars in gaming revenue have failed to systematically reduce tribal poverty levels (the median poverty rate for gaming tribes in Washington, Oregon, Idaho, and Alaska actually increased over 2000-2010 from 25% to 29%, despite $19 billion in gaming revenue), and there is evidence of an inverse correlation between per capita payments and poverty reduction. 172 Additionally, taxation revenue from businesses located on Indian reservations has been crowded out by parallel state taxation powers. 173 Dual taxation forces tribes to reduce their tax rates or forfeit tax revenue altogether in order to maintain market pricing, yet the threat of double taxation continues to frighten investors away. 17 4 Despite tribal taxation powers representing "an essential attribute of Indian sovereignty,"1 75 tribes' ability to generate taxation revenue or offer tax incentives to stimulate economic activity has been sharply curtailed by "flexible preemption analysis" decisions.1 76 Naturally, in these circumstances, tribes seeking additional revenue streams to support the needs of their members are more willing to "rent" their sovereign immunity for financial reward. The Saint Regis Mohawk Tribe has acknowledged that the upfront payment of $13.75 million followed by quarterly royalty payments of $3.75 million from Allergan will allow it "to address some of the chronically unmet needs of the Akwesasne community, such as housing, employment, education, healthcare, cultural and language preservation. "177 Interestingly, the Tribe's participation in this transaction has also been justified, not only by its significant economic needs, but by the long history of unlawful appropriation of Native American inventions in the United States. The Native American Intellectual Property Enterprise Council, in its amicus brief to the PTAB, justified the assignment of Restasis® patents to the Tribe on the basis that Appropriation and outright theft of Native American inventions and ideas without attribution has occurred for hundreds of years. The curing of rubber, the game of Lacrosse, tortillas, potato chips, root beer, and innumerable planting, cultivation, crossbreeding, and cooking techniques and inventions were all Native American in origin, yet the Tribes saw little or no benefits aside from occasional lip service. 178 Framing Allergan's patent assignment as a form of intergenerational equity (when in fact its only purpose was to protect Allergan's Restasis® revenue) suggests an alarming form of vigilante justice that should not be encouraged. Denying U.S. patients access to affordable generic medicines in order to remedy the historical deprivation of intellectual property rights to Native American tribes seems like a misguided attempt to correct one wrong by committing another. Justifying abuse of the patent system "in order to overcome significant historical disadvantages" 179 faced by Native American tribes is misdirected and unsustainable. Certainly, the U.S. government should be doing more to compensate Indian tribes for centuries of oppression, discrimination, and resource appropriation, but back-door vigilantism by means of ~~crippling~~ [decimating] inter partes review is not an appropriate remedy. Understanding the motivation for tribal participation in this transaction does not diminish its effect on consumer welfare and the underlying patent bargain. In granting patent rights, society agreed to provide inventors with a time-limited monopoly in return for the release of information concerning socially beneficial innovation. The financial needs and historical suffering of American Indians, while important, have no bearing on this bargain. For this reason, inter partes review cannot and should not be manipulated to serve extraneous objectives while there continue to exist alternative (and more appropriate) means of achieving them.

#### Abuses of and limitations on tribal mirror the discourses of Removal common in the 19th century. Abuses of tribal sovereignty are part and parcel of attempts to eliminate natives

Robert A. Williams 89 Jr., Professor of Law, University of Arizona College of Law. Member, Lumbee Indian Tribe., Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law, 31 ARIZ. L. REV. 237 (1989).

As an eastern Indian moved West, I have become more appreciative of the importance of a central theme of all American Indian thought and discourse, the circle. To come West, and listen to so many Indian people speak and apply a vital and meaningful discourse of tribal sovereignty, has been a redemptive experience. It has enabled me to envision what must have been for all Indian peoples before Europeans established their hegemony in America. As an eastern Indian moved West, I continually reflect on the cycles of confrontation between white society and American Indian tribalism.1 I am most alarmed by the structural similarities which can be constructed between the early nineteenth century Removal era and the modern West today. In the early nineteenth century, white society confronted the unassimilability of an intransigent tribalism in the East, and responded with an uncompromising and racist legal discourse of opposition to tribal sovereignty.2 The full-scale deployment of this discourse resulted in tribalism's virtual elimination from the eastern United States. Particularly in the modem West today, white society again finds itself confronting a resurgent discourse of tribal sovereignty as its intercourse with once remote Indian Nations increases. The revival of an uncompromising and racist legal discourse of opposition to tribal sovereignty, articulated by many segments of white society today, just as certainly seeks tribalism's virtual elimination from the western United States. While there are many differences between the Removal era confrontations with tribalism and the confrontations occurring today in Indian Country over the place and meaning of tribal sovereignty in contemporary United States society, the importance of the circle in American Indian thought and discourse particularly alerts me to many alarming similarities. In this Article, I present a short account of an early nineteenth century discourse of tribal sovereignty, that of the Cherokee Nation.3 This vibrant and applied discourse of tribal sovereignty is contained in the documents of the Cherokee Nation's war for America with the white man. Its themes of an Indian people's fundamental human right to retain and rule its ancestral lands and the Unites States' recognition of that right in formal treaties can be found manifested in the form of the Cherokees' written laws, court systems and stubborn resistance to state jurisdictional encroachments. The Cherokees' discourse of their treaty-recognized rights of self-governing autonomy ought to sound familiar to anyone conversant with contemporary Indian Country's discourses of tribal sovereignty. Having articulated the basic themes of the Cherokees' early nineteenth century discourse of tribal sovereignty, I then analyze the opposing legal discourse deployed by whites during the Removal era in response to Indian resistance to white hegemony.5 This analysis suggests that the principal themes of the Removal era's discourse of opposition to tribal sovereignty were appropriated from the corpus of well-known and oft-cited texts and arguments comprising a two-centuries old legitimating narrative tradition on tribalism's deficiency and unassimilability with the values of white society.6 I conclude this Article with a brief discussion of white society's contemporary public discursive practices that seek to constrain tribalism's self-determining rights, including the modern Supreme Court's discourse of implied limitations on tribal sovereignty. I suggest that these modem public discourses seek to confine and even to eliminate tribalism in the West today by use of central themes and thematic devices of the same racist, narrative tradition of the Indian's cultural inferiority that informed the Removal era's dominant legal discourse of opposition to tribal sovereignty. This still-vital narrative tradition of tribalism's incompatibility with the supposed superior values of the dominant society is, I argue, part of the broader legacy of European-derived colonialism and racism reflected throughout modern federal Indian law and discursive practice.

#### Disrespecting the sovereign rights to native people’s paves the way for violent extermination and international violence

Rana 14 (Aziz, faculty @ Cornell U, *Settler wars and the national security state*, Settler Colonial Studies, 2014, Vol. 4, No. 2, 171–175)//mm \*\*\*Note: IHL = International Humanitarian Law

Frederick Jackson Turner famously stated that “the ﬁrst ideal of the pioneer was that of conquest” and that “the riﬂe and the ax” were his principal “symbols”. For my remarks, I plan to develop this thought by assessing what settler wars on the American frontier – speciﬁcally conﬂicts with native peoples over land and material resources – tell us about the contemporary national security state. Due to limitations of time, the argument I am going to make is a schematic one, so bear with me in its bluntness and lack of nuance. The basic claim is that we tend to think of frontier wars between settlers and natives as episodes in a distant historical past that say very little about the present. But in actuality, it was precisely through these conﬂicts that American settlers developed key political and legal scripts concerning which political communities can claim full sovereignty as well as who rightly enjoys meaningful protections during wartime. Today, these scripts continue to inﬂuence foreign and domestic policy – not only in the United States and Europe but even in postcolonial states – and mirror current debates (such as over the status of non-state actors or the use of drones in international humanitarian law). For all these reasons, I think it is worth taking a moment to go back to the early nineteenth century and to revisit especially how American jurists in the context of the frontier conceived of the legal rules governing war with native communities. To begin with, a quick word about international humanitarian law (IHL) (or the law of armed conﬂict) may be useful. IHL has long been thought of – in the nineteenth century as well as today – as providing both a “sword” and a “shield”. In other words, the historic purpose behind IHL was to sanction practices that during peace time would be viewed as criminal. For instance, although in peace time you cannot engage in murder, during warfare certain forms of violence against individuals become legally acceptable. As a result, the laws of war provide a sword to belligerents, justifying their capacity to employ coercive violence. At the same time, these laws are also meant to be a shield to those groups caught up in armed conﬂicts; they are supposed to establish clear limitations and constraints on the use of force and to ensure that individuals (combatants and civilians) enjoy basic rights. What settler wars raised, in the interaction between the US federal government and American Indian nations, was a central question about whether communities whose forms of political and social organization were not cognizable under traditional ideas of Western statecraft, especially the Westphalian state, would nonetheless be treated as self-determining and rights bearing subjects. After independence, one of the very ﬁrst responses to this question was presented by Supreme Court Chief Justice John Marshall in the 1823 case Johnson v. M’Intosh. As I discuss in my book, The Two Faces of American Freedom, the case concerned whether American courts should respect the validity of revolutionary-era land purchases between white settlers and native peoples. In speaking for a unanimous Court and holding such sales invalid, Marshall argued that private citizens could not buy land directly from American Indians. Rather the US federal government enjoyed ultimate title to the land and alone could extinguish native occupancy. I am not going to go through Marshall’s holding in great detail, but he grounded his argument in what he called the “Doctrine of Discovery”. According to Marshall, this doctrine had long been recognized as part of international law (or the law of nations), and gave to European states in the New World an “exclusive right to extinguish the Indian title of occupancy either by purchase or conquest.” Such customary imperial authority meant that native peoples did not possess legally recognizable sovereignty, akin to European states, over their own territory. Indeed, if a European state were to stake a claim to territory within the American zone of discovery (but still practically controlled by an Indian nation) this was in fact an act of aggression against the USA, the relevant sovereign power. A far less explored element of this case is how Marshall struggled with the issue of frontier confrontations between settlers and natives, and particularly which laws were supposed to govern these military conﬂicts. As a normative matter, Marshall was deeply wary of defending indigenous conquest – not to mention frontier violence against native peoples – through arguments about the “superior genius” of Europeans or the “character and religion” of American Indians. He viewed many of these claims as ultimately justiﬁcations for the mistreatment of native communities. Nonetheless, Marshall accepted the inevitability of war on the frontier and maintained that the Doctrine of Discovery could be legitimately converted into a right of conquest – one that presumed that local peoples could be removed at will by settlers. The problem as he saw it was that native societies at root could never be made peaceable, a fact tied for Marshall to the very “nobility” of the American Indian. Precisely because the US federal government was engaged in a project of conquering their land, native peoples would refuse to submit. In his view, American Indians were “as brave and as high spirited as they were ﬁerce, and were ready to repel by arms every attempt on their independence.” This indigenous bravery meant that in refusing to submit native peoples would use all the available means of violence at their disposal. And as a consequence, they could not be counted on to engage in self limitation or to abide by basic principles of just war, principles that European states supposedly respected. Unless white settlers conquered deﬁnitively their indigenous neighbors on the frontier, American colonists would risk “exposing themselves and their families to the perpetual hazard of being massacred”. It is for this reason that Marshall reached a stunning conclusion: both the laws of war and the laws of occupation that applied among Europeans – and ensured that “the conquered shall not be wantonly oppressed”–could not apply with native peoples. For Marshall, “the tribes of Indians inhabiting this country were ﬁerce savages, whose occupation was war.” Any effort to extend legal protections, ordinarily granted to European publics, to native communities would be fatal to internal security. It would be the equivalent of waging war with one hand tied behind your back. In a sense, Marshall, whatever his qualms with the frontier treatment of indigenous neighbors, nonetheless articulated an initial defense of total war. Such war was acceptable in the context of conﬂicts with native peoples, precisely because settlers would be trapped in an asymmetrical ﬁght with an opponent that ignored the classic rules of military engagement. Marshall’s arguments have had a remarkably long shelf life in both national security policy and international humanitarian law. First of all, one could well argue that for Americans (perhaps even more so than the Civil War or the World Wars) it was the confrontation with native peoples that helped to deﬁne what “war” itself meant. Marshall’s claims about the limited rules that applied in the context of the frontier were directly tied to a view about what actually constitutes a legally cognizable war, complete with a formal declaration. Real wars were those between states where assumptions about reciprocity applied – these were conﬂicts governed by limitations on coercive force and fought between legitimate sovereigns. But conﬂicts with native peoples, however violent, were not true “wars”; they were skirmishes at the edges of American power. Since US expansion into territory within its zone of discovery was not invasion (unlike an aggressive act against an actually sovereign state), conﬂicts on the frontier were simply threats that needed to be paciﬁed for domestic security. And since the ordinarily rules did not apply to these paciﬁcation efforts, not surprisingly federal ofﬁcials persistently refused to formalize these encounters with declarations of war or explicit congressional authorizations. According to this logic, you do not declare war against the Indian communities in the Southwest or on the Great Plains because they do not have a structure that looks like the state, they cannot claim sovereignty, and above all they cannot be expected behave as a rational state would. One of the great ironies of these presumptions about what constitutes “real” war (and so brings with it reciprocal rights protections) is that in historical fact the “real” wars – think only of the two World Wars – produced a degree of unconstrained and organized violence on both sides that dwarfed any danger posed by native peoples ﬁghting to protect their land. If Marshall’s claims have justiﬁed a framework for what counts as legitimate war, they also have been integrated into the basic discourses of IHL and underscore the dark side of the laws of war themselves. The classic argument made by public international lawyers as well as by legal historians is that the expansion of IHL across the globe in the twentieth century was really a bumpy but progressive spread of basic rights. But again in historical fact, the very construction and entrenchment of IHL rested in practice on arguments not that different from those made by Marshall. Indeed, as Frédéric Mégret has shown in his essential article, “From ‘Savages’ to ‘Unlawful Combatants’” European lawyers in the late nineteenth century who played a central role in devising IHL norms developed their views against the backdrop of colonial wars in Asia and Africa. In the process, they too employed similar legal and political scripts in making claims about the limited responsibilities owed indigenous peoples (due to the presumed failure of local communities to distinguish non-combatants from combatants, to self-limit, or to respect legal reciprocity). For Mégret, the way that non-Western communities ﬁnally got treated as formally sovereign equals and rights-bearing subjects during wartime was by simply adopting the modern Westphalian state after independence, and in particular by replicating the institutions of a standing army and thus the national security state (complete with hierarchy, discipline, and a separate military class of experts to make key decisions about the use of force). Now, there are evident parallels between the American frontier context and the present moment. The ﬁrst and most obvious is in the title Mégret gives his article and concerns the status today of non-state actors. We see a clear continuity between those presently viewed as unwilling and unable to obey the laws of war (unlawful combatants) and native communities in the historical past. But more tellingly, we also see the continuity of claims about provisional or incomplete sovereignty. Just as expansion into native land was not viewed as invasion because of the limited control exercised by native peoples over their territory, contemporary American policymakers argue that you can use speciﬁc kinds of violence, like drone attacks, in places such as Yemen (whether or not they are a hostile nation), because Yemen is fundamentally a failed state. Using a drone attack in Yemen is different than using one in Germany or France given the underlying nature of the political community and existing institutional structures. The very persistence of claims – even in the era of formal sovereign equality – about provisional sovereignty suggests the embeddedness of settler frameworks in our national security narratives. One need look no further than the common security conversation about the dangers of asymmetrical conﬂict. Now one might think, just as an objective fact, that the relevant asymmetry in our post-9/11 world – not to mention the settler wars that Marshall discussed nearly 200 years ago – is an asymmetry between a state that can organize tremendous resources to engage in large scale forms of violence and its far weaker foe. Moreover, this asymmetry is further compounded by the additional fact that the relevant state claims the sword of IHL (all its coercive legitimacy) but rejects most of the shields that might limit it (those protections guaranteed to rights-bearing subjects). But in point of fact that the argument about asymmetry is the one we have all been conditioned to accept by our national security discourse. This is the claim that the USA ﬁnds itself ﬁghting wars at a military disadvantage due to existing rules of engagement. As we have seen, such a claim goes all the way back to the settler conﬂicts and recurs time and again: in the late nineteenth century colonial wars in Asia and Africa, during independence struggles in the midtwentieth century, throughout the Cold War in the depiction of guerrillas, and of course at the present moment. Perhaps even more pointedly we see the continued power of classic colonial scripts in how the national security state has itself become the universal institutional form governing the connection between statecraft and warfare. One of the remarkable features of the early twenty-ﬁrst century is the practical elimination of alternative modes of political and social life, modes that proliferated at the time Marshall penned his opinion in Johnson v. M’Intosh. Today, even in postcolonial settings, institutions marked by executive centralization, limited transparency, and a professional military increasingly deﬁnes modern decision making in the context of armed conﬂict or presumed emergency. Indeed, there are tremendous incentives for previously colonized communities to adopt these dominant forms of statecraft; such forms not only help validate claims to territorial sovereignty but also greatly enhance the capacity of governments to mobilize resource, protect citizens, and (more ominously) suppress dissent. Still, at the end of the day one might say, what is the problem with either the dominance of the Westphalian state (particularly in its national security iteration) or an IHL regime that privileges state actors over non-state ones? Certainly belligerents during armed conﬂicts that refuse to self limit or do not respect reciprocity should be seen as problematic. But it is nonetheless worth noting that the dominance of the national security state – its institutions and legal prerequisites – comes at profound costs (and this is where I will end). To begin with, these structures drawn from the Westphalian model and adopted in colonized societies reinscribe historic conﬂicts between settlers and natives but only now between what Antony Anghie has called the third and the fourth world (i.e. postcolonial states and local indigenous communities within them). In contemporary struggles over land and resources, precisely due to the logics of statecraft indigenous peoples often still ﬁnd themselves framed as outsiders without meaningful political legitimacy or full rights-bearing status. This leaves them in the remarkable position of facing threats and coercion in the post-independence period from previous anti-colonial allies. More generally, the global mimicry of a particular mode of statecraft – tied to a colonial past and bound today to national security discourses – has pointedly failed to produce a more peaceful global community, precisely what jurists like Marshall imagined would be the result of an international community of “civilized” Westphalian states. Instead, this form has generated an insulated war-making apparatus, able to organize resources on a vast scale and engage in total war. Such power has been a recipe not only for truly brutal international conﬂicts but also for the domestic application of violence against suspected internal enemies, often deemed “terrorists”. And in the post-9/11 American context, the persistence of ofﬁcial claims about asymmetry, provisional sovereignty, and threats from failed states and non-state actors has in practice promoted greater not less instability at the present day edges of US power. Not unlike Marshall’s old fears of ineradicable danger from native communities, these ofﬁcial judgments have justiﬁed a continual project of expanding the American footprint into the frontier, a footprint that has left in its wake more local insurrections and even greater need for territorial presence. The ultimate result is a vicious cycle of temporary paciﬁcation and sustained conﬂict, one sadly familiar to scholars of the American frontier but seemingly unrecognized by today’s political elites.

### Contention Two: Solvency

#### Although the Allergen deal fell through, the court did not invalidate the scheme itself. The better route is to invalidate the agreement as a violation of antitrust laws. This method avoids constraining tribal sovereignty and recognizes the actions of Allergen for what they are – an attempt to rent sovereignty in order to evade US patent and antitrust law

Samantha Roth ‘19, Tribal Sovereign Immunity as a Defense at the Patent Trial and Appeal Board Or a Violation of U.S. Antitrust Laws, 23 MARQ. INTELL. PROP. L. REV. 57 (2019).

Eliminating or limiting tribal immunity does not seem to be the correct approach for handling a case such as this. As previously noted, tribal sovereign immunity developed to atone for depriving tribes of their rights for years. Cutting these rights down as a snap reaction to what is admittedly an unscrupulous arrangement between Allergan and the Regis Mohawk Tribe punishes all tribes for the actions of one. A more appropriate way to invalidate this arrangement would be to invalidate it under antitrust laws, thus leaving tribal rights intact. A patent-owner essentially has a government-sanctioned monopoly over its product for the life of the patent." The importance of stimulating discovery and invention was recognized by the Constitution, which granted Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."9 4 This is exemplified under section 154 of the Patent Act, which states that a patent-holder has "the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States" for a period of twenty years from the date of filing the application.9 5 As part of the system that grants these monopolies, the government has set up certain systems to regulate, including the IPR system through the PTAB. Despite the fact that the granting of a patent establishes what is essentially a monopoly, patent-holders still must strike a balance between their patentmonopoly and any applicable antitrust laws.96 Under the Noerr-Pennington doctrine, a private party is typically immune from antitrust liability when the party is seeking to influence government action, even where that action would hinder competition." This doctrine attempts to strike a balance between encouraging competition while not impinging on a party's freedom of speech.98 When a party seeks to enforce its intellectual property rights in court, it is seeking redress from the government and would fall under the NoerrPennington doctrine. Thus, typically under this doctrine, Allergan's infringement suit against Teva would be immune from antitrust allegations. However, there are several exceptions to the Noerr-Pennington doctrine. Most notably in this case, the immunity provided by the doctrine is lost when a party uses sham litigation to enforce intellectual property rights in court.99 A sham litigation occurs when the lawsuit is objectively baseless and when the litigant's subjective motivation is to interfere with the business of a competitor through the use of the governmental process." A lawsuit is objectively baseless when "no reasonable litigant could realistically expect to succeed on the merits of the suit."'ol A litigant's subjective motivation is suspect when the "baseless lawsuit was an attempt to use the litigation process-as opposed to the outcome of the litigation-as an anticompetitive weapon."l 0 2 The subjective motivation in this case helps to illuminate whether the lawsuit was objectively baseless. While subjective motivation may be hard to prove, Allergan has made its motivation abundantly clear: it feared a losing case and arranged a deal with the Regis Mohawk Tribe as means to outsmart the system. Presumably, Allergan would not have made any arrangement with the Regis Mohawk Tribe if it believed that it was going to win on the merits of its infringement case, thus suggesting an objectively baseless lawsuit. Allergan weaponized the Regis Mohawk Tribe's immunity to give itself an anticompetitive edge. Because the Noerr-Pennington doctrine immunity would likely fail, Allergan should have to answer to the antitrust implications of its actions in addition to the IPR. If the Noerr-Pennington doctrine immunity is lost, then the Sherman Act may apply. Section 1 of the Sherman Act states, "Every contract ... or conspiracy, in restraint of trade or commerce among the several States ... is hereby declared to be illegal."'0 3 Section 2 of the Sherman Act states, "Every person who shall 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 ... shall be deemed guilty of a felony." 104 There are two types of analysis that courts use to assess if a party has operated in violation of the Sherman Act. The evaluating body will either use a per se analysis or a rule of reason analysis.ios A per se analysis is used where a restraint on trade is "so plainly anticompetitive" that there is no need for "an elaborate inquiry into the restraint's likely competitive effect."1 0 6 This is generally reserved for situations such as "naked price-fixing, output restraints, and market division among horizontal competitors, as well as certain group boycotts."'o Most challenges in intellectual property will require a rule of reason analysis.'os This requires an assessment of "whether the restraint is likely to have anticompetitive effect and, if so, whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those 09 anticompetitive effects."l However, patents present a unique challenge to an antitrust analysis because "[b]y their nature, patents create an environment of exclusion, and consequently, cripple competition."'o This analysis issue has arisen in another type of pharmaceutical arrangement that has drawn criticism as a violation of the Sherman Act: "reverse payment" settlements aka "pay-to-delay" schemes.i'" The issues with this type of arrangement was well-described by the Supreme Court in FTC v. Actatvis, Inc.112 The Court explained: Company A sues Company B for patent infringement. The two companies settle under terms that require (1) Company B, the claimed infringer, not to produce the patented product until the patent's term expires, and (2) Company A, the patentee, to pay B many millions of dollars. Because the settlement requires the patentee to pay the alleged infringer, rather than the other way around, this kind of settlement is often called a "reverse payment" settlement agreement.' 1 3 In FTC, the Court noted that this arrangement occurs mostly "in the context of pharmaceutical drug regulation, and specifically in the context of suits brought under statutory provisions allowing a generic drug manufacturer ... to challenge the validity of a patent owned by an already-approved brand-name drug owner.""14 The Eleventh Circuit Court of Appeals, which heard FTC v. Actavis prior to the Supreme Court, held that "absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent."" This holding essentially protected reverse payments from antitrust challenges. However, on appeal, the Supreme Court rejected that idea because the Sherman Act "imposes strict limitations on the concerted activities in which patent owners may lawfully emerge,"" 6 and these arrangements have the "potential for genuine adverse effects on competition."" 7 The Court concluded that the rule of reason analysis that applies to any other type of antitrust litigation must also apply when assessing an arrangement where one party is a patent-holder."I It also noted that the Hatch-Waxman Act itself, which was clearly procompetitive, ran contrary to the Court of Appeals' conclusion that reverse payment schemes should be immune from antitrust attack."' The Court remanded for further proceedings but suggested some areas where the lower court might find anticompetitive effects as part of its analysis.'2 0 The Court noted that only valid patents had a right to exclude others from use; "an invalidated patent carries with it no such right."' 2 ' However, if the reverse payment scheme is allowed to stand without further analysis, it is possible that the patent-monopoly will be allowed to continue, at the expense of the consumer, even though the patent may in fact be invalid.122 Also, the Court questioned whether a large reverse payment might demonstrate that the patentee was charging prices that were "higher than the competitive level," referring to the FTC's claim that "reverse payment agreements are associated with the presence of higher-than-competitive profits." 23 The Court acknowledged that the patentee may be able to justify the large reverse payment, making it a permissible settlement agreement, but there was no immunity preempting the parties from having to demonstrate this kind of 124 analysis. While looking at settlement arrangements between brand-named patentholders and generic-brand would-be competitors is not an exact equivalent to the arrangement between Allergan and the Regis Mohawk Tribe, the Court's logic still seems very applicable. Despite the fact that Allergan had a patent that it would normally be free to assign or use in any other manner it found suitable, the patent should not provide complete immunity because the Sherman Act "imposes strict limitations on the concerted activities in which patent owners may lawfully engage."l25 Thus, it must be determined if the arrangement between Allergan and the Regis Mohawk Tribe, "is likely to have anticompetitive effect and, if so, whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects" using a rule of reason analysis.' 2 6 The anticompetitive effects seem obvious and significant. Allergan has not tried to cover up the fact that the sole reason for the arrangement with the Regis Mohawk Tribe was to avoid having its patent invalidated, which would permit generic drug manufacturers to enter the market. These actions were intended to prolong the patent-monopoly beyond what might have been otherwise allowable-this is the epitome of an anticompetitive arrangement. Also, as suggested by the Court in FTC, an invalid patent has no right to any patent protection. By circumventing the system that seeks to determine the validity of the patent, a patent-monopoly may be extended to a product that is not actually deserving of such protection. The possibility that an invalid patent for the brand-name drug is allowed to stand and continue to exclude generics from entering the market is plainly anticompetitive. Finally, the Court in FTC questioned whether the presence of a large reverse payment demonstrated that the patentee was charging prices that were "higher-than-competitive." A similar question could be asked of Allergan's drug pricing given that it was willing and able to pay the Regis Mohawk Tribe a substantial sum of money to take over its patent. If no legitimate explanation can be offered by Allergan, it is possible that this "sale" might be demonstrative of a severe anticompetitive effect. The procompetitive benefits are less obvious, but they do exist. Typically, licensing agreements are favored because they tend to allow more people access to the patent.12 7 Furthermore, the Native American population is a group that has historically faced discrimination and disenfranchisement. 128 The Regis Mohawk Tribe has retained rights in this agreement to "practice the patents for research, education, and other non-commercial uses."1 29 Theoretically, if the Regis Mohawk Tribe took advantage of these rights, the Regis Mohawk Tribe could have an opportunity to gain valuable experience and become a competitive player in the market. These potential benefits could be a serious benefit to the Regis Mohawk Tribe, but there is nothing that indicates the Regis Mohawk Tribe has any intention to take advantage of them. The anticompetitive effects are clearly unreasonable, even considering any possible procompetitive benefits. They run counter to the purpose of two large acts of Congress that attempted to curb such effects. The Hatch-Waxman Act was clearly intended to allow generics to enter the market sooner, and the inter partes review proceedings function to invalidate patents in an expedient manner. The arrangement between Allergan and the Regis Mohawk Tribe was an attempt to dodge these restraints that Congress enacted upon the patent monopoly. Despite the analysis weighing towards a violation of the Sherman Act, there is of course still a question of whether the Regis Mohawk Tribe would attempt to shield itself behind its tribal sovereign immunity. Given the perceived egregiousness of this arrangement, it seems very possible that (if this were to reach the Supreme Court), the Court would use this occasion to act on the doubts it expressed in Kiowa about the continued benefit of tribal immunity in a modem world. Even if the Regis Mohawk Tribe were found to be protected, Allergan would have no such protection and could still be held responsible for its actions. The punishment of the one party would still be enough to deter any similar arrangements in the future. Congress could address these issues to prevent any such instances in the future. The case law is clear: Congress can abrogate the tribal immunity with respect to patent (and other intellectual property law)-it just has to do so in a manner that is unequivocal. Perhaps taking such actions would prevent similar unscrupulous business decisions in the future. If Congress has purposefully not abrogated tribal immunity with respect to intellectual property law for whatever reason,13 0 it could also stipulate that tribal immunity applies where the tribe was the inventor or rightfully obtained rights to a patent (i.e., through purchasing the rights; not for being paid to hold onto the rights). But "sovereign immunity should not be treated as a monetizable commodity that can be purchased by private entities as part of a scheme to evade their legal responsibilities."'3 ' In the absence of such Congressional action, this arrangement should be recognized for what it is: an attempt to bypass current patent laws at the expense of the public that depends on critical drugs and a violation of U.S. antitrust law.

#### Antitrust is key – only using antitrust avoids the necessity of constraining sovereign immunity. Any other counterplan links to this.

Cecilia Cheng & Theodore T. Lee ‘18, When Patents Are Sovereigns: The Competitive Harms of Leasing Tribal Immunity, 127 YALE L.J. F. 848 (2017-2018).

Fortunately, while the novelty and complexity of this case have created much uncertainty, there is another means for redress -one that does not require us to enter the quagmire of sovereign immunity: a cause of action for anticompetitive conduct. This Essay argues that Allergan's actions should be subject to antitrust scrutiny, and that Allergan may be vulnerable to a suit for treble damages because of its conduct. This approach may be preferable to addressing the agreement on other grounds, as it deters the relevant conduct without having to confront thorny questions about the applicability of tribal sovereign immunity in the IPR context. More importantly, it directly disciplines the conduct that is most objectionable to commentators: unduly increasing the probabilistic value of patents.

#### Only antitrust allows for the Company to be sued and for the Tribe to be protected. After the plan only the pharma companies are liable for damages under the Sherman Act, not the Tribes.

Cecilia Cheng & Theodore T. Lee ‘18, When Patents Are Sovereigns: The Competitive Harms of Leasing Tribal Immunity, 127 YALE L.J. F. 848 (2017-2018).

As explained in Section I.B, FRCP 19 may be an impediment to more conventional patent invalidation measures, since plaintiffs must join the Tribe in order to proceed in federal court.17 While potential future plaintiffs may face significant trouble in the general patent litigation context, however, they may not have to join the Tribe in an antitrust suit in order to proceed. Antitrust suits may avoid this procedural hurdle because the Sherman Act allows consumers to recoup treble damages without implicating the interests of the Tribe." As explained below, by pursuing a Sherman Act suit, plaintiffs can proceed without joining the Tribe as long as they seek damages from Allergan, rather than an injunction against the enforcement of the agreement. A suit for damages under Section 2 of the Sherman Act59 would not injure the financial interests of the Tribe, as the suit would not invalidate the contract itself but rather would claim consumer damages payable by the drug company.60 Whether a co-conspirator is a required party would be judged under the dual factors of FRCP 19(a)(1), which require courts to assess relief from the points of view of both (1) the plaintiff and (2) the absent party.6' From the plaintiffs' point of view, courts have generally held that absent co-conspirators are not required parties under FRCP 19(a)(1)(A) because "[a]ntitrust conspirators are liable for the acts of their co[-]conspirators" 62 and plaintiffs can recover full damages from a single conspirator.