Antitrust Law (Introduction)

Introduction

This course is occupied with the federal Antitrust Law; even though every state has its own Antitrust Law (which is in most cases rather similar to the federal law – with exceptions).
The term 'Antitrust' derives from a particular situation in the American economy in the 19. Century: because a company could only do business in its state of 'residency', nationwide firms had to incorporate a company in every state in which it wanted to do business. The stocks of these companies were then given into a trust, which controlled all companies. The result was something like a single nationwide company. After some time, these trusts began to control not only one business but also competing companies. With the promulgation of the Sherman Act, Congress intended to do something against such trusts.
Antitrust defines – among other regulations – the rules of the game by which competition takes place. It assumes that market forces – within the borders of these regulations – will produce good results or at least better results than any of the alternatives that largely abandon reliance on market forces.
Antitrust thus looks to <u>perfect competition</u> for guidance, but the analysis inevitably emphasizes the myriad and complex imperfections of actual markets (<u>workable competition</u>).

Perfect Competition

<u>Definition of perfect competition</u>

A market economy will be perfectly competitive if the following conditions hold:
(1) Sellers and buyers are so numerous that no one's actions can have a perceptible impact on the market price, and there is no collusion among buyers and sellers.
(2) Consumers register their subjective preferences among various goods and services through market transactions at fully known market price.
(3) All relevant prices are known to each producer, who also knows of all input combinations technically capable of producing any specific combination of outputs and who makes input-output decisions solely to maximize profits.
(4) Every producer has equal access to all input markets and there are no artificial barriers to the production of any product.

'Problem' factors for perfect competition:

- Barriers to entry (blocked access to raw materials, scale economies, capital requirements, goodwill of established producers)
- Promotion and product differentiation
- Income distribution
- Distribution of opportunities
- Public restraints
- Invention and innovation (may require a certain size and market power)
- Adjustment pains
- Countervailing power
- Theory of second best

Competition Factors to Consider for Workable Competition

Market structure key factors: (1) The number and size distribution of sellers and (2) conditions of entry by other firms into the market

- Whatever the number of producers, competitive results are more likely when barriers to entry by new producers are relatively low.
- And competitive results will be approached more closely as buyers and sellers are more numerous.

This makes coordinated behavior more difficult, increases the probability of a 'maverick', it dampens everyone's sensitivity to mutual interdependence.

Behavior of competitors

Each firm should make its decisions independently and without collusion with its competitors.

Actual performance of market

Signs of non-workable competition:

(1) Profits persistently above usual investment returns,
(2) scale of many firms seriously outside the optimal range,
(3) considerable chronic excess capacity not justified by secular change or reasonable stand-by provision,
(4) excessive selling costs, and
(5) persistent lag in adoption of cost-reducing technical changes or persistent suppression of product changes which would advantage buyers.

But keep on consideration: growing demand of product or particular firm, manager skill, etc. These factors become more meaningful when considered together with other performance indicators and market structure.

Competition in Reality

Oligopoly: In reality markets are normally dominated by a few big sellers (producers). In such a oligopoly, sellers normally know what the other sellers are doing, and are doing the same, even without an agreement.
Antitrust law just tries to make the market a little bit more vibrant.
Monopoly: A monopoly exists when there is only one seller in a particular marketplace (which mostly is the case for utilities as electricity or water [such monopolies are usually authorized by the government]). A monopolist can set the prize as it likes. And can produce as much items as it likes. But it has to keep in mind scale economies (see pp. 12, 28). In reality it is very difficult to find the point where the marginal costs where at their deepest.
In a competitive market the sellers do not have the choice to stop producing at that point, they produce until they do not get anything per item [?].

In addition, nobody really knows where the prize equilibrium (supply=demand) lies; especially, sellers often don't know the curve of buyers, i.e. how much the buyers are willing to pay. In reality sellers find the prize in comparison to other sellers, in calculation their actual costs, etc.

Structure of Enforcement of Antitrust Law

To federal agencies are concerned with the enforcement of antitrust law: the Department of Justice (Antitrust Division [http://www.usdoj.gov/atr/index.html]) and the Federal Trade Commission (http://www.ftc.gov/ftc/antitrust.htm).

CIVIL	**CRIMINAL**
Clayton Act §4	Sherman Act §1, §2
Lawsuit by:	Lawsuit by: Government (DoJ)
• Government (DoJ, FTC) seeks injunctive relief (=> bench trial) civil fines, penalties (by FTC) • State government (acting in parens patriae, i.e. on behalf of its citizens) seeks injunctive relief and three times the damages suffered by natural persons residing in that state • Private seeks treble damages and attorney's fees (encourages such suits) and/or injunctive relief; also possible as a class action	In the U.S. a violation of antitrust law (esp. horizontal prize fixing) is a criminal act like theft or robbery, which is to be punished with fines and/or jail sentences. Only of all antitrust cases include a criminal indictment, but almost every criminal case is immediately followed by a parallel private civil lawsuit (in which is no 5th Amendment protection). In a criminal case there's no need to show damages (even though this is useful to get substantive fines or jail sentences). Criminality instead requires a showing of mens rea: defined as knowledge that the consequences on one's conduct would be anticompetitive or a specific intent to violate the law (regardless of the result).

Standing to sue

Standing to sue means the right to bring a lawsuit to which the court has to listen. Although Clayton Act §4 appears superficially clear in affording standing to 'any' affected person, the courts have limited the universe of plaintiffs allowed to seek treble damages.

(Clayton Act §16 authorizing equitable relief is to distinguish from §4: Its requirement is 'threatened loss or damage' rather than actual injury, and it is not limited to business or property interests.)

Passing on and consumer recoveries: The defendant will not be allowed to prove that the plaintiff passed the price increase to its customers and therefore suffered no injury. (*Hanover Shoe*) Consumers purchasing from a innocent middleman may not recover from the manufacturer. (*Illinois Brick*)

Employees: A loss of employment or reduction in wages is generally not considered to be an injury to 'business or property' unless the plaintiff's job is itself shown to be a commercial venture or enterprise. But a employee injured because of an employer conspiracy fixing wages has standing, while an employee dismissed after a merger that is deemed illegal is only indirect related to the reasons for condemning the merger and has therefore no standing.

Derived injuries: Where the immediate victim is a city or a corporation, standing is usually denied to 'indirectly' injured taxpayers, shareholders, or creditors. Similarly, standing is denied to licensors, franchisors, percentage-lease landlords.

But see *McCready* case, and *Associated General Contractors* (pp. 82): The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party … to perform the office of a private attorney general.

Antitrust injury

The plaintiff seeking damages (or an injunction) must show that it (1) suffers injury (or threatened injury) that is both (2) actually caused by the defendant's illegal conduct an d (3) of the kind that the antitrust laws were designed to prevent.

Plaintiff must prove 'antitrust injury', that is to say injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. (*Pueblo Bowl-O-Mat*)

Antitrust Law (The Theory)

General Definitions

Market Power/Monopoly Power

Market power is a measure of a firm's ability to raise prices above competitive levels without incurring a loss in sales that outweighs the benefits of the higher price. Monopoly power is the power to control prices or to exclude competition.
Market share is used frequently as a proxy for market/monopoly power. Price elasticity of demand and cross-elasticity of demand are also measures of market/monopoly power. (*du Pont [Cellophane]*)

Market Share

A firm's market share is its sales divided by the productive capacity of all firms producing the same item and items that consumers regard as reasonable substitutes ('relevant market').
One includes all production of firms currently producing the relevant product as well as all firms that are capable of producing the relevant product and that could easily and economically shift to production of that product within one year in response to a price increase. One includes also production of vertically integrated firms that now consume all their production, if the firm would begin to sell the product in response to a price increase.

Relevant market

Product market

The relevant product market is composed of products that are reasonably substitutable from the point of view of the buyer (functional interchangeability). Therefore, it is important to assess what exactly the product is the seller is selling. The economic tool in determining what should be included in the product market is cross-elasticity of demand: A high cross-elasticity between two products means that the second product should be included into the definition of the relevant market of the first product. (*du Pont [Cellophane]*)
The objective is to determine a group of products such that a hypothetical firm that was the only present and future seller of those products could profitably impose a small but significant and non-transitory increase in price (SNIP: a 5% increase lasting a year).

One starts with the product market of the firm under question and assumes a small price increase in order to determine if other firms would respond. If the response, in terms of substitute products (cross-elasticity), is great enough to make the price increase unprofitable, those products are added to the market in ascertaining the defendant's market share. The process goes through successive iterations until the smallest product market is identified that, if it were served by a single firm, the firm could profitably impose a small but non-transitory price increase.

In determining whether product substitutability exists, one considers as particularly the following factors:

(1) Evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;

(2) Evidence that sellers base decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;

(3) The influence of downstream competition faced by buyers in their output markets; and

(4) The timing and costs of switching products.

Geographic market

The relevant geographic market is composed of all the suppliers of the relevant product who can offer their product to the same buyers. Where do the buyers buy and the sellers sell? The issue is whether buyers of a firm's product have a tendency to increase purchases from more distant suppliers as the defendant's price increases. If this tendency is great, the distant suppliers should be counted as a part of the firm's market. The goal is to identify the geographic boundaries of a hypothetical firm selling the relevant products that could profitably raise prices. See product market assessment.

One considers all relevant direct and circumstantial evidence in determining geographic substitutability, but will give particular attention to the following:

(1) Evidence that buyers have shifted or have considered shifting to relative changes in price or other competitive variables;

(2) Evidence that sellers base business decisions on the prospect of buyer substitution between geographic locations in response to relative changes in price or other competitive variables;

(3) The influence of downstream competition faced by buyers in their output markets; and

(4) The timing and costs of switching suppliers.

Noerr-Pennington Doctrine (Right to Petition)

General Rule

If competitors join in a 'contract, combination or conspiracy' for the purpose of influencing government decision-making, their action is protected from antitrust challenge. This is true even if their underlying intention is to restrain competition or gain an advantage over competitors. This defense is grounded in the First Amendment constitutional theory of the right to petition government. (*Noerr*)

'Sham' Exception

Where the efforts by competitors are a mere 'sham', the defense is inapplicable. However, the sham exception only 'encompasses situations in which persons use the government *process* – as opposed to the outcome – as an anticompetitive weapon.' The sham test focuses on whether there is a genuine attempt to gain a favorable result as opposed to merely an attempt to misuse the governmental process. A 'sham' will be determined by whether the petitioning was 'objectively reasonable.'

The Court established a two-tier definition for determining the 'objectively baseless' test for sham conduct:

(1) First, the Court will ask whether a reasonable participant could realistically expect success or a favorable outcome on the merits.

(2) Second, if the challenged government petition is found to be meritless, then the Court will inquire where the baseless petition conceals 'an attempt to interfere *directly* with the business relationship of a competitor through the use of government *process* - as opposed to the *outcome* of that process.'

Only if the Court finds an objectively meritless petition *and* anticompetitive intent to injure a competitor will it conclude that the petition was a sham. (*Professional Real Estate Investors*)

Horizontal Restraints: Collaboration among Competitors

SHERMAN ACT SECTION 1

"***Every contract, combination …, or conspiracy, in restraint of trade…, is hereby declared to be illegal.***" Pursuant to this statute, courts have condemned commercial stratagems that constitute unreasonable restraints on competition. (*Standard Oil*) Not covered are merely ancillary restraints that flow from a contract or agreement which has as its main subject something else than a restraint of competition (e.g. a purchase contract excludes by its nature all other potential parties to the contract; a non-competing clause in a business purchase contract, etc.).

Proof of Agreement

Mere evidence of parallel conduct by competitors is not enough for an antitrust plaintiff to obtain a direct verdict. Sherman Act Section 1 requires some form of combination, agreement, condition, or understanding, commonly referred to as 'concerted action' or a meeting of the minds. At a minimum, concerted action means something more than unilateral action. Condemnation depends upon finding two or more parties who may be said to have 'agreed' to do what was done.
A distinction should be made between 'motive' and 'objective'. The emphasis is on the finding of a agreement to achieve a certain objective – even though the motives of the participants may differ.

Express Agreement

An express agreement satisfies the requirements of proof.

Implied Agreement

When direct evidence of an agreement does not exist it is often necessary to utilize indirect or circumstantial evidence in order to infer the requisite agreement. At a minimum sufficient evidence that permits the conclusion that the existence of a conspiracy is more likely than not.

Conscious Parallelism

Although mere evidence of parallel conduct by competitors is not enough for an antitrust plaintiff to obtain a direct verdict, an agreement is properly inferred from conscious parallelism when some of the so-called 'plus factors' exist (*Interstate Circuit*):

- Whether the defendant's action were a ***radical departure*** from prior practice;
- Whether the defendant was ***aware*** that its co-defendants had been solicited to conduct themselves similarly;
- Whether the defendant had been ***invited*** to engage in the alleged conspiracy when it was solicited;
- Whether each defendant had a substantial ***profit motive*** for concerted action;
- Whether the defendant actually participated in the scheme and engaged in substantial unanimity of action, or uniform conduct;
- Whether the defendant's conduct represented ***interdependent action*** in the sense that compliance would not profit any single defendant unless all the other defendants similarly complied.

However, such inference, even if based on sufficient 'plus factors', may be rebutted by the defendants' evidence. 'When the proof supported the inference of such concerted action,

the burden rested on the defendants of going forward with the evidence to explain away or contradict it.' (*Theater Enterprises*)

Facilitating Practices

Such actions may include meetings, the exchange of presale price quotations, and other practices relating to price or other dimensions of competition. Such behavior can be analyzed on two levels: First, it may be evidence of a direct conspiracy to fix prices. Second, the joint decision to have a meeting, etc. is itself a 'contract, combination, or conspiracy.'

Data dissemination

Competitors sometimes exchange information about their prices, inventories, investments, or other aspects of their business. This is often done through a trade association that is a 'combination' of its members and therefore subject to Sec. 1 examination. An agreement to exchange information is itself a 'contract, combination, or conspiracy.' In addition, an agreement to exchange price information, e.g., may imply an agreement to raise or maintain prices.

Data exchange in regard to future market conditions (production estimates, suggested price levels, production limits) would be prohibited. The exchange of current price information among competitors selling a fungible product in a highly concentrated market is even a *per se* violation of Sec. 1 (even when the price exchange yields lower, rather than higher, prices). (*American Column & Lumber/Container*)

On the other hand, exchange of data that includes only past, closed transaction prices and other data in summary, average or aggregate form and which does not identify individual customers may be allowed (especially when the information also is fully available to customers, the public, and all the other buyers and sellers in the industry). (*Maple Flooring*)

Base-Point Pricing

If a base-point pricing system results in identical pricing by all competing corporations, it is unlawful. Could be lawful if truly unilateral, but the FTC sees it as an unfair trade practice under Sec. 5 FTC Act.

Oligopoly Pricing

The theory suggests that in an oligopolistic market each seller takes into account the market reactions of the other competitors before price and output decisions are made: If one seller lowers its price, the others would follow and no increase in market share would occur – so, nobody lowers its price. Common interest and mutual understanding dictate that competitors in concentrated markets forego price competition.

The mere existence of an oligopolistic market structure in which a small group of manufacturers engage in parallel pricing of an identical product does not violate the antitrust laws. In order to find a violation, in the absence of an agreement, there must be
(1) evidence of anticompetitive intent or purpose; or
(2) the absence of an independent business reason for the conduct.

Intra Enterprice Conspiracy (Single Entity Argument)

The 'contract, combination, or conspiracy' language of Sec. 1 requires proof of a relationship between at least two persons which are separated by their economic interests. (If, however, the otherwise single entity was formed for a purpose which is determined to be unlawful under the antitrust law, the single entity argument is not viable.)
Concern: A Concern – although consisting of legally separated persons – can be seen a single entity.
Wholly owned subsidiary: As long as the initial parent-subsidiary combination was lawful, a parent and a wholly-owned subsidiary are a single entity. (*Copperweld*)
Partially owned subsidiary: A parent and a partially owned subsidiary may be capable to satisfy the plurality requirement. The requirement might even be satisfied by the fact that the subsidiary is owned by two or more 'parents.'
Trade associations: Trade associations are capable of forming a conspiracy. The focus is on the members (which are in competition), not on the association as a single entity – the association itself is the 'contract, combination, or conspiracy.'
Members of nonprofit foundations: Members of nonprofit organizations are not immune from antitrust law. Again, the focus is on the members, not the foundation. Only in case of activities that does not constitute trade at all (e.g., mailing letters asking for donations), there may be an exception.

Characterization

Anticompetitive conduct can take many forms: price fixing, market division, concerted refusal to deal (boycott), output restriction, etc. The first step in assessing such a 'contract, combination …, or conspiracy, in restraint of trade' among competitors is to characterize the challenged behavior. Courts often look to the buyers and their choices.

1. When there is an agreement not to compete in terms of price or output ('naked **restriction on price or output**'), [a **concerted refusal to deal** (boycott)], or a **horizontal market division** no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement, it is ***per se*** illegal. (*Socony/Topco/Klor's*)
2. In some cases, for restraints that are not per se unlawful but are sufficient anticompetitive on their face (almost 'naked trade restraint') that they do not require a

full-blown rule of reason analysis [even an observer with a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect], an abbreviated, or '***quick look***' analysis is enough. If the 'quick look' does not show such an obvious 'trade restraint', the rule of reason will be applied. (*CA Dental Association*)

3. In **every other case** the ***Rule of Reason*** is going to be applied.

Horizontal Price Fixing

'Naked' horizontal price fixing (and output restricting) agreements among competitors are illegal *per se*. That includes agreements that have the effect of stabilizing prices without any other purpose. (*Container*) Proof of market power or evidence that the agreement had any influence on price is not necessary (*Socony*, note 59). That's the rule for minimum as well as for maximum price fixing agreements. (*Maricopa*)

Horizontal Market Allocation

Horizontal Market Division

A horizontal market division is created when competitors agree not to compete in a designated market. Such an agreement may divide a market in various ways: territorial market division; product market division; customer market division; functional market division.

A market division is some circumstances may be more pernicious than price fixing. Because in an airtight market division, no competition exists, but where the only restraint is price fixing, other nonprice competition (that is, on quality, service, or inventory) may exist and even be robust. Therefore, a 'naked' horizontal market division is unlawful *per se*. Proof of market power or evidence that the agreement had any influence on price is not necessary. (*Topco/Palmer*)

Boycott and Other Concerted Refusals to Deal

When the agreement is between competitors, it is a horizontal restraint known as a group boycott or a concerted refusal to deal. Two variations are possible:

First, firms at one level of competition may decide to refuse to deal with a supplier or customer that is dealing with a competitor of the agreeing firms. The trade pressure may force the vertical partner to cease doing business with the target in order to retain the business of the target's competitor. The agreement is horizontal (that is, between competitors) aimed at a competitor or a potential competitor; it is known as a secondary boycott and is classified as a concerted refusal to deal. (*FOGA*)

Second, a firm at one level (e.g. retailer) may enter an agreement with a firm at another level (e.g. supplier) to refuse to deal with a competitor of the retailer. The arrangement is between noncompeting firms in a vertical relationship aimed at a target in competition with at least one of the conspirators; the effect is horizontal, although the agreement is not. (*Klor's*)
The threshold test requires a showing of
(1) market power;
(2) exclusive or unique access to supply (an essential element of competition; *or*
(3) a lack of an efficiency rationale when the boycott is aimed at a competitor.
Otherwise, the refusal to deal is to be judged under rule of reason analysis. (*Northwest Wholesales Stationers*) In addition, the antitrust law does not permit the *per se* rule in the boycott context in the absence of a horizontal agreement. (*NYNEX*)

Rule of Reason Analysis

The Rule of Reason test of legality asks 'whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business…; its condition before and after the restraint was imposed; the nature of the restraint; and its effects, actual and probable (market power of agreeing competitors, etc.). The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.' (*Chicago Board of Trade*)
'It is necessary to consider the economic conditions peculiar to the industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce that product.' (*Appalachian Coal*)
In declining to adopt a broad-based rule of reason, the Court did concede that a summary analysis was too narrow a focus. The standard adopted was a balancing test that determined the 'competitive significance' of the restraint. This test was limited to an economic analysis of the agreement' competitive impact. The safety or 'quality product' defense was excluded from the balancing process. Once the Court found that the canon actually restricted competition, it rejected the practice as illegal. By its nature, the ban on competitive bidding resulted in maintenance of price levels; it also prevented customers from making price comparisons.
In short, this case teaches that the rule of reason in price-affecting cases is focused on an examination whether the challenged practice promotes or suppresses competition. No room is left for an evaluation of noneconomic factors, such as social or political benefits.

This is far narrower than that recognized in *Chicago Board of Trade*. It also made clear that the Sherman Act does not permit competition to agree on one form of competition over another. (*Professional Engineers*)
Because the Court had no substantial experience with blanket licensing arrangements, it rejected the quick characterization process of the per se rule, even though it conceded that a price-fixing arrangement was 'literally' at stake. The review standard was limited to whether the conduct is 'designed to increase economic efficiency and render markets more rather than less competitive.' (*BMI*)

Vertical Restraints

SHERMAN ACT SECTION 1

"***Every contract, combination …, or conspiracy, in restraint of trade or commerce …, is hereby declared to be illegal.***" Pursuant to this statute, courts have condemned commercial stratagems that constitute unreasonable restraints on competition.

In General

Generally, vertical restraints are limitations placed on retailer activities by the manufacturer or distributor. First are agreements in which a seller attempts to control a factor relating to the eventual resale of the product. The direct impact of this category of restraints is on competition between sellers of the same product or intrabrand competition. The second broad category includes efforts by a seller to limit a buyer's purchases form sellers of competing products. The impact of these restraints is on competition between brands or on interbrand competition.

Intrabrand Distributinal Restraints: Restricted Distribution

Vertical restraints on distribution can be of the price or nonprice variety. Those in the first category include minimum and maximum resale prices. Nonprice restraints appear in a number of forms, but typically involve the allocation of particular geographic areas or classes of customers to specified resellers. The distinction between fixing minimum resale prices and other price and nonprice restraints is critical. Fixing the minimum price at which a product may be resold is a *per se* violation of Sec. 1. Fixing the maximum price and nonprice restraints are examined under the rule of reason. (*Kahn/GTE Sylvania*)
The rational offered for both price and nonprice vertical intrabrand restraints is that they actually enhance interbrand competition by allowing if suppliers to minimize intrabrand free riding.

Resale Price Maintenance (RPM)

Setting Vertical Minimum Prices

Fixing the minimum price at which a product may be resold is a *per se* violation of Sec. 1. (*Dr. Miles*)

Consignment Contracts as Means to Control Vertical Price

When a consignment device is used to cover a vast distribution system, fixing prices through many retail outlets, the antitrust laws prevent the consignment agency for then the prohibition of price fixing would be avoided by clever manipulation of words, not by differences in substance.

A key factor that has been identified as distinguishing legitimate consignments form those designed to bypass the prohibition is the allocation of business risk. When most of the risk remains with the manufacturer, the consignee is more likely to be a legitimate sales agent. Another factor the courts have looked to is whether there are nonprice purposes for the consignment: maintain quality standards, efficient method of marketing, etc.

Unilateral Refusal to Deal as a Means to Enforce Vertical Price Maintenance

Another method of controlling resale prices is for the manufacturer to announce 'suggested' resale prices and to refuse to deal with retailers who do not adhere to those prices. This is made possible by the fact that RPM falls within Sec. 1. Consequently, in order to find liability there must be evidence that a pricing arrangement was the product of a contract, combination, or conspiracy.

As a general matter, RPM that can be achieved through unilateral conduct is permitted. The problem is, therefore, one of determining when events have gone far enough to permit the reasonable inference that the conduct is no longer unilateral. (*Colgate*)

Vertical Maximum Price Fixing

Vertical maximum price fixing is to be assessed under the rule of reason. (*Kahn*)

Dealer Termination

Proof of complaints from dealers is not enough to prove that termination is not the product of independent action allowable under *Colgate*. The evidence must tend to exclude the possibility that the manufacturer and non-terminated distributors were acting independently. That is, direct or circumstantial evidence of a conscious commitment to a common scheme to achieve an unlawful objective: the distributor communicates its acquiescence or agreement and this was sought by the manufacturer (‘plus-factors’ as newsletters, interdependent acting, termination of other dealers, etc.). (*Monsanto/Parke Davis*)

Sole Outlets; Territorial and Customer Limitations

As for other nonprice restraints: they are judged under the rule of reason. Usually, intrabrand nonprice vertical restraints are lawful when the firm imposing them has little market power because such a firm is unlikely to have the power to have any ultimate anticompetitive impact.

Dual Distribution

If the manufacturer is integrated and owns retail stores as well as sells to independent retailers, the question is whether a assignment of territories is a horizontal market division (*per se* illegal) or a vertical nonprice restraint (judged under the rule of reason).
A trend seems to go toward evaluating dual distribution under the rule of reason.

Exclusive Dealership

Exclusive dealership should be judged under the rule of reason. Although, if exclusive dealership and territorial restraints are combined, one should give a closer look to the arrangement.

Interbrand Vertical Foreclosure

Courts have condemned commercial stratagems that constitute unreasonable restraints on competition. Among them "tying arrangements" and "exclusive dealing" contracts. Much of exclusive dealing and tying are prohibited by Sec. 3 of the Clayton Act.
But it is important to note some limitations on the application of the Clayton Act. First, the Act only applies to conditions imposed by sellers. A requirement contract by a buyer would not fall within the Act. However, it may come under Sec. 1 of the Sherman Act. Second, the Clayton Act refers to goods or commodities, but not services. Here again the Sherman Act would be the relevant statute.

Exclusive Dealing (Requirement Contracts)

Exclusive dealing arrangements are essentially requirement contracts. In the usual case, a manufacturer conditions the sale of a product to a retailer on the purchase by the retailer of all of its requirements for that product.
Where agreements have been challenged as unlawful exclusive dealing, the courts have condemned only those contractual arrangements that substantially foreclose competition in a relevant market by significantly reducing the number of outlets available to a competitor to reach prospective consumers of the competitor's product.
Acknowledging that some exclusive dealing arrangements may have benign objectives and may create significant economic benefits, courts have tended to condemn under the § 1 Rule of Reason test only those agreements that have the effect of foreclosing a competing manufacturer's brands from the relevant market. More specifically, courts are

concerned with those exclusive dealing arrangements that work to place so much of a market's available distribution outlets in the hands of a single firm as to make it difficult for other firms to continue to compete effectively, or even to exist, in the relevant market. To evaluate an agreement's likely anticompetitive effects, courts have consistently looked at a variety of factors, including (*Tampa Electric*):

(1) the degree of exclusivity and the relevant line of commerce implicated by the agreements' terms;
(2) whether the percentage of the market foreclosed by the contracts is substantial enough to import that rivals will be largely excluded from competition;
(3) the agreements' actual anticompetitive effect in the relevant line of commerce;
(4) the existence of any legitimate, procompetitive business justifications offered by the defendant;
(5) the length and irrevocability of the agreements; and
(6) the availability of any less restrictive means for achieving the same benefits.

Reciprocal Dealing

Here firm A agrees to make purchases from firm B only on the condition that firm B purchase from firm A. In these instances the leverage involved lies in firm A's ability to purchase or withhold its purchases from firm B. The alleged damage occurs to competitors of firm A who will find it more difficult to find outlets for their products. (*Consolidated Foods*)

Tying Arrangements

Under a tying arrangement, a manufacturer sells a product – the tying product – to a buyer only under the condition that the buyer purchase another specified product - the tied product. Although tying arrangement are nominally still in the *per se* category, they only have been found unlawful where sellers exploit their market power over one product to force unwilling buyers into acquiring another. (*International Salt/Northern Pacific Railway*) The "essential characteristic" of an illegal tying arrangement is a seller's decision to exploit its market power over the tying product "to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."

Liability for tying under § 1 exists where

(1) two separate "products" are involved;
(2) the defendant affords its customers no choice but to take the tied product in order to obtain the tying product;
(3) the arrangement affects a substantial volume of interstate commerce; and
(4) the defendant has substantial market power in the tying product market, so as to coerce the tie;

All four elements are required, whether the arrangement is subjected to a per se or Rule of Reason analysis.

(1) Two Separate Products

The resolution of product and market definitional problems must depend upon proof of commercial reality. Product and market definitions were to be ascertained by reference to evidence of consumers' perception of the nature of the products and the markets for them, rather than to abstract or metaphysical assumptions as to the configuration of the "product" and the "market." (*Jefferson Parish*)

(2) No Choice by Customer

(3) Substantial Volume of Interstate Commerce

(4) Market Power in the Tying Product Market

The resolution of product and market definitional problems must depend upon proof of commercial reality. Product and market definitions were to be ascertained by reference to evidence of consumers' perception of the nature of the products and the markets for them, rather than to abstract or metaphysical assumptions as to the configuration of the "product" and the "market."
The very existence of the tying arrangement may allow the inference of market power. *Kodak* suggests that sufficient market power may result from transaction costs related to imperfect information. (*Kodak*)

Full Line Forcing, Full System Contracts (One Product Defense)

This defense is based on the fact that a single product classification may protect the good-will of the seller and enhance interbrand competition. The joint sale of two items may as well result in efficiencies in supplying the good that could mean lower prices for consumers.
E.g., it seems appropriate to classify a hole system (consisting of several single items) as a single product during the start-up stage to assure its proper functioning and to protect that way the good-will of the firm. (*Jerrold*)
The second category of single-product issue cases can be seen as being primarily concerned with efficiencies. In essence, they respond to the instances in which the tying of a good that actually could be marketed separately creates efficiencies in production or distribution and lower prices for consumers. E.g. cars and wheels could be marketed individually!

Monopoly and Attempt to Monopolize

SHERMAN ACT SECTION 2

Section 2 of the Sherman Act declares that it is unlawful for a person or firm to "***monopolize, or attempt to monopolize … any part of the trade or commerce among the several States, or with foreign nations.***"

Maintenance of Monopoly Power by Anticompetitive Means

The offense of monopolization under § 2 of the Sherman Act has two elements (*Grinnell*):

(1) the possession of monopoly power in the relevant market; and

(2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. (Hand in *Alcoa*: 'skill, foresight and industry')

(1) Monopoly Power (Market Power and the Relevant Market)

The threshold element of a § 2 monopolization offense being "the possession of monopoly power in the relevant market," the Court must first ascertain the boundaries of the commercial activity that can be termed the "relevant market" (for assessment see above) Next, the Court must assess the defendant's actual power to control prices in or to exclude competition from that market.

Proof of a dominant market share and the existence of a substantial barrier to effective entry create the presumption (*prima facie* showing) of monopoly power. Defendant may rebut the presumption in showing constraints that actually deprive it of "the ability

(1) to price substantially above the competitive level and

(2) in doing so for a significant period without erosion by new entry or expansion."

(2) Maintenance of Monopoly Power by Anticompetitive Means (Monopoly Conduct)

In a § 2 case, once it is proved that the defendant possesses monopoly power in a relevant market, liability for monopolization depends on a showing that the defendant used exclusionary, anticompetitive, and predatory methods to achieve or maintain its position. This second element of a monopoly maintenance claim is satisfied by proof of behavior that not only

(1) tends to impair the opportunities of rivals, but also

(2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

If the evidence reveals a significant exclusionary impact in the relevant market, the defendant's conduct will be labeled "anticompetitive" unless the defendant comes forward

with specific, procompetitive business motivations that explain the full extent of its exclusionary conduct. Moreover, predatory conduct, by definition as well as by nature, lacks procompetitive business motivation.

- Maintenance of excess capacity [Alcoa?];
- long-term leasing [United Shoe?];
- product innovation and predisclosure [Berkey v. Kodak?];
- physical and technological ties [?];
- limiting the supply of an essential resource (‘essential facility’) [Terminal Railroad, Aspen Skiing];
- refusal to deal [Otter Tail];
- price Squeeze;
- raising rival’s costs;
- vertical integration [?].

The Problem of Strategic Behavior

The problem is that a great deal of conduct that has an exclusionary effect probably should not be condemned under the antitrust law. As predatory should be judged only conduct that seems aimed primarily at excluding competitors either by preventing their entry or hastening their exit. Conduct that is competition on the merits, but excludes incidentally competitors, should not be seen as predatory.

Vertical Integration by the Monopolist

The trend now appears to be toward acceptance of the ‘Chicago School’ view that integration is usually not harmful to consumers and should be generally permitted.

Attempt to Monopolize and Predatory Pricing

Attempt to Monopolize and Anticompetitive Conduct

In order for liability to attach for attempted monopolization, a plaintiff generally must prove "
(1) that the defendant has engaged in predatory or anticompetitive conduct with
(2) a specific intent to monopolize," and
(3) that there is a "dangerous probability" that the defendant will succeed in achieving monopoly power.

In the vast majority of instances, however, intent will be inferred from conduct, thereby reducing the analysis to two elements:
(1) conduct; and
(2) a dangerous probability of success.

(1) Intent

Sec. 2 comes into play only when the person who foresees a fight to the death (between competitors) intends to use or actually uses unfair weapons. The intent must go further than just a desire to displace competitors. It requires something more than an intent to compete vigorously. (*Spectrum Sports*)

Proof of the intention to prevail by improper means can be established by direct or indirect evidence. For the most part, intent is inferred from the actions of the firm.

(2) Dangerous Probability of Success

The analysis typically entails a determination of market power by defining the relevant market and establishing the defendant's market share. The logic seems to be that dangerous probability is in reference to market power. Thus, an examination of the current power or market share of the defendant is required: A rising share may show more probability of success than a falling share. Claims involving greater than 50% share should be treated as attempts at monopolization when the other elements for attempted monopolization are also satisfied.

Market power and market share can be related to the dangerous probability in two ways:

(1) It shows how close the defendant is to obtaining a dominant market share. In this case, the market power is not directly related to the market share, but it can be used in assessing the probability of gaining a dominant market share by the means and resources used. Or,

(2) the market power is directly used to gain a dominant share of the market, in which case the firm may be liable under the theory of monopolization.

(3) Conduct

The conduct element of attempt must extend only to practices that are outside the scope of 'competition on the merits' or 'skill, foresight, and industry.' First, the range of activity legally available to the firm charged with attempt should be broader than that afforded the monopolist. Second, activity that is permissible for the monopolist should be similarly permitted for firms possessing less than monopoly power.

Conduct by a powerful firm on the verge of becoming a monopoly may be condemned while the same conduct by a less powerful firm may be permissible, at least under Sec. 2. Thus, on a continuum, the more market power a firm possesses the less egregious the conduct must be before Sec. 2 is triggered. Conversely, the less market power, the more offensive the conduct must be.

Use of leverage

Leverage means to use of power in one market to influence sales in another market. In this case, the plaintiff must demonstrate actual market power in the second market even if the power exercised is a result of monopoly power in another market. (*Griffith*)

Predatory Pricing

Structural Prerequisites for a Predatory Pricing Claim

Predatory pricing involves
(1) pricing at levels below profit maximizing levels
(2) with the intent that weaker competitors will eventually be excluded form the market and
(3) the foregone profits can be recouped by charging higher prices.

Predatory pricing constitutes the conduct portion of the attempt charge. Since, intent may be inferred from the action, it may also be indicative of specific intent. This still leaves the question of dangerous probability of success. The most suicidal predation is harmless if there is little likelihood that the scheme will work. (*Brook Group*)

Identifying the Predatory Price

Any price at or above marginal cost, even though not profit maximizing, would be regarded as non-predatory. The general standard has the major exception that prices below short run marginal cost are not predatory as well if they are equal to or exceed average total cost. A firm need not earn an economic profit in order to escape the presumption of predatory pricing. (*Barry Wright/Brook Group*)

Mergers

CLAYTON ACT SECTION 7

Section 7 of the Clayton Act makes it illegal for two companies to merge "***where in any line of commerce or in any activity affecting commerce …, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.***"

Mergers should not be condemned unless they facilitate collusion, or increase or enhance market power to proportions of a monopoly or oligopoly (maintaining prices above competitive levels).

Analysis of the likely competitive effects of a merger requires determinations of
(1) the "line of commerce" or product market in which to assess the transaction;
(2) the "section of the country" or geographic market in which to assess the transaction; and
(3) the transaction's probable effect on competition in the product and geographic markets.

Horizontal Mergers

Horizontal mergers involve firms selling the same or products in the same geographical market; these firms compete directly. By merging, firms eliminate competition between themselves.
The antitrust concern is whether the resulting firm will result in market power of sufficient size to enable the combined enterprise to act like a monopolist or to facilitate collusion among the remaining competitors. The test is whether the merger has reasonable probability of lessening competition. Most important, the Court noted that Sec. 7 gave courts the authority to stop, in their incipiency, any trend towards a lessening of competition. Courts need not find that a substantial lessening of competition would occur as a direct result of the merger; the reasonable probability to do so in the future was enough. (*Brown Shoe*)
A presumption of illegality exists for horizontal mergers in concentrated markets when, as a result of the merger, the resulting firm controls an ‘undue market share’ and market concentration and market power significantly increases. Although ‘undue market share’ is not defined exactly, 30% serve as benchmark for invoking the presumption of illegality. But even a merger resulting in less than 30% market share might raise an inference of illegality. However, the presumption is rebuttable if there is evidence that the merger is not anticompetitive. To be sure, enhanced efficiencies, ease of market entry, economies of scale, and increased competition on other market are not defenses. (*Philadelphia National Bank*)

The Relevant Market

The Relevant Geographic Market

The size of the relevant geographical market depends on the type of product and the capabilities of firms selling that product. The geographical market includes the area that consumers will look to when satisfying a consumption need. “The proper definition of a geographic market is determined by a ‘factual inquiry into the “commercial realities” faced by consumers.’”

The Relevant Product Market

The relevant product market is the smallest market where the hypothetical firm having all the total production of that product could increase price but not lose enough customers to decrease profits. In other words, the product market must be large enough to include all the effective substitutes that buyers would turn should price increase. “Where an increase in the price of one product leads to an increase in demand for another, both products should be included in the relevant product market.” (*Staples*)

Market Power

Market power is the ability to maintain price above competitive levels for a significant period of time.

Market share is used frequently as a proxy for market power. In analyzing whether a firm could exercise market power, one evaluates both demand and supply elasticity. The hypothetical firm cannot effectively exercise market power if a price increase would cause:

(1) consumers to switch to other products;

(2) consumers to switch to the same product manufactured by other firms in other area; or

(3) producers of other products to shift and produce products in the relevant market, by modifying the use of present facilities, shifting the production of the present facility, or by constructing new facilities.

Market Concentration

In assessing the competitive effects of a merger, the Department of Justice will concentrate on the market concentration and any increase in concentration caused by the merger. In determining the concentration that exists and the increased concentration that will result from a merger, the Department of Justice will use the *Herfindahl-Hirschmann Index* (HHI). The index is calculated by squaring the percentage market share of each firm in the market and summing the squares.

Market concentration is divided into three categories:

(1) unconcentrated markets (HHI below 1000);

Mergers that result in market with a post-merger HHI below 1000 will usually not be challenged.

(2) moderately concentrated markets (HHI between 1000 and 1800); and

Such mergers will probably not be challenged if the increase due to the merger is less than 100 points. Mergers producing increases on the HHI of more that 100 points are likely to be challenged unless factors as (1) the financial conditions of firms within the relevant market; (2) the relative ease of entry into the market; or (3) the effect of potential competitors, result in a conclusion that the merger is not likely to substantially lessen competition. Some mergers also will be allowed if the parties show that the merger is reasonably necessary to achieve available efficiencies.

(3) highly concentrated markets (HHI above 1800).

Mergers that produce an increase of less than 50 points are unlikely to be challenged, even in highly concentrated markets. Mergers producing increases on the HHI of more that 50 points are likely to be challenged unless factors as (1) the financial conditions of firms within the relevant market; (2) the relative ease of entry into the market; or (3) the effect of potential competitors, result in a conclusion that the

merger is not likely to substantially lessen competition. And only in extraordinary cases (failing company?) will the above factors prevent a challenge of a merger that increases the HHI by more that 100 points.

Potential Adverse Competitive Effects of Mergers

Market share and concentration data provide only the starting point for analyzing the competitive impact of a merger. Development of the industry, technical innovation, international competitiveness, investment in infrastructure, customers privacy, etc. might be considered as well. (*General Dynamics*)

Coordinated Interaction

The greater the concentration within a market, the more likely are coordinated interactions. 'Coordinated effects' essentially are the threat that the merger will introduce collusion between the newly merged entity and its rivals. 'Coordinated actions' include parallel or matching conduct by competitors, both explicit price fixing and tacit oligopoly behavior.

Unilateral Effects

A merger may diminish competition even if it does not lead to increased likelihood of successful coordinated interaction, because merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output. Analysis of product differentiation and product capacity are necessary.
As the price of Brand A rises, some customers will shift to Brand B. If the same firm owns Brand A and Brand B, it will not lose customers by elevating the price for Brand A. As a result, the price increase is more profitable to the merged entity.

Efficiencies

The primary benefit of mergers to the economy is their efficiency-enhancing potential, which *increases competitiveness* and result in *lower prices to consumers*.

Entry Into the Market

A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally, could not profitably maintain a price increase above premerger levels. To determine whether entry into the market is easy, one evaluates the likelihood of entry in response to a small but significant and non-transitory increase in price, as well as timeliness, likelihood, and sufficiency of entry. Other factors: regulatory barriers, legal barriers, financial barriers, etc.

Timeliness

Entry into a market is timely only of, following a merger, committed entry can be achieved within two years from initial planning to significant market impact on price.

Likelihood

Entry into a market is likely only if a new entrant would be profitable at premerger prices.

Sufficiency of Entry

Entry into a market is sufficient only if a potential competitor would be able to successfully offer a product or service within the two year limitation. For entry to be considered sufficient, a potential entrant must possess the market knowledge and financial ability to introduce a new product or service that will have a significant impact on price to deter supra-competitive pricing by a merged firm.

The Failing Company Defense

Certain situations, such as acquisitions of undercapitalized or failing companies, may justify mergers that otherwise would be invalidated. In order to invoke this absolute defense, defendants have to show

(1) that the resources of one company were so depleted, and any prospect of rehabilitation were so remote, that it faced the grave probability of a business failure; and
(2) that efforts were made before this merger to sell it to a non-competitor or at least a less threatening competitor, such as a new entrant or a small competitor.

Vertical Mergers

Vertical mergers occur when one firm purchases either a customer or a supplier, with the result that the acquiring firm expands into a new market. The integration may cause advantages over non-integrated firms, which – to remain competitive – may have to integrate as well.

Vertical integration can result in what court call 'foreclosure.' This occurs when the patronage or custom of the acquired firm is no longer available to competitors of the acquiring firm.

Court have focused their attention on the following inquiries when a vertical integration is challenged:

(1) whether competitors of the supplier or the buyer will be foreclosed from the market;
(2) whether there is a trend towards vertical integration in the market;
(3) whether there is an intent to foreclose competition;
(4) whether barriers to entry are erected that foreclose equal access to markets.

Conglomerate Mergers

Conglomerate mergers are those in which the merging firms had no prior relationship. Examples of conglomerate mergers include product market extension mergers, which involve products closely identified with each other, and geographical market extension.
Several theories have been used to challenge conglomerate mergers: Reciprocity and entrenchment are the traditional theories. Loss of a potential competitor is the newest.
Reciprocity: A merger between firms may increase the reciprocal purchasing between the merging firms and foreclose competitors from supplying the products to those firms.
Entrenchment: A merger may reinforce the position of an already dominant firm. Size alone could discourage new entrants and create barriers to entry for new competitors.

Merger of Potential Competitors

Mergers involving potential competitors are acquisitions between firms that are not in competition with each other but which are actual potential entrants in the market of the other or perceived as such. The merger of a potential entrant may be anticompetitive because the potential entrant sitting on the sidelines of a market helps keep prices lower in that market, either

(1) because the other competitors keep prices down because they know about the possible entry of the potential competitor if they raise the price, or
(2) because if they would raise the price the potential competitor would actually enter the market.

Perceived Potential Competitor Theory

The perceived potential competitor theory requires that the firm:
(1) be perceived by competitors in the market as a potential entrant;
(2) that this perception creates a restraining effect on the competitors in the market; and
(3) that the market under review is concentrated.

Actual Potential Competitor Theory

Under the actual potential competitor theory there must be showing:
(1) of reasonable probability that the acquiring firm, but for this merger, would have entered the market in the near future either through *de novo* entry or a toehold merger;
(2) that the entry through other means would have resulted in a deconcentrated market or a procompetitive effect; and
(3) that the market under review is concentrated.

‘Reasonable probability’ is defined as to whether the defendant has both the capacity and incentive to enter. Capacity refers to the financial, technological and legal means.

Antitrust Law (Cases)

Noerr-Pennington Immunity

Eastern Railroad Presidents Conference v. Noerr Motor Freight (1961) [64]

In this case railroads influenced legislation restricting competition from the trucking industry. The Court held that antitrust law does not apply to restraints which are the result of valid government actions. Only private restraints are regulated under the antitrust law.

California Motor Transport Co. v. Trucking Unlimited (1972) [64]

Trucking companies through administrative and judicial harassment hat attempted to prevent competitors from obtaining operation privileges.
The Court held that concerted activities resulting in a 'pattern of baseless repetitive claims' that attempted to bar a party from government access were a 'sham' to conceal an attempt to interfere with the commercial interests of the competition.

Allied Tube & Conduit Corp. v. Indian Head (1988) [64n171]

The question of protection for lobbying activities directed at private or ‘quasi-legislative’ bodies. The Court held that no immunity existed for private standard-setting.

FTC v. Superior Court Trial Lawyers Association (SCTLA) (1990) [69/143/166]

A group of private-practice lawyers agreed not to represent indigent criminal defendants in the D.C. courts until the city government increased the lawyer's compensation. The Court held the horizontal agreement among the lawyers to withhold the supply of legal services and hereby increase wage rates represented a 'naked restraint' on price and output.
In evaluating the requisite conduct, the Court commented that although there was a political impact, the means employed (that is, boycott) to obtain the more favorable legislation was economic, rather than political in nature. Therefore, irrespective of 'whatever economic (or other) justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness.'
In distinguishing *Noerr*, the Court explained that 'in the *Noerr* case the alleged restraint of trade was the intended consequence of legislation; in this case the boycott was the means by which the lawyers sought to obtain favorable legislation.'

Professional Real Estate Investors v. Columbia Pictures Industries (1993) [65]

The issue presented in this case was whether a copyright infringement action was a sham, and thus without *Noerr-Pennington* protection, merely because a subjective expectation of success did not motivate the litigation. The Court held that a sham will be determined by whether the petitioning was 'objectively reasonable.' The Court established a two-tier definition for determining the 'objectively baseless' test for sham conduct: First, the Court will ask whether a reasonable participant could realistically expect success or a favorable outcome on the merits. Second, if the challenged government petition is found to be meritless, then the Court will inquire where the baseless petition conceals 'an attempt to interfere *directly* with the business relationship of a competitor through the use of government *process* - as opposed to the *outcome* of that process.
Only if the Court finds an objectively meritless petition *and* anticompetitive intent to injure a competitor will it conclude that the petition was a sham.

Horizontal Restraints

(Standard Oil Co. v. United States (1911) [119/121/250/352])

The Court introduced the distinction between the rule of reason and per se illegality. The Court permitted to weigh competitive factors and determine whether a restraint is reasonable: whether there has been a significant interference with or impact on competition. Under this standard, only unreasonable restraints are illegal.
But the Court also recognized that certain conduct is, by its very nature or character, inherently anticompetitive and thus unreasonable. Such conduct, therefore, does not need to be evaluated under the broad rule of reason but is illegal per se.

<u>Per Se Illegality of Horizontal Price Fixing</u>

(United States v. Trenton Potteries Co. (1927) [113/124/181])

The Court reviewed the conduct of members of a trade association that controlled 82% of the domestic vitreous bathroom fixtures production. Members of the association were charged with combining to fix and maintain uniform sanitary pottery prices. In ruling that defendants' conduct (fixing prices) was per se illegal (whether the fixed prices were reasonable or not), the Court limited its holding to 'those controlling in any substantial manner a trade or business.' This language suggests that per se treatment is applicable only when price fixing is effective.

United States v. Socony-Vacuum Oil Co. (1940) [113/125/181]

The Court was confronted with whether an agreement among competitors to reduce the supply of petroleum products from the market was a per se price-fixing agreement.
The Court rejected the requisite that a price fix is only per se unlawful if it is effective: 'a conspiracy to fix prices violates Sec. 1 though it is not established that the conspirators had the means available for the accomplishment of their objective. Any combination which tampers with price structures is engaged in an unlawful activity.' Market power is not a precondition to find a per se violation (n. 59).
Socony is perhaps the strongest decision in support of a per se condemnation for price-fixing agreements. Its classic definition of price fixing – 'tampering with the price structure' – is a broad standard capable of sweeping in various market conduct, some of which may not directly affect price.

United States v. Container Corp. of America (1969) [111/115/148]

The Court held that the exchange of current price information among competitors selling a fungible product in a highly concentrated market is a violation of Sec. 1 even when the price exchange yields lower, rather than higher, prices. The Court focused on the price-stabilizing effect of defendants' conduct, which resulted from the horizontal price exchange. The Court emphasized preservation of natural market forces as the underlying concern of antitrust: 'Interference with the setting of price by free market force is unlawful per se.'

Arizona v. Maricopa County Medical Society (1982) [128/142/155/209]

In this case the per se rule was applied. The Court struck down a maximum fee schedule agreed upon by doctors for reimbursement for health services provided to policyholders of certain insurance plans. The Court reasoned that the doctors did not argue that the quality of the public service they provided would be enhanced by reason of the price restraint, or that the restraint was necessary because of ethical considerations. The Court concluded that a maximum price was just as anticompetitive as a minimum price. Thus, the conduct fell out of rule of reason protection.
At bottom, the Court held that both maximum fee setting and minimum fee setting are illegal per se regardless of their potential procompetitive features. In addition, the Court did not hesitate to apply, although for the first time, the per se rule to professionals. Even professional members of a nonprofit foundation are not immunized from Sec. 1 through the argument that the foundation is a single entity incapable of combining or conspiring.

Horizontal Market Division

United States v. Topco Associates (1972) [129/(167)/168/172]

Topco Associates was comprised of several dozen regional supermarket chains that operated as a purchasing agent for its members. Topco was organized by the regional chains in order to compete with national chains that marketed private-label grocery products. By taking advantage of their combined size and purchasing power, the regional members were able, through Topco, to advertise and purchase in volume their own private-label products. The Topco chains had an average 6% market share; thus it did not have substantial market power.

The alleged unlawful conduct in consisted of both territorial allocation and the veto power of Topco members over the membership applications of competitors. Each Topco member was licensed to sell the private-labelled products only in a designated area. Members were prohibited from selling the products outside the assigned areas. Most licenses were exclusive.

The defendants argued that their association actually increased competition because it enabled its members to increase efficiency in competing with larger national chains. The Court rejected this argument, holding that geographic market division among competitors, standing alone, are per se violations of Sec. 1.

Palmer v. BRG of Georgia (1990)

HBJ began offering Georgia bar review courses in direct competition with BRG. In 1980 HBJ gave BRG (main provider of courses in Georgia) an exclusive license to market its material in Georgia and they agreed that HBJ would not compete with BRG in Georgia and BRG would not compete with HBJ outside of Georgia. The agreement gave HBJ a share of BRG's revenues. After the agreement the price of BRG's courses rose from $150 to $400.

The Court held the agreement to be a per se illegal allocation of markets.

Concerted Refusal to Deal/Boycott

Fashion Originators' Guild of America v. FTC (FOGA) (1941) [160]

Members of a trade association that designed and manufactured women's dresses sought to prevent 'style piracy' through an agreement to refuse to deal with retailers who had purchased from the targeted manufacturers that sold copies. The action limited competition because it reduced the number of outlets to which the member manufacturers could sell and the source from which the retailers could buy.

FOGA is a model boycott case in which the parties engaged in industry self-regulation by putting pressure on buyers to refuse to deal with competing suppliers in competition with defendants.
The court came close to declaring a per se standard of the conduct when it upheld the FTC's refusal to consider evidence of the 'reasonableness' of the methods pursued. But the Court did evaluate the purpose behind the conduct and the market power of the member firms. The Court found no public interest; only the self-interest and protection form commercial competition. Less restrictive alternatives would have been available: tort action, copyright action, etc.

Associated Press v. United States (1945)

AP is a cooperative, nonprofit organization with 1200 newspaper members. AP distributes to its members the news gathered by its own employees, member newspapers, and foreign news agencies. The Government complains of the following practices: (1) a member may efficiently block membership by competing newspapers and thereby remain the exclusive outlet for AP news in its locality, (2) members are obligated to supply AP exclusively with the news they generate, and (3) the Canadian Press has contracted to supply Canadian news to AP exclusively in the U.S. in return for a reciprocal undertaking by AP.
It has been argued that the owner of the property can choose his associates and can, as to that which he has produced by his own enterprise and sagacity, efforts or ingenuity, decide for himself whether and to whom to sell or not to sell. While it is true in a very general sense that one can dispose of his property as he pleases, he cannot "go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade." The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. That the object of sale is the creation or product of a man's ingenuity does not alter this principle.
It is further contended that since there are other news agencies which sell news, it is not a violation of the Act for an overwhelming majority of American publishers to combine to decline to sell their news to the minority. But the fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman Act. It is apparent that the exclusive right to publish news in a given field, furnished by AP and all of its members, gives many newspapers a competitive advantage over their rivals. Conversely, a newspaper without AP service is more than likely to be at a competitive disadvantage. It is true that the record shows that some competing papers have gotten along without AP news, but morning newspapers, which control 96% of the total circulation in the United States, have AP news service.

Klor's Inc. v. Broadway-Hale Stores, Inc. (1959) [161/247]

In this case, the Court decided that a concerted refusal to deal by competitors was per se unlawful. A retailer, Broadway, entered into an agreement with suppliers of appliances 'either not to sell to Klor's or to sell to it only at discriminatory prices and unfavorable terms.' Broadway – which was alleged to have monopolistic buying power – did not dispute the allegations but moved for summary judgment 'because consumers and other competitors had access to supply, thus there was no injury to the public.'
The Court seemed concerned that if this conduct went unchecked there could be a 'tendency toward monopoly.' This was not a case where a retailer was denied access to one product or brand with other suppliers or brands available. The concerted refusal to deal included numerous major brands. The implication was that the makers of these brands all agreed with Broadway (and perhaps among themselves) to withhold supply from Klor's.

Monsanto Co. v. Spray-Rite Service Corp. (1984) [183/226]

The question was whether a combination was formed when competitors of a price-cutting dealer complained to their joint supplier and termination of the dealer resulted. In other words, was evidence of complaints of competing dealers and subsequent termination of the offending dealer sufficient to permit an inference of a combination on violation of Sec. 1?
Although the Court held that there was sufficient evidence for an inference con concerted action, it emphasized *Colgate* and the manufacturer's freedom to engage in independent action. Proof of complaints by dealers, a common occurrence, was not enough to prove that termination was not the product of independent action allowable under *Colgate*. The evidence must tend 'to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.' What is required after this case is direct or circumstantial evidence of 'a conscious commitment to a common scheme to achieve an unlawful objective.' By this the Court meant 'that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.'
The Court recognized that manufacturers may have an interest, independent from complaining dealers, in protecting dealer from free riding discounters.
The Court's decision was influenced by the difficulty of distinguishing vertical price restraints, all of which at that time were per se illegal, from nonprice restraints, which are subject to the rule of reason.

Northwest Wholesales Stationers, Inc. v. Pacific Stationery &Printing Co. (1985) [163]

A cooperative was made up of 100 office supply retailers acting as a wholesaler to member retailers. Nonmember retailers could make purchases at the same price as

members, but they were not permitted to share in the cooperative's profits (in form of a rebate on the purchase price). The plaintiff was expelled as a member after it changed its policy and began dealing as a wholesaler as well as a retailer. The Court concluded that the cooperative was designed to increase economic efficiency (economies of scale in purchasing and warehousing) and that the plan ensured ready access to supply that otherwise might not be available.
The Court rejected, except for a narrow category of cases, the per se characterization for concerted refusal to deal. The per se standard is acceptable only if the boycotting cooperative possesses market power of if it has exclusive access to either supply or an essential element so that competition is affected. Otherwise the refusal to deal is to be judged under the rule of reason.
Thus the Court raised the plaintiff's burden of proof in refusal to deal cases. The threshold test requires a showing of (1) market power; (2) exclusive or unique access to supply (an essential element of competition); or (3) a lack of an efficiency rationale when the boycott is aimed at a competitor. Except in this narrow range of cases, the Court abandoned the per se rule for group boycotts.

FTC v. Indiana Federation of Dentists (1986) [35/142]

The Court held that a concerted refusal by dentists to provide X-rays to insurance companies for reimbursement approval should be examined under the rule of reason because the dentists had argued that the refusal to deal (group boycott) was based on an ethical and moral policy designed to enhance the patients' welfare – precisely the justification rejected in *Professional Engineers*! Finally, the Court concluded that the boycott was no more than a scheme to protect the price the dentists charged.
The Court reasoned that proof of actual detrimental effect 'can obviate the need for an inquiry into market power.' Thus, the actual, demonstrated adverse effect on competition, like a reduction of supply or a collective withholding of information, might mean that the detailed analysis can be omitted.

Nynex Corp. v. Discon, Inc. (1998)

A local telephone company (NYNEX) that had been buying obsolete telephone equipment removal services from a particular supplier (Discon) switched its purchases of such services to a more expensive competitor of the supplier (AT&T). The supplier then brought against the company an action alleging that the company's decision, not justifiable in terms of ordinary competitive objectives, to switch to the competitor were unfair, improper, and anticompetitive, because this switching was part of an attempt to defraud customers by passing the higher costs on to the customers and getting some rebate from AT&T.

The United States Supreme Court held that the rule that group boycotts are per se violations of 1 did not apply to the telephone company's decision to buy removal services from the supplier's competitor, and thus the supplier had to allege and prove harm not just to itself, but to the competitive process, where (1) precedent limited the per se rule in the boycott context to cases involving horizontal agreements among direct competitors, (2) the instant case involved only a vertical agreement and a vertical restraint that deprived the supplier of a potential customer, and (3) the supplier's simple allegation of harm to itself did not automatically show injury to competition.

Rule of Reason

Chicago Board of Trade v. United States (1918) [110/114/122/167/240]

In this case the Court announced its classic rule of reason. The Court considered the legality of an agreement by members of the Board of Trade that regulated the price that any member could pay for grain purchased after the Board's normal closing hour (the price set at the close of the day's business). The Court announced the test of legality as 'whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business…; its condition before and after the restraint was imposed; the nature of the restraint; and its effects, actual and probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.' (See open-ended list of relevant factors in the case.)
The Court upheld the challenged conduct on the theory that this price restraint actually promoted competition by 'perfecting market conditions.'

National Society of Professional Engineers v. United States (1978) [112/132/142/208]

The Government charged that the professional association's canon of ethics prohibiting competitive bidding by its members violated Sec. 1. The issue was 'whether the canon was justified because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety.'
In declining to adopt a broad-based rule of reason, the Court did concede that a summary analysis was too narrow a focus. The standard adopted was a balancing test that determined the 'competitive significance' of the restraint. This test was limited to an economic analysis of the agreement' competitive impact. The safety or 'quality product' defense was excluded from the balancing process. Once the Court found that the canon actually restricted competition, it rejected the practice as illegal. By its nature, the ban on

competitive bidding resulted in maintenance of price levels; it also prevented customers from making price comparisons.
In short, this case teaches that the rule of reason in price-affecting cases is focused on an examination whether the challenged practice promotes or suppresses competition. No room is left for an evaluation of noneconomic factors, such as social or political benefits. This is far narrower than that recognized in *Chicago Board of Trade*. It also made clear that the Sherman Act does not permit competition to agree on one form of competition over another.
But certainly the Court was more willing to permit an examination that went beyond a quick per se classification to the extent that it weighed the net economic, competitive consequences of the challenged practice. A retreat from the high point of per se analysis, illustrated in *Socony* and *Container*, was evident.

Broadcast Music v. Columbia Broadcasting System (BMI/ASCAP) (1979) [112/134/173]

The Court extended the focused rule of reason beyond professionals to a commercial blanket licensing arrangement. By providing a blanket license covering all members of the association, a purchaser of musical works would have to negotiate and contract with only one entity for the right to use all products represented by the licensor. The cost of transacting would be reduced accordingly. 'Not all arrangements among … competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints.'
Because the Court had no substantial experience with blanket licensing arrangements, it rejected the quick characterization process of the per se rule, even though it conceded that a price-fixing arrangement was 'literally' at stake. The review standard was limited to whether the conduct is 'designed to increase economic efficiency and render markets more rather than less competitive.'
This case also suggests that the price-fixing label is applied or rejected after the Court makes a harm-benefit analysis. At that point the Court is able to reach a conclusion whether the conduct is a naked restraint or whether it has redeeming virtues.
Another factor important to the analysis in this case was the finding that the individual copyright owners were free to sell compositions separately from the blanket license. Thus, supply and output were not restricted by the license.

National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma (NCAA) (1984) [46]

The University of Oklahoma and the University of Georgia brought suit in the United States District Court for the Western District of Oklahoma against the NCAA, challenging the validity under the Sherman Act of the NCAA's restraints in the televising

of college football games. The District Court ruled that the NCAA unlawfully restrained trade by fixing the price for particular telecasts, boycotting and threatening to boycott potential broadcasters by its exclusive network football-broadcast contracts, and placing an artificial limit on the production of televised college football. E.g., the networks agreed that they must schedule appearances for at least 82 members of NCAA during a 2 year period, and that not team could appear more than 6 times. They also agreed that the payments would not change with the size of the audience. The broadcasters could not buy a single interesting game, they had to buy a package.

The United States Supreme Court held that (1) the record supported the conclusion that by curtailing output and blunting the ability of member institutions to respond to customer preference, the NCAA restricted rather than enhanced the place of intercollegiate athletics in the nation's life; and (2) the NCAA television plan, which limited the total amount of televised intercollegiate football and the number of games that an NCAA member might televise, and which forbade any member to make any sale of television rights except in accordance with the basic plan, constituted a restraint on the operation of a free market in violation of 1 of the Sherman Act.

California Dental Association v. FTC (1999)

A nonprofit dental association to which approximately three-quarters of the dentists practicing in California belonged (1) provided insurance and financing arrangements to members, and (2) engaged, on behalf of members, in lobbying, litigation, marketing, and public relations. Members were prohibited, under the association's code of ethics, from engaging in false or misleading advertising, and the association had issued advisory opinions and guidelines concerning advertising. The Federal Trade Commission (FTC) brought a complaint alleging that the association had applied its guidelines so as to unreasonably restrict two types of truthful and nondeceptive advertising--price advertising, particularly as to discounted fees, and advertising related to the quality of dental services.

The United States Supreme Court held that the Court of Appeals had erred in deciding that a "quick look" by the FTC was sufficient for finding that the restrictions were anticompetitive, as any anticompetitive effects of the restraints were far from intuitively obvious; and thus, a fuller consideration of the issues was called for on remand.

The Court of Appeals was comparably tolerant in accepting the sufficiency of abbreviated rule-of-reason analysis as to the nonprice advertising restrictions. The court began with the argument that "these restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services."

The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services.

If quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and it is of course the producers' supply of a good in relation to demand that is normally relevant in determining whether a producer-imposed output limitation has the anticompetitive effect of artificially raising prices.

Conspiracy: Proof of Agreement

Interstate Circuit, Inc. v. United States (1939) [186/189n396]

In this case the Court faced the question of whether to uphold a trial court's finding of an inference of an agreement. The standard of review is that the trial court cannot be reversed unless the finding of fact is clearly erroneous.

The evidence demonstrated that Interstate (movie exhibitor with almost monopoly) sent a letter to the distributors (of movies) naming all their representatives and asking them to agree to impose controls over admission prices and double-features as a condition of Interstate's continued patronage of the distributor's films. There was no direct evidence that the distributors agreed with each other to comply with Interstate's demand; however, each distributor observed at least some of Interstate's requested conditions. Thus the government was 'compelled to rely on inference drawn from the course of conduct of the alleged conspirators' in order to prove the requisite Sec. 1 agreement.

The Court upheld the trial court's inference of an agreement. The Court identified several 'plus factors' from which such an inference properly could be made. These 'plus factors' remain today as the benchmark from which an agreement can be interfered:

- Whether the defendant's action were a *radical departure* from prior practice;
- Whether the defendant was *aware* that its co-defendants had been solicited to conduct themselves similarly;
- Whether the defendant had been *invited* to engage in the alleged conspiracy when it was solicited;
- Whether each defendant had a substantial *profit motive* for concerted action;
- Whether the defendant actually participated in the scheme and engaged in substantial unanimity of action, or uniform conduct;
- Whether the defendant's conduct represented *interdependent action* in the sense that compliance would not profit any single defendant unless all the other defendants similarly complied.

This case shows that although mere evidence of parallel conduct by competitors is not enough for an antitrust plaintiff to obtain a directed verdict, an agreement is properly inferred from conscious parallelism when these so-called 'plus factors' exist. The case also shows, however, that such inference, even if based on sufficient 'plus factors', may

be rebutted by the defendants' evidence. 'When the proof supported … the inference of such concerted action, the burden rested on the defendants of going forward with the evidence to explain away or contradict it.'

Theatre Enterprises v. Paramount Film Dist. Co. (1954) [189]

The Court considered parallel conduct. The defendants offered some evidence of independent business judgment to rebut the inference of an agreement. 'This Court has never held that proof of parallel business behavior itself' is sufficient to warrant a direct verdict for a plaintiff in a civil antitrust suit. Although there was some evidence of an agreement, many of the *Interstate Circuit* plus factors were absent. E.g., the defendants were able to argue plausible profit maximizing business justifications that could make each of the defendants' actions independently rational and thereby negate the charge of interdependency. Additionally, the defendants didn't know from each other's conduct.

Matsushita Electric Industrial Co. v. Zenith Radio Corp. (1986)

This lawsuit claimed that the Japanese companies had conspired since the 1950's to drive domestic firms from the American market, by maintaining artificially high prices for these products in Japan while selling them at a loss in the United States.
The majority of the Court that the posited predation scheme was implausible and thus that the defendants lacked motive to conspire. But the Court also said: 'We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a issue of conspiracy. Conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.'

Copperweld Corp. v. Independence Tube Corp. (1984) [198/212]

In this case the Court held that as long as the initial parent-subsidiary combination was lawful, a parent and a wholly-owned subsidiary are a single entity incapable of combining or conspiring to satisfy the predicate plurality for a Sec. 1 cause of action.

Facilitating Practices

American Column & Lumber Co. v. United States (1921) [146]

The Supreme Court was unsympathetic to a trade association that required its members to make daily reports on sales, purchases, and production, and to require immediate reporting on any price changes. Speeches and memoranda about the danger of overproduction were circulated among the members, and discussions were held regarding restrictions on output and price maintenance. The association represented only 33% of the industry but there was evidence of actual increases in price. The Court found that the 'purpose and effect were to restrict production and to encourage members to unite in

pressing for higher and higher prices.' It observed that the extensive interchange of reports (supplemented by meetings) certainly constituted a combination through which agreements, actual or implied, could readily be arrived at and maintained.
Specifically, the Court disapproved of a trade association's soliciting views of members as to future market conditions (production estimates, suggested price levels, production limits). But the exchange of past, closed transaction prices was sanctioned.

Cement Manufacturers Protective Assn. v. United States (1925)

Cooperation of manufacturers in gathering and exchanging (1) information concerning production of cement and the prices for which it was sold by them in actual, closed "specific job" contracts constituting but a part of their business, and (2) information of transportation costs from chief points of production, *held* not an unlawful restraint on commerce, even assuming that the result may tend to bring about uniformity of price, through the operation of economic law.
Dissemination of information enabling sellers of goods under contracts for future delivery individually to prevent purchasers from fraudulently procuring deliveries on the pretense that the sellers are obligated by their contracts to make them, is not an unlawful restraint of trade, even though the information be gathered by and disseminated among the sellers themselves through cooperation.

(Maple Flooring Manufacturers Assn. v. United States (1925) [146])

In this case the Court upheld a data exchange plan where the exchange of statistical date included only past prices and other data in summary, average or aggregate form and which did not identify individual customers. The information also was fully available to customers of the trade association members, the public, and all the buyers and sellers in the industry.
Defendants controlled 70% of the total production, but the Court reasoned that it was important that there be a free exchange of ideas and knowledge of the competitive factors. This even could increase the likelihood of rational competition. No evidence of price stabilization was found.

United States v. Container Corp. of America (1969) [111/115/148]

The Court held that the exchange of current price information among competitors selling a fungible product in a highly concentrated market is a violation of Sec. 1 even when the price exchange yields lower, rather than higher, prices. The Court focused on the price-stabilizing effect of defendants' conduct, which resulted from the horizontal price exchange. The Court emphasized preservation of natural market forces as the underlying concern of antitrust: 'Interference with the setting of price by free market force is unlawful per se.'

Vertical Restraints

Price Restraints

Dr. Miles Medical Co. v. John D. Park & Sons Co. (1911) [219]

The per se prohibition of vertical minimum resale prices originated in this case. The Court viewed vertical price fixing as indistinguishable from a horizontal agreement among the dealers reselling the manufacturers products. It has not been overruled yet.

State Oil Co. v. Khan (1997) [158/235]

The Court reversed *Albrecht* when it ruled in this case that vertical maximum price-fixing schemes are no longer per se illegal, but rather should be analyzed under a rule of reason because by their nature they are not always anticompetitive and are frequently procompetitive. The Court reasoned that 'low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.'

Non-Price Restraints

United States v. Colgate & Co. (1919) [223]

This case is the beginning point for any analysis of the vertical combination issue. Colgate had engaged in a number of practices designed to influence the resale price of its products including prior announcement of desired resale prices, persistent urging of dealers to adhere to those prices, and termination of sales to dealers who did not observe the requested resale price. A retailer could 'after buying, if it chose, give away its purchase or sell it at any price that he saw fit affected only by the fact that it might by its action incur the displeasure of the manufacturer who could refuse to make future sales to it.'

Thus, the issue became whether the dictates of *Dr. Miles* extended to a seller who announced desired resale prices and refused to deal with those who did not adhere to those prices. The Court said, the per se rule did not apply because sellers must be free to deal with whomever they wished and were similarly free to announce in advance under what circumstances they would refuse to deal.

Generally, Colgate permits resale price maintenance if it can be achieved through unilateral conduct. The problem is, therefore, one of determining when events have gone far enough to permit the reasonable inference that the conduct is no longer unilateral, which depends largely on the Court's view of the per se rule against vertical price fixing.

Standard Oil Co. of California (Standard Stations) v. United States (1949) [250]

The Court reviewed the contract between Standard Oil and independent retailers that required all purchasers of gasoline to be from Standard Oil (which was the largest seller in the area [6.7%] and covered 16% of all retail stations). The issue was whether a showing that a 'substantial portion' of the market was affected was enough to satisfy the statutory requirement that the effect of the agreement 'may be to substantially lessen competition.' Requirement contracts could be economically beneficial to both buyers and sellers and, ultimately, to consumers. This seemed to require an evaluation of competitive effects on a case-by-case basis.
The Court, however, didn't want to require plaintiffs to show actual anticompetitive effects. A plaintiff would typically find it virtually impossible to show that 'but for' the agreement, competition would be more vigorous. However, rather than announce a rigid per se standard, the Court opted for the rule that 'Sec. 3 is satisfied by proof that competition has been foreclosed in a substantial *share* of the line of commerce affected.'

United States v. Parke Davis & Co. (1960) [224]

The Court considered an effort by a manufacturer of pharmaceutical products to control prices charged by retailers by enlisting the aid of wholesalers. The wholesalers where told that they would be cut off from supplies if they sold for less than the suggested wholesale prices or if they sold to retailers who resold for less than the suggested retail price. The Court found that Parke had gone well beyond *Colgate* in that it used the threat of a refusal to deal as 'the vehicle to gain the wholesalers' participation in the program' to maintain retail prices.

Tampa Electric Co. v. Nashville Coal Co. (1961) [250]

A utility instituting the use of coal as a boiler fuel, contracted with Nashville Coal Co. for all its coal requirements over a 20 year period. The Court focused on the impact on suppliers who were in competition with Nashville Coal: under this market definition, the share of commerce affected was 77%.
First, the Court viewed the market definition as an indispensable step in its foreclosure analysis. Second, it was willing to review a range of factors regarding the competitive impact of the arrangement (Nashville wasn't a dominant seller; no industry wide dealing; length of contract). The approach taken involved a broader range of factors to consider than it was the case in *Standard Stations*.

Continental T.V. v. GTE Sylvania (1977) [226/235/238/239]

This case (in overturning *Schwinn*) removed nonprice vertical restraints from the per se category. Vertical intrabrand restraints on distribution were to be viewed under the rule of

reason. This created the possibility that manufacturers could grant to distributors or other resellers local monopolies.
Sylvania was a producer of television sets. Its franchisees could sell any brand of television from their stores and could sell to any class of customers. However, they could not sell Sylvania televisions from other than approved locations. The plan was designed to shield Sylvania dealers from competition by other Sylvania dealers in hopes that they would compete aggressively and promote Sylvania televisions against other brands.
This case is a landmark in antitrust law because it constituted the first absolutely clear signal by the Court that economic analysis was to be the Court's guiding methodology in antitrust matters.
The Court cited the possible use of vertical restraints as a means of promoting interbrand competition by limiting free rider effect. It stated that interbrand competition was the primary concern of antitrust law.

Monsanto Co. v. Spray-Rite Service Corp. (1984) [183/226]

The question was whether a combination was formed when competitors of a price-cutting dealer complained to their joint supplier and termination of the dealer resulted. In other words, was evidence of complaints of competing dealers and subsequent termination of the offending dealer sufficient to permit an inference of a combination on violation of Sec. 1?
Although the Court held that there was sufficient evidence for an inference con concerted action, it emphasized *Colgate* and the manufacturer's freedom to engage in independent action. Proof of complaints by dealers, a common occurrence, was not enough to prove that termination was not the product of independent action allowable under *Colgate*. The evidence must tend 'to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.' What is required after this case is direct or circumstantial evidence of 'a conscious commitment to a common scheme to achieve an unlawful objective.' By this the Court meant 'that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.'
The Court recognized that manufacturers may have an interest, independent from complaining dealers, in protecting dealer from free riding discounters.
The Court's decision was influenced by the difficulty of distinguishing vertical price restraints, all of which at that time were per se illegal, from nonprice restraints, which are subject to the rule of reason.

Business Electronics Corp. v. Sharp Electronics Corp. (1988) [228]

Business Electronics was terminated as a dealer by Sharp after it had repeatedly sold at prices below list and after a competing dealer threatened to drop Sharp products. Noting that every vertical restraint could have an impact on price, the Court reasoned that the per

se label must be reserved for a very narrow class of cases. The court concluded that economic analysis supports the view that a vertical restraint is not illegal per se unless it includes some agreement on price or price levels.
It distinguished *Dr. Miles* as based on an impermissible restraint on alienation and *Albrecht v. Herald Co.* as involving an express agreement on price.

Tying Arrangements

International Business Machines Corp. v. United States (IBM) (1936)

IBM manufactured certain machines that sorted cards according to the holes in them to reflect certain information. The cards were not of unusual composition, although the had to be of a precise thickness and free from imperfections that might jam the machine. IBM leased the machine with the condition that users purchase their requirements of blank cards from it. This condition was held to violate Sec. 3 of the Clayton Act.
IBM asserted that the condition was necessary to protect its goodwill. The Court rejected this defense, because others were perfectly capable to manufacture suitable cards.

International Salt Co. United States (1947) [261]

In this case, International Salt leased its patented machines only on the condition that lessees purchase from International Salt all the salt to be used in the machines. The Court held that it was a violation of Sec. 1 Sherman Act and Sec. 3 Clayton Act. In so doing, it announced that it was 'unreasonable, per se, to foreclose competitors from any substantial market.' The Court made note of the limited monopoly held by International Salt but did not expressly indicate that such a finding was necessary for applying the per se standard under either the Clayton or Sherman Act.

Northern Pacific Railway Co. v. United States (1958) [126/262]

Northern Pacific leased land for various uses on the condition that lessees use Northern Pacific to ship all commodities produced or manufactured on the land as long as Northern Pacific's rates were equal to those of competitors. The Court said that 'tying arrangements are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of commerce is affected.'
The Court observed that a seller without dominance would be unable to have anything but an insignificant effect on trade. The suggestion is that the involvement of a 'not insubstantial' amount of commerce indicates that the defendant has the requisite degree of market dominance. 'The very existence of this host of tying arrangement is itself evidence of the defendant's great power.' This observations came very close to suggesting that

independent attention to power in the tying product market was unnecessary (=> per se rule!). Over the next several years, however, this policy was destined to change.

United States v. Jerrold Electronics Corp. (1961) [272]

The seller of community antenna systems required purchasers to buy the complete system although several components could be sold, and were available, separately. The defendant's unique 'head and equipment' provided the necessary economic power for demanding full system sales. The issue for the Court was 'whether this should be treated as a case of tying the sale of one product to another product or merely as the sale of one product.'

One of the factors was whether there was a business justification for complete system sales. Defendant argued that is was necessary to sell its product as a complete system in order to assure its proper functioning and to protect the good-will of the firm. The Court concluded that during the start-up stage of the firm/product, it was appropriate to classify the system as a single product (single product defense).

United States v. Loew's (1962)

The Court found illegal a block booking arrangement, under which the license of one or more films to television stations was conditioned upon acceptance of a package containing one or more unwanted or inferior films. The Court held that the prerequisite economic power is presumed when the tying product is patented or copyrighted. But it also held that cost-justified price differentials between the package price and prices for individual films would be permitted.

Jefferson Parish Hospital District No. 2 v. Hyde (1984) [265/296]

In this case, the Court considered once again the standards applicable to tying arrangements. The Jefferson Hospital contracted with a firm of anesthesiologists to provide all the hospital's anesthesiology services. An excluded anesthesiologist charged the hospital with tying anesthesiology services to hospital services.

The Court reaffirmed the per se rule status of tying. It focused on the question whether hospital services and anesthesiology services should be regarded as two products for tying analysis purposes (sufficiently distinguished in the consumers' eyes to be subject to separate demand) and whether the Hospital possessed sufficient power in the tying product market.

On the issue of market power, the Court began its analysis that the relevant power was of the type that would ordinarily be used by a firm to raise prices above competitive levels. The Court believed the question was whether the defendant possessed this type of power and used it to coerce the purchase of a tied product that would otherwise not have been purchased.

Eastman Kodak Co. v. Image Technical Service, Inc. (1992) [267/294]

Kodak manufactured photocopiers and also sold parts and serviced the machines. Only Kodak parts could be used in Kodak equipment (100% market share!). Kodak instituted a policy of selling parts for its equipment only to buyers who repaired their own machines or used Kodak service.

The charge was that Kodak had tied service to Kodak replacement parts thereby foreclosing independent service organizations. Thus, it became difficult if not impossible for independent service organizations to compete effectively for the business of repairing Kodak equipment.

Kodak's defense was that since it did not have market power in the original equipment market, any purchaser who would prefer not to use Kodak service would just shift to competing suppliers of office equipment (because buyers would asses the total costs of equipment and service over its lifetime). Thus, the absence of market power in the original market would mean that a seller could not have market power in the aftermarket.

The Court rejected this reasoning in noting that Kodak had increased the price of service without incurring decreased equipment sales, a combination which was inconsistent with its theory. The type of 'lifecycle pricing' suggested by Kodak required a significant investment by buyers (acquisition of information about repair costs, breakdown frequency, losses caused by breakdown, etc.). If these costs were sufficiently high, the price in the aftermarket could exceed competitive levels. In addition, the costs of switching to a different brand of equipment in response to the higher service costs could be high enough that locked-in buyers would elect rather to pay supracompetitive prices than switching. Information and switching costs 'could create a less responsive connection between service and parts prices and equipment sales.'

Monopolization

United States v. Aluminum Co. of America (“ALCOA”) (1945) [59/286]

Learned Hand’s (why was he never appointed to the U.S. Supreme Court?) landmark monopolization case and starting point for modern monopolization law. It emphasized market power analysis as a component of the monopolization offense. And it made clear that Sec. 2 would be applied to conduct beyond that condemned for multiple firms under Sec. 1.

Alcoa sold virgin ‘ingot’ aluminum and produced aluminum products. Through patents it possessed a legal monopoly on the production of aluminum until 1909. Alcoa’s dominance after that was maintained and extended by agreements with foreign competitors limiting competition and with power companies restricting the sale of electricity to potential domestic producers.

First, it was concluded that Alcoa was a monopoly. Then, the Court turned to the question whether Alcoa's conduct violated Sec. 2. Much of the opinion is an indictment of bigness per se. Accordingly, 'having proved that Alcoa had a monopoly, the plaintiff had gone far enough; if it was an excuse that Alcoa had not abused its power, it lay on Alcoa to prove that it had not. The discussion of abuse left only the narrowest way out for the monopolist since it seemed to require complete competitive passivity. Liability would not attach to a monopolist which had power 'thrust upon it,' or which gained its power by 'force of accident,' or was a 'passive beneficiary.'

There is, however, additional language in the opinion that broadens the freedom of monopolists. First, the Court observed that dominance resulting form 'skill, foresight and industry' was not to be condemned. Similarly, 'the successful competitor, having been urged to compete, must not be turned on when it wins.' The analysis suggests that complete competitive passivity on behalf of the monopolist is not required.

The Court also addressed the intent requirement in monopolization cases. It rejected the notion that the intent requirement could be equated with the traditional concept of 'specific intent' in criminal law. In Judge Hand's words, 'no monopolist monopolizes unconscious of what he is doing.'

United States v. Griffith (1948) [290/312]

A monopolization charge was leveled at theater owners who were monopolists in some towns but who faced competition in others. Through the mechanism of booking films for the entire chain, defendants were able to force film distributors to make concessions as a condition of having their films shown in the towns where the defendant were the only exhibitors.

'The existence of power to exclude competition when it desired to do so is itself a violation of Sec. 2, provided it is coupled with the purpose or intent to exercise that power.'

The issue left open is whether this use of 'leverage' (use power in one market to gain advantages in another) is itself a violation of Sec. 2 or is a violation only it the defendant is likely to become a monopolist in the second market.

United States v. E.I. Du Pont de Nemours & Co. ("Cellophane") (1956) [31/292]

Cross-elasticity determines what should be included in the product market. It measures the responsiveness of the demand for one product to changes in the price of a different product. A high cross-elasticity indicates that the products are good substitutes and should be included in the same market.

In this case, the defendant's market share was critical and hinged on whether the market was defined as cellophane, in which case the market share would have been 75%, or

flexible wrapping paper, in which case the share would have been 20%. The Court described the question as whether flexible wrappings were reasonably interchangeable.

United States v. Grinnell Corp. (1966) [291]

The Court did not decide whether a showing of monopoly power resulted in a rebuttable presumption, that Sec. 2 had been violated. Although the Court did not settle the issue of the burden of proof, it did offer what even today is regarded as the closest thing to a definitive statement of the monopolization offense.
The offense of monopoly under Sec. 2 has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident (Hand in *Alcoa*: 'skill, foresight and industry').
The second requirement seems to require conduct that has as its primary purpose the elimination of competition by means that are independent of competitive merit, or that are predatory in nature.

Otter Tail Power Co. v. United States (1973) [64n171]

Otter Tail had refused to sell wholesale power to municipal systems or to allow power produced by others to flow through its transmission system to reach such municipal systems.. Because of federal and/or state regulations, the local monopoly by Otter Tail was unavoidable. These refusals were held to violate Sherman Act Sec. 2.

Berkey Photo v. Eastman Kodak Co. (1979)

Kodak introduced a new camera and at the same time a new kind of color film, which was made in a size that would fit into the new camera. The film was not made available in sizes that would fit into cameras by competitors.
Berkey alleged a violation of Sec. 2 arising from Kodak's failure to predisclose the nature of the new film, permitting time to adapt the new requirements. The Court found no violation when an integrated business benefits from association with a division possessing a monopoly in its own market. It was an ordinary and acceptable business practice to keep one's new developments a secret.. The antitrust law did not require a duty to predisclose information to a competitor.

<u>Essential Facility</u>

United States v. Terminal Railroad Ass'n of St. Louis (1912) [304]

Ancestor to *Aspen Skiing*: to A group of railroads acquired control of St. Louis' rail terminal facilities and a bridge crossing the Mississippi River. By controlling this 'essential facility,' the combination was able to discriminate against competitors and gain

an advantage in rail service. The Court held that acquisition and control of the terminal facilities by a group of railroads smaller than the total number dependant on the facilities was a violation of Sec. 1 and 2. The Court ordered that any existing of future railroad be allowed to participate in ownership and control.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp. (1985) [304]

Aspen Highlands was the operator of a single mountain ski facility. Aspen Skiing owned the three remaining ski areas. For a period of time they cooperated in offering an 'all-Aspen' ticket which enabled the purchaser to ski on any of the four areas. The allocation of revenues was based on the relative use. Eventually Ski Co. terminated the cooperation, Highlands market share fell from 20% to 11%. Highlands claimed that Ski Co. had monopolized by refusing to cooperate in making the multi-area ticket available.
The Court began its analysis by observing that there was no general duty for a monopolist to cooperate with a rival. The right not to cooperate, however, was not unqualified: Ski Co. had not violated Sec. 2 if it had valid business reasons to terminate the cooperation. But there were none. The Court suggested that Ski Co.'s conduct was essentially predatory because the change in policy resulted in losses to Ski Co. which it eventually hoped to recoup once the damage to Highlands had been accomplished. (Note that this case was about termination of an existing cooperation, not about the duty to cooperate with a new competitor, etc.)
This case can be read as imposing a positive duty on a monopolist to cooperate with competitors as a means of preventing their exclusion. However, it is hard to imagine an instance in which a monopolist would be required to cooperate with a smaller rival unless an 'essential facility' or resource is involved.

Attempt to Monopolize

United States v. Griffith (1948) [290/312]

A monopolization charge was leveled at theater owners who were monopolists in some towns but who faced competition in others. Through the mechanism of booking films for the entire chain, defendants were able to force film distributors to make concessions as a condition of having their films shown in the towns where the defendant were the only exhibitors.
'The existence of power to exclude competition when it desired to do so is itself a violation of Sec. 2, provided it is coupled with the purpose or intent to exercise that power.'

The issue left open is whether this use of 'leverage' (use power in one market to gain advantages in another) is itself a violation of Sec. 2 or is a violation only it the defendant is likely to become a monopolist in the second market.

Spectrum Sports, Inc. v. McQuillian (1993) [315/319]

The Court reviewed a long-standing approach of the Ninth Circuit under which a party could be held to have violated the attempt provisions of Sec. 2 without inquiry into the relevant market or power in that market. If the conduct was sufficiently predatory or unfair, an assessment of market power was unnecessary.
The Court rejected this approach and announced that ‘demonstrating the dangerous probability of monopolization in an attempt case requires inquiry into the relevant product and geographic market and the defendant’s power in that market.’

Predatory Pricing

Barry Wright Corp. v. ITT Grinnell Corp. (1983) [333]

Wright and Grinnell both manufactured and sold certain components used in constructing nuclear power plants. Wright and Grinnell manufacturer collaborated in an effort to break Pacific's strong market presence for snubbers, but Grinnell bought snubbers from manufacturer to meet its then-current needs for the components. When Pacific learned of Wright’s and Grinnell’s intentions, it entered into exclusive buy-sell contracts with Grinnell for snubbers at substantial discounts. Plaintiff initiated suit alleging that Pacific’s and Grinnell’s (collectively, defendants) exclusive contracts violated the Sherman Act.
The trial court found for defendants. On appeal the court affirmed, holding that because the prices charged by manufacturer were not below its costs, and because the sales generated a profit margin for manufacturer, there was no antitrust violation, as non-predatory, non-discriminatory price reductions, made in response to the competition presented by plaintiff, were not violative of § 2.

Brook Group, Ltd. v. Brown & Williamson Tobacco Corp. (1993) [327/418]

In this case the Court laid out a framework of analyzing predatory pricing. Plaintiffs are required to show that defendant (1) charged prices ‘below an appropriate measure’ of the defendant’s costs, and (2) ‘had … a dangerous probability of recouping its investment in below-cost prices.’ Since that case, lower courts have stressed the issue whether the firm can reasonably expect to recoup its losses. The Court expressly declined to identify what it would regard as the relevant measure of cost in a predatory pricing case (marginal costs, average variable costs, average total costs?)

Horizontal Merger

Brown Shoe Co. v. United States (1962) [357/360]

First case decided under the 1950 amendment to the Clayton Act. In this case, a vertical integration (and horizontal merger) case, the Court invalidated an acquisition of a shoe retailer by a shoe manufacturer when the retailer controlled only 5% of its market and the manufacturer controlled only 1%. Even though the shoe market was unconcentrated and neither party to the merger controlled a substantial share, the Court noted a trend toward acquisition of retailers by shoe manufacturers with certain manufacturers supplying increasingly large percentages of the captive retailers' need. It believed that this merger would intensify the existing concentration process. Other manufacturers were foreclosed from supplying these captive retailers, the Court opined. It relied on Sec. 7's expressed intend of halting market concentration in the early stages and the absence of any business justification for the merger between the fourth largest manufacturer and the eighth largest retailer. 'Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business.
Most important, the Court noted that Sec. 7 gave courts the authority to stop, in their incipiency, any trends toward a lessening of competition. No longer did courts need to find that a substantial lessening of competition would occur as a direct result of the merger; the tendency to do so in the future was enough. Closely coupled to this was the fact that the amended Sec.7 allowed courts to stop mergers based on reasonable probabilities of anticompetitive effects, rather than certainties.
The Court also recognized that a merger of small companies in order to compete with larger companies dominating the market would be permitted, as would mergers involving a failing company that would otherwise be unable to have a viable competitive effect on the market. Congress intended to restrain mergers only to the extend that such combination may tend to lessen competition.
In this case the Court established a broad, multifaceted rule of reason for evaluation horizontal mergers. A plaintiff need not show monopoly power resulting from the merger or that there is an actual lessening of competition. The result in this case demonstrates an antimerger tone and an inhospitality towards horizontal mergers.

(United States v. Philadelphia National Bank (1963) [361])

The merger between the second and the third largest banks would have created the largest firm in the market, controlling 30% of the business in the relevant market.
The Court seemed to move even further toward establishing prima facie illegality for horizontal mergers, at least mergers in concentrated markets. A presumption of illegality exists for horizontal mergers in concentrated markets when the resulting firm controls an

'undue market share' and the concentration significantly increases. The Court did not define the 'undue market share', it noted, however, that even market share of less than 30% might be 'undue.'
The presumption is rebuttable if the defense introduces evidence that the merger is not anticompetitive. However, the Court rejected as defense enhanced efficiencies, ease of market entry, economies of scale, and increased competition in other markets. Only the 'failing company' defense was approved as an absolute defense.

United States v. Von’s Grocery Co. (1966) [362]

The Court invalidated a merger between the third and sixth largest grocery companies in L.A., even though their combined sales only accounted for 7.5% of total sales. The merger created the second largest chain. The Court again noted that the market showed signs of increased concentration (number of small single store owners dropped 60%; number of chains had increased 60%; mergers occurred rapidly before litigation began).
The Court felt that this increased concentration was sufficient to prevent the merger. In addition, the Court was concerned that the merger disposed of a substantial competitor in the market. Preventing the market would further the intent of the Act expressed by Congress: to arrest a trend towards increased concentration before that trend developed to the point where the market was left in the grip of a few large competitors.
After this case, it seemed that the Court would invalidate any merger between high ranking market share competitors whenever the relevant industry showed signs of concentration or where an aggressive competitor was acquired.

United States v. General Dynamics Corp. (1974) [364]

The Court faced a merger between two of the top ten coal producers in the U.S. Evidence produced by the Government showed a distinct trend toward increased concentration within the coal production. However, the Court said that 'statistics concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects.' The Court concluded that in this market, coal reserves, rather than market share were a better indicator of future market power. Because defendant had weak reserves, the Court held that the merger did not portend a substantial lessening of competition. It held that statistical data could be rebutted by evidence that defendant was really an unpromising or weak competitor.

FTC v. Staples (1997) [389]

Planned merger between Staples and Office Depot. Defendants are both corporations which sell office products through retail stores, commonly described as office supply superstores. Staples is the second largest office superstore chain in the United States and

Office Depot is the largest office superstore chain. OfficeMax. Inc., is the only other office supply superstore firm in the United States.
In assessing the relevant product market the FTC defined it as 'the sale of consumable office supplies through office superstores.' The FTC excluded the sale by non-superstore alternatives (as Wal-Mart, Best Buy, etc.) from the product market because it could be shown that they were not competitors for the same product. In areas were only one office superstore was, it charged approximately 5% higher prices (proof of SNIP) than in areas with other superstores, regardless whether the alternative office supply sellers were present or not. Customers of office superstores would not change to alternative office supply sellers after a SNIP, but they would change to another office superstore.
The case is also important because it uses the DoJ/FTC Horizontal Merger Guidelines in assessing the market concentration and the probable effect of the merger on competition (danger of collusion, ease of entry into the market, efficiencies)

Vertical Merger

(United States v. Yellow Cab Co. (1947) [212/355])

A manufacturer of cabs had acquired several cab companies in several cities. This resulted in control of a large portion of the taxicab services, including 80% of the market in Chicago. This meant that the cab companies might be forced to purchase their cabs solely from Checker Cab. Competition would be unreasonably affected because other cab suppliers would be 'foreclosed' from selling to those cab operators controlled by Checker Cab. Cab companies would have to pay more for the cabs than in a competitive market.
The Court held that if anticompetitive intent to foreclose competition could be shown, the acquisition violated the Sherman Act.

United States v. E.I. du Pond de Nemours & Co. (General Motors) (1957) [357]

It was the first time the Court applied Sec. 7 to a vertical merger. Du Pont's purchase of 23% of GM's stock prior to 1920 was sufficient to support the violation.
The relevant market was determined as automotive paint finishes and fabrics. In this limited market, Du Pont's sales to GM were seen as foreclosing other suppliers of automotive finishes. Du Pont supplied approximately 67% of GM's paint finishes Because GM controlled almost one-half of the automotive market, this foreclosed 33% of automotive finish sales from other suppliers.
The Court noted that the two required elements of Sec. 7 had been established: (1) the market affected was substantial; and (2) competition would be foreclosed in a substantial share of the relevant market.

Brown Shoe Co. v. United States (1962) [357/360]

First case decided under the 1950 amendment to the Clayton Act. In this case, a vertical integration (and horizontal merger) case, the Court invalidated an acquisition of a shoe retailer by a shoe manufacturer when the retailer controlled only 5% of its market and the manufacturer controlled only 1%. Even though the shoe market was unconcentrated and neither party to the merger controlled a substantial share, the Court noted a trend toward acquisition of retailers by shoe manufacturers with certain manufacturers supplying increasingly large percentages of the captive retailers' need. It believed that this merger would intensify the existing concentration process. Other manufacturers were foreclosed from supplying these captive retailers, the Court opined. It relied on Sec. 7's expressed intend of halting market concentration in the early stages and the absence of any business justification for the merger between the fourth largest manufacturer and the eighth largest retailer. 'Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business.
Most important, the Court noted that Sec. 7 gave courts the authority to stop, in their incipiency, any trends toward a lessening of competition. No longer did courts need to find that a substantial lessening of competition would occur as a direct result of the merger; the tendency to do so in the future was enough. Closely coupled to this was the fact that the amended Sec.7 allowed courts to stop mergers based on reasonable probabilities of anticompetitive effects, rather than certainties.
The Court also recognized that a merger of small companies in order to compete with larger companies dominating the market would be permitted, as would mergers involving a failing company that would otherwise be unable to have a viable competitive effect on the market. Congress intended to restrain mergers only to the extend that such combination may tend to lessen competition.
In this case the Court established a broad, multifaceted rule of reason for evaluation horizontal mergers. A plaintiff need not show monopoly power resulting from the merger or that there is an actual lessening of competition. The result in this case demonstrates an antimerger tone and an inhospitality towards horizontal mergers.

Conglomerate Merger

FTC v. Procter & Gamble (Clorox) (1967) [374/391]

Procter & Gamble sought to acquire Clorox, the leading bleach manufacturer. Even though Procter & Gamble did not manufacture bleach, its ability to do so may have restrained Clorox's pricing. De novo entry (as opposed to acquire a already established company) into the bleach market was possible for Procter & Gamble and it was found to be a 'likely prospective entrant.'

In addition, the Court felt that the huge advertising advantages (advertising plays a key role for a otherwise not distinguishable product) that would inure to the already dominant Clorox would erect entry barriers that would dissuade new entrants. The merger would discourage price competition and production increases from existing bleach firms because they would fear retaliation from Procter & Gamble.
That Procter & Gamble's presence on the edge of the market would restrain Clorox's pricing is an application of the 'perceived potential entrant theory', which holds that firms in the market fear outside entry and behave competitively. The Court accepted that theory as justifying the invalidation of the merger between potential competitors. It also rejected the defenses of increased efficiency and economies of scale as defenses to illegality. (In newer cases the trend seems to be to allow the defense of efficiencies.)

Bendix Corp. (1970)

The FTC condemned an acquisition on potential entry ground even though the acquiring firm was not found to be a probable de novo entrant. The FTC found it sufficient that Bendix would have entered through a smaller acquisition (which it had considered) instead of acquiring the third largest competitor in the market. The merger was seen as elimination Bendix as a potential competitor, because Bendix was among the most likely of a limited number of possible entrants capable to enter successfully by acquisition of a smaller firm.

United States v. Falstaff Brewing Corp. (1973)

Falstaff wanted to acquire Narragansett, the largest (and only regional) seller of beer in New England. Falstaff, a nationwide seller, did not yet sell beer in New England (but had a brewery close to it).
Given its financial capabilities and the conditions in the New England market, it would be reasonable to consider it as an potential entrant into that market. And it could well have been perceived as a potential entrant (with already current effect on competition).

United States v. Marine Bancorporation (1974)

NBC (a subsidiary of Marine), the second largest bank in Washington state, operating in Seattle and the west, acquired the ninth largest bank, operating in Spokane and the east. The Court doubted that NBC was an actual or perceived potential entrant because state law prohibited NBC from establishing de novo branches in Spokane. Similarly, if it acquired an existing small bank, it would face the same legal problem.

Price Discrimination

FTC v. Morton Salt Co. (1948) [413/420]

The test of whether such discounts are discriminatory or not is found in this case, perhaps the leading price discrimination case. Morton Salt offered substantial discounts to customers who purchased salt in greater than carload lots. The defense was that the discounts were available to all purchasers on an equal basis. As a factual matter, only five large purchasers qualified for the lowest discount. In finding that the discount amounted to the type of discrimination forbidden by the Robinson-Patman Act, the Court noted that 'theoretically, these discounts are available to all, but functionally they are not.'
In addition, the Court held that evidence of a system of substantial quantity discounts was sufficient to establish a prima facie violation of Sec. 2(a) RP Act.: '[T]he FTC need only prove that a seller charged one purchaser a higher price for like goods than it had charged one or more of the purchaser's competitors.' The Court thus flatly ruled out the need to show actual injury.

United States v. Borden Co. (1962) [424/425]

Most important review of the cost justification defense. Two Chicago dairies were charged with violating the RP Act by granting grocery-store chains discounts in excess of discounts available to independent stores. Both introduced cost studies to justify the differential. Borden's cost justification study was based on a comparison of its average cost per $100 of sales to the chains with the average cost per $100 of sales to the independents.
This study was rejected because in many instances buyers were not classified in accordance with the cost of serving them. E.g., all independents were assigned costs associated with cash collection but not all independents paid cash. The Court said: 'A balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member. High on the list of 'musts' in the use of the average cost of customer groupings is a close resemblance of the individual members of each group on the essential point or points which determine the costs considered.'

FTC v. Borden Co. (1966) [416]

The Borden Company sold chemically identical brand-name and private-label milk at different prices. The Court held that a pronounced public preference for a particular name brand, which results in a willingness to pay a higher price for that name brand, does not establish a difference between the products in the sense of RP Sec. 2(a).

Utah Pie v. Continental Baking (1967) [417]

The case arose when Utah Pie, a local producer and seller of frozen desert pies with a dominant share of the relevant market, began to experience stiff price competition from national firms. The competitors were selling at prices that were lower than those charged in their other markets.

United States v. United States Gypsum Co. (1978)

Defendants were competing producers who exchanged presale price quotations, in violation of Sec. 1 (*Container*). They defended their behavior on the ground that they were merely verifying rivals' prices in order to determine whether a price to a buyer would qualify for the meeting competition defense under RP Act.
The Court nonetheless found a Sec. 1 violation because a good faith believe, rather than certainty that a price meet an equally low price, was sufficient to satisfy the meeting competition defense. Nothing in the RP Act would require discussion of price between competitors to show good faith. The good-faith requirement implicitly suggest a somewhat imperfect matching between competing offers actually made and those allowed to be met.
Good faith would be indicated by reports of similar discounts from other customers, threats of termination if the discount were not met, etc.

Great Atlantic & Pacific Tea Company v. FTC (1979) [432]

A & P was charged violating Sec. 2(f) RP Act when, in negotiations with Borden over the sale of private-brand milk, it induced Borden to lower its price. Borden's price turned out not simply to meet but actually beat competing sellers. A & P argued that if Borden had a meeting competition defense, then there was no violation of the Act and it had not violated Sec. 2(f). [?]

Texaco Inc. v. Hasbrouck (1990) [421]

According to the Court the presumption of competitive harm is not warranted when the discount does no more than provide 'due recognition and reimbursement for actual marketing functions.'

Brook Group, Ltd. v. Brown & Williamson Tobacco Corp. (1993) [327/418]

In this case the Court laid out a framework of analyzing predatory pricing. Plaintiffs are required to show that defendant (1) charged prices 'below an appropriate measure' of the defendant's costs, and (2) 'had … a dangerous probability of recouping its investment in below-cost prices.' Since that case, lower courts have stressed the issue whether the firm can reasonably expect to recoup its losses. The Court expressly declined to identify what

it would regard as the relevant measure of cost in a predatory pricing case (marginal costs, average variable costs, average total costs?)

Horizontal Merger Guidelines

0. PURPOSE, UNDERLYING POLICY ASSUMPTIONS AND OVERVIEW

These Guidelines outline the present enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agency") concerning horizontal acquisitions and mergers ("mergers") subject to section 7 of the Clayton Act, to section 1 of the Sherman Act, or to section 5 of the FTC Act. They describe the analytical framework and specific standards normally used by the Agency in analyzing mergers.

0.1 Purpose and Underlying Policy Assumptions of the Guidelines

The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time.

0.2 Overview

(1) First, the Agency assesses whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured.
(2) Second, the Agency assesses whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects.
(3) Third, the Agency assesses whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern.
(4) Fourth, the Agency assesses any efficiency gains that reasonably cannot be achieved by the parties through other means.
(5) Finally the Agency assesses whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market.

1. MARKET DEFINITION, MEASUREMENT AND CONCENTRATION

1.0 Overview

A merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly

defined and measured. Mergers that either do not significantly increase concentration or do not result in a concentrated market ordinarily require no further analysis.

1.1 Product Market Definition

1.2 Geographic Market Definition

1.3 Identification of Firms that Participate in the Relevant Market

1.31 Current Producers or Sellers

1.32 Firms That Participate Through Supply Response

1.4 Calculating Market Shares

1.5 Concentration and Market Shares

2. THE POTENTIAL ADVERSE COMPETITIVE EFFECTS OF MERGERS

2.0 Overview

Other things being equal, market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power. The smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase, and the less likely it is that an output restriction will be profitable. If collective action is necessary for the exercise of market power, as the number of firms necessary to control a given percentage of total supply decreases, the difficulties and costs of reaching and enforcing an understanding with respect to the control of that supply might be reduced. However, market share and concentration data provide only the starting point for analyzing the competitive impact of a merger. Before determining whether to challenge a merger, the Agency also will assess the other market factors that pertain to competitive effects, as well as entry, efficiencies and failure.

2.1 Lessening of Competition Through Coordinated Interaction

2.2 Lessening of Competition Through Unilateral Effects

3. ENTRY ANALYSIS

3.0 Overview

A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels. Such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern.

Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern. In markets where entry is that easy (i.e., where entry passes these tests of timeliness, likelihood, and sufficiency), the merger raises no antitrust concern and ordinarily requires no further analysis.

3.1 Entry Alternatives

The Agency will examine the timeliness, likelihood, and sufficiency of the means of entry (entry alternatives) a potential entrant might practically employ, without attempting to identify who might be potential entrants. An entry alternative is defined by the actions the firm must take in order to produce and sell in the market. All phases of the entry effort will be considered, including, where relevant, planning, design, and management; permitting, licensing, and other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements.

3.2 Timeliness of Entry

3.3 Likelihood of Entry

3.4 Sufficiency of Entry

4. EFFICIENCIES

The Agency will consider only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed *merger-specific efficiencies*. Only alternatives that are practical in the business situation faced by the merging firms will be considered in making this determination; the Agency will not insist upon a less restrictive alternative that is merely theoretical.

Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.

5. FAILURE AND EXITING ASSETS

5.0 Overview

Notwithstanding the analysis of Sections 1-4 of the Guidelines, a merger is not likely to create or enhance market power or to facilitate its exercise, if imminent failure, as defined below, of one of the merging firms would cause the assets of that firm to exit the relevant market. In such circumstances, post-merger performance in the relevant market may be no worse than market performance had the merger been blocked and the assets left the market.

5.1 Failing Firm

5.2 Failing Division

UNITED STATES v. MICROSOFT CORP.

The United States, nineteen individual states, and the District of Columbia ("the plaintiffs") bring these consolidated civil enforcement actions against defendant Microsoft Corporation ("Microsoft") under the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2.
Specifically, the plaintiffs contend that Microsoft violated §2 of the Sherman Act by engaging in a series of exclusionary, anticompetitive, and predatory acts to maintain its monopoly power. They also assert that Microsoft attempted, albeit unsuccessfully to date, to monopolize the Web browser market, likewise in violation of §2. Finally, they contend that certain steps taken by Microsoft as part of its campaign to protect its monopoly power, namely tying its browser to its operating system and entering into exclusive dealing arrangements, violated § 1 of the Act.
The Court concludes that Microsoft maintained its monopoly power by anticompetitive means and attempted to monopolize the Web browser market, both in violation of § 2. Microsoft also violated § 1 of the Sherman Act by unlawfully tying its Web browser to its operating system. The facts found do not support the conclusion, however, that the effect of Microsoft's marketing arrangements with other companies constituted unlawful exclusive dealing under criteria established by leading decisions under § 1.

I. SECTION TWO OF THE SHERMAN ACT

A. Maintenance of Monopoly Power by Anticompetitive Means

1. Monopoly Power

In this case, the plaintiffs postulated the relevant market as being the worldwide licensing of Intel-compatible PC operating systems. The Court has already found, based on the evidence in this record, that there are currently no products - and that there are not likely to be any in the near future - that a significant percentage of computer users worldwide could substitute for Intel-compatible PC operating systems without incurring substantial costs.
The plaintiffs proved at trial that Microsoft possesses a dominant, persistent, and increasing share of the relevant market. Microsoft's share of the worldwide market for Intel-compatible PC operating systems currently exceeds ninety-five percent.
The plaintiffs also proved that the applications barrier to entry protects Microsoft's dominant market share. This barrier ensures that no Intel-compatible PC operating system other than Windows can attract significant consumer demand, and the barrier would

operate to the same effect even if Microsoft held its prices substantially above the competitive level for a protracted period of time. Together, the proof of dominant market share and the existence of a substantial barrier to effective entry create the presumption that Microsoft enjoys monopoly power.

2. Maintenance of Monopoly Power by Anticompetitive Means

In a § 2 case, once it is proved that the defendant possesses monopoly power in a relevant market, liability for monopolization depends on a showing that the defendant used anticompetitive methods to achieve or maintain its position.

a. Combating the Browser Threat

June 1995 proposal that Netscape abstain from releasing platform-level browsing software for 32-bit versions of Windows.

i. The OEM Channel

First, Microsoft bound Internet Explorer to Windows with contractual and, later, technological shackles in order to ensure the prominent (and ultimately permanent) presence of Internet Explorer on every Windows user's PC system. Second, Microsoft imposed stringent limits on the freedom of OEMs to reconfigure or modify Windows 95 and Windows 98 in ways that might enable OEMs to generate usage for Navigator in spite of the contractual and technological devices that Microsoft had employed to bind Internet Explorer to Windows. Finally, Microsoft used incentives and threats to induce especially important OEMs to design their distributional, promotional and technical efforts to favor Internet Explorer to the exclusion of Navigator.

ii. The IAP Channel

Microsoft adopted similarly aggressive measures to ensure that the IAP channel would generate browser usage share for Internet Explorer rather than Navigator. To begin with, Microsoft licensed Internet Explorer and the Internet Explorer Access Kit to hundreds of IAPs for no charge. Then, Microsoft extended valuable promotional treatment to the ten most important IAPs in exchange for their commitment to promote and distribute Internet Explorer and to exile Navigator from the desktop. Finally, in exchange for efforts to upgrade existing subscribers to client software that came bundled with Internet Explorer instead of Navigator, Microsoft granted rebates - and in some cases made outright payments - to those same IAPs.

Considering that Microsoft never intended to derive appreciable revenue from Internet Explorer directly, these sacrifices could only have represented rational business judgments to the extent that they promised to diminish Navigator's share of browser usage and thereby contribute significantly to eliminating a threat to the applications barrier to entry.

iii. ICPs, ISVs and Apple

By extracting from Apple terms that significantly diminished the usage of Navigator on the Mac OS, Microsoft helped to ensure that developers would not view Navigator as truly cross-platform middleware. By granting ICPs and ISVs free licenses to bundle Internet Explorer with their offerings, and by exchanging other valuable inducements for their agreement to distribute, promote and rely on Internet Explorer rather than Navigator, Microsoft directly induced developers to focus on its own APIs rather than ones exposed by Navigator.

b. Combating the Java Threat

As part of its grand strategy to protect the applications barrier, Microsoft employed an array of tactics designed to maximize the difficulty with which applications written in Java could be ported from Windows to other platforms, and vice versa. The first of these measures was the creation of a Java implementation for Windows that undermined portability and was incompatible with other implementations. Microsoft then induced developers to use its implementation of Java rather than Sun-compliant ones.

These actions cannot be described as competition on the merits, and they did not benefit consumers. In fact, Microsoft's actions did not even benefit Microsoft in the short run, for the firm's efforts to create incompatibility between its JVM for Windows and others' JVMs for Windows resulted in fewer total applications being able to run on Windows than otherwise would have been written. Microsoft was willing nevertheless to obstruct the development of Windows-compatible applications if they would be easy to port to other platforms and would thus diminish the applications barrier to entry.

B. Attempting to Obtain Monopoly Power in a Second Market by Anticompetitive Means

Relying on this language, the plaintiffs assert that Microsoft's anticompetitive efforts to maintain its monopoly power in the market for Intel-compatible PC operating systems warrant additional liability as an illegal attempt to amass monopoly power in "the browser market."

The Court is nonetheless compelled to express its further conclusion that the predatory course of conduct Microsoft has pursued since June of 1995 has revived the dangerous probability that Microsoft will attain monopoly power in a second market. Internet Explorer's share of browser usage has already risen above fifty percent, will exceed sixty percent by January 2001, and the trend continues unabated.

II. SECTION ONE OF THE SHERMAN ACT

A. Tying

Liability for tying under § 1 exists where (1) two separate "products" are involved; (2) the defendant affords its customers no choice but to take the tied product in order to obtain the tying product; (3) the arrangement affects a substantial volume of interstate commerce; and (4) the defendant has "market power" in the tying product market.

B. Exclusive Dealing Arrangements

Notwithstanding the extent to which these "exclusive" distribution agreements preempted the most efficient channels for Navigator to achieve browser usage share, however, the Court concludes that Microsoft's multiple agreements with distributors did not ultimately deprive Netscape of the ability to have access to every PC user worldwide to offer an opportunity to install Navigator. Navigator can be downloaded from the Internet. It is available through myriad retail channels. It can (and has been) mailed directly to an unlimited number of households. How precisely it managed to do so is not shown by the evidence, but in 1998 alone, for example, Netscape was able to distribute 160 million copies of Navigator, contributing to an increase in its installed base from 15 million in 1996 to 33 million in December 1998. As such, the evidence does not support a finding that these agreements completely excluded Netscape from any constituent portion of the worldwide browser market, the relevant line of commerce.

finis operis, © by marcel küchler 2000
comments to: marcelkuechler@dplanet.ch