Antitrust I: Principals – In Class Notes

Background

- The Sherman Act and the Clayton Act are the principal statutory foundations for US Antitrust law
- There is a Schumpeterian rub in antitrust. On the one hand, competition lowers prices and increases quality. On the other hand, creative destruction can completely upend people's lives.
    - How do we know competition works and works for us?
    - How can we balance these gains and losses?
- There are four principled themes to concern ourselves with
    - Migration of antitrust law away from formal modeling
    - Rising trends in globalization (as illustrated by cartels etc.)
    - The increasingly complicated marketplace when dealing with digital acquisitions
    - The skill set which is required of contemporary practitioners.
- Eventually everything becomes competing crystal ball gazing

Errors in Antitrust Enforcement

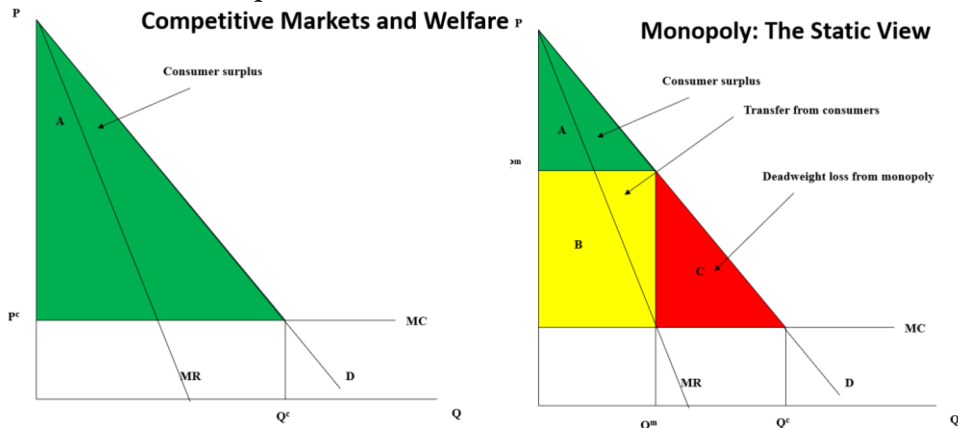
- Type I - false positive - Business conduct that is pro-competitive but wrongfully considered illegal.
- Type II - false negative - Anticompetitive conduct is not properly punished.
    - Lipsky theory is that Type I error is worse than Type II. This is speculative and childish
    - SCOTUS has bought this viewpoint is what you need to remember

Statutory Authorities and Enforcement

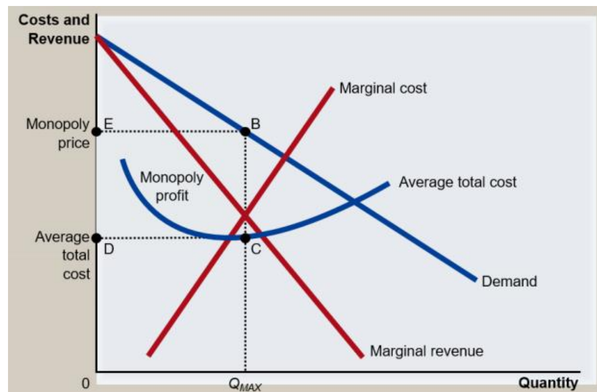
- Bear in mind that there may be a state level or international statutory framework at play too.
- Suit can be brought by federal enforcers (FTC and DOJ). Both enforce Sherman and Clayton.
- Suits can be brought by state's attorneys general under state or federal authority
- Private plaintiffs (customer / supplier / competitors)
    - Section 4 and 16 of Clayton Create a Private Right of Action - "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust law may sue … and shall recover threefold the damages … sustained"
    - A similar provision exists in Sherman
    - Also allows for the award of costs, including reasonable attorney fees.
- In order to sue, private parties require standing. Constitutional Standing enables access to a court (*Lujan v Defenders of Wildlife*). It is about acute and particularized injury which the court can redress. In antitrust, the complainant has additional requirements (Sec 4 Clayton)
    - "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws… shall recover threefold the damages by him sustained"
- Elements of Standing
    - Government plaintiffs do not need to show an antitrust injury. Only private plaintiffs must show an injury caused by anticompetitive conduct. *California v. Am. Stores Co. (1990).*
    - 1) Antitrust Injury – *Brunswick Corporation v Bowl-O-Mat* – The injury must flow from the type of injury antitrust laws were meant to prevent.
        - "Injury should reflect the anticompetitive effect of either the violation of anti-competitive acts"
            - "The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."
        - Just because you lost in the competitive market to a better mousetrap doesn't mean you have an antitrust claim. In Bowl-O-Mat, Brunswick is buying failing firms
        - *Associated General Contractors of California v California State Counsel of Carpenters (1983)* – downstream union alleges they were injured by a group boycott of employers that were coerced to enter into non-union agreement. No standing in antitrust.

- 2) Complainant party must directly engage in economic activity with defendant firm – *Illinois Brick* – You cannot be a downstream economic purchaser. Two Exceptions
  - Control exception (Footnote 16) –indirect purchaser has a right to antitrust action in situations where the direct purchaser is owned or controlled by its customer
  - Preexisting cost plus – pass on defense – an indirect purchaser may have standing when the costs initially borne by the direct purchased are passed along pursuant to a preexisting cost-plus contract and the overcharge is not absorbed by the direct purchased
    - Refined in *Hanover Shoe v United Shoe Machine Corp* – "insurmountable"
    - Plaintiff buyer must show they were compelled to raise price via overcharge
    - Profit and total sales declined
    - He could or would not have raised prices absent the overcharge
  - There are also state level exceptions to *Illinois Brick* in state statutory rules

Fundamental Economic Concepts



- Left: Perfect Competition. We set price at the level where marginal cost == marginal revenue
- Right: Monopoly. Price raised to demand curve location above MC == MR

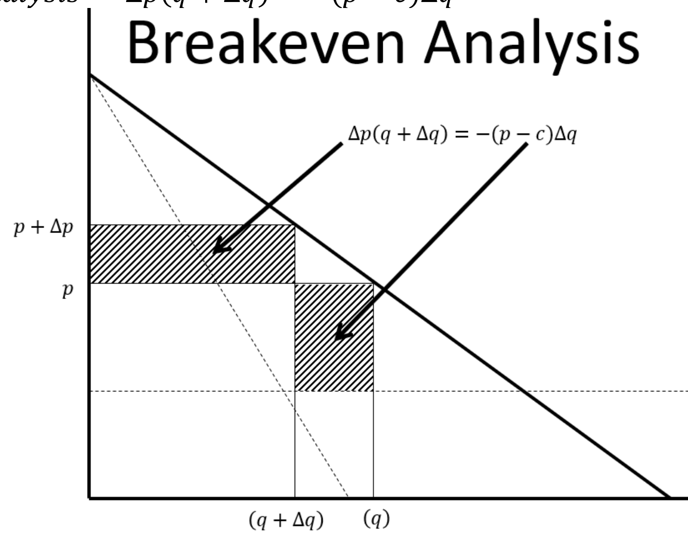


- Pricing with Market Power
  - The issue will always be: did the unlawful conduct increase market power. Market power is the ability to increase price profitably.
- Law of Demand – demand curves are downward sloping. As prices rise, quantity demanded falls
- Complements and Substitutes
  - Substitute – if price rises on product A, consumption of product B rises
    - If products are substitutes, we are dealing with a horizontal merger
  - Complement – if the price of product A rises, consumption of product B falls
    - If products are complements, we are dealing with a vertical merger

- A firm is thus defined as a monopoly IF
    - Literal: it is the sole seller of the product within market
    - Economic: its product does not have close substitutes and it can unilaterally restrict market output and raise price
    - This is distinguished from market power, which is the ability to price above marginal cost

Formulas

- $Elasticity = \frac{\%\ change\ in\ Quantity\ Demanded}{\%\ Change\ in\ Price}$
    - Demand is "elastic" when E is greater than 1
    - Demand is "inelastic" when E is less than 1
    - Demand is "unit elastic" when E=1
- $Breakeven\ Analysis = \Delta p(q + \Delta q) = -(p - c)\Delta q$



    - Thus, the optimal price will be: $\frac{1}{Elasticity} = Margin$

Questions to Ask

- Is there a *Cellophane* Fallacy?
    - In *Cellophane*, the court determines that because there is high elasticity of demand, there obviously cannot be monopoly power
    - Critical flaw, DuPont was already charging the monopoly price. This is why there were substitutes out there.
    - Analysis of monopoly power must occur at the competitive price, not the monopoly price

Mergers – Background

Statutory Authority

- The Clayton Act addresses practices the Sherman Act does not clearly prohibit, e.g., mergers and interlocking directorates
- Section 7 of the Clayton Act prohibits M&A where the effect "may be substantially to lessen competition, or to tend to create a monopoly."
- As amended by the Robinson-Patman Act, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants.
    - Note that the SCOTUS decisions are less important in contemporary litigation. It has been some time since SCOTUS took on a horizontal merger case
    - Punchline: Federal judges do use the merger guidelines, and they use them a lot. But they don't have to. This is just generally funky because district court opinions are what guide us

- So, most section 7 doctrine by federal district / appellate courts determining merger cases

Hart-Scot-Rodino Process

- Pre-merger notification begins in 1976. The principal is that it is hard to chase down deals that have already been consummated. Metaphor: "difficult to unscramble the eggs"
- You have to fill out an HSR filing. Based on certain thresholds (as of 2022). Will update annually.
  - Threshold One:
    - Value of the transaction is more than $403.9mm
  - Threshold Two:
    - Value of the transaction is more than $101mm, AND
    - One party is valued at a minimum of $202mm, AND
    - The other party is valued at a minimum of $20.2mm
- The agency reviews the filing to see if there is a *prima facie* case to stop them. If no, early termination
- You will hear the phrase "merger approval" This is untrue. What actually happens is that there isn't an initial challenge. The govt cannot "approve" mergers. FTC and DOJ can file suit post-merger
- Basic Flow:
  - filing notice → clearance → initial waiting period (30 days) → substantial compliance with 2nd request → second waiting period (30 days)
- Suit under HSR is a temporary injunction seeking to delay under Section 7 (Clayton).
  - Settlement is always a possibility (divestiture, etc.)

Horizontal Mergers

- A horizontal merger is one between firms that sell the same products, or sell products which are natural substitutes

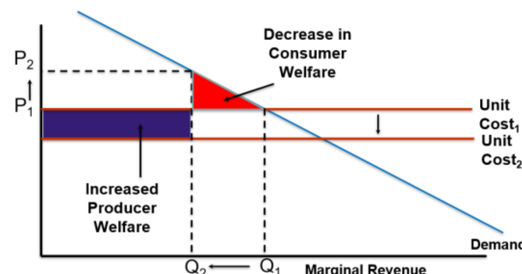
Questions to Ask

- What is the statutory authority?
  - Section 7 of the Clayton Act: "No person engaged in commerce […] shall acquire, directly or indirectly, the whole or any part of the stock […] the effect of such acquisition may be to substantially to lessen competition, or to tend to create a monopoly."
  - Applies to major stock acquisitions or mergers.
    - Can also apply to private parties making a large purchase (e.g. Musk buys Twitter)
  - Sec 5 (FTC Act) unfair methods of competition – [keep in mind]
  - Sec 8 (Clayton) interlocking firm boards – [keep in mind]
- Does the party have standing?
  - Clayton and Sherman can be enforced by the FTC, DOJ, or Private Parties
    - Private parties must show that they are harmed (a la *Brunswick*)
- Did the merging parties violate HSR filing rules? Potential Issues…
  - Did the parties fail to file an HSR despite needing do based on dollar value?
  - Did the parties merge before the waiting period passes?
  - Did the parties merge before the government granted early termination?
- Has plaintiff met their *prima facie* burden?
  - Meeting the initial burden is necessary for burden to shift to the defendant. *Baker Hughes*
    - "By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes the presumption that the transaction will substantially lessen competition."
    - Burden then shifts to defendant.
    - There are many ways to do this. Structural is preferred for obvious reasons.
  - Structural Presumption - If there is a market concentration of 30% or higher the merger is presumptively unlawful – *US v Philadelphia National Bank*

        - The presumption is rebuttable, but not often successfully (*T-Mobile*)
        - This REQUIRES a market definition
    - There are cases with much smaller shares (*Von's Grocery* (7.5%), *Brown Shoe* (less) but these are not given credence by the court anymore)
    - It is theoretically possible that there could be a theory of harm where you do NOT meet the PNB levels, but it would need to be a really bangarang theory of harm.
- What is the definition of the market? (Section 4 of the HMG)
    - You are going to need to define PRODUCT and GEOGRAPHIC market
    - Merger analysis starts with defining the relevant market" – *US v Marine Bancorp*
    - A relevant product market can be narrowed if the sub-market more accurately reflects the lines of commerce affected by the merger – *FTC v Staples*
        - *Sysco* is a good example. One need not include all competitors (substitutes). Only relevant ones. Sysco ends up only being national broadline food distribution
            - Differentiated from specialty food distribution, cash-and-carry, etc.
        - We thus operate on the Narrowest Market Principle – "This Court's task is to identify the narrowest market within which the defendant companies compete that qualifies as a relevant market." *FTC v. Peabody Energy*
    - Two products must be reasonably interchangeable to be included within the same product market in an antitrust analysis under the Clayton Act. – *US v H&R Block*
    - The market need not be the entirety of what the firm sells. The market might only include a subset of the firm's product offerings.
        - In *Promedica Health,* the market at hand was the secondary market for OB services despite the fact that the focal hospitals also provided cardio, GP, surgery, etc.
        - There are cases where the Court has said "Too narrow"
            - *US v Gillette* (Parker Pens case): DOJ alleges market is premium fountain pens that are refillable and sell between 450 and 500 dollars. Court held that the appropriate market is far too narrow.
            - UNCLE JOSH SAYS: More than six words == Fake Market
    - Antiquated Approach - *Brown Shoe* sets out practical indicia for identifying a sub-market
        - The relevant market is "products and services with which the defendants' products compete" *United States v Anthem*
        - Informal Indicia
            - Reasonable interchangeability of use – buyers view them as substitutes
            - Cross-elasticity of demand – sales data indicate they are substitutes
                - THESE ARE DIFFERENT. THINK ABOUT THEM INDEPENDENTLY. DON'T LUMP THEM TOGETHER
        - Formal Indicia
            - (1) industry recognition of a submarket,
            - (2) peculiar characteristics and uses,
            - (3) unique production facilities,
            - (4) distinct customers,
            - (5) distinct prices,
            - (6) sensitivity to price changes,
            - (7) specialized vendors
    - Economic Approach
        - Hypothetical Monopolist Test (HMT)
            - SSNIP Test – Small but Significant Non-transitory Increase in Price
                - This is usually 5%, but can be different based on industry
            - Start small and grow until the industry cannot sustain a SSNIP

- Mechanics thus become (this is iterative)
  - Could a hypothetical monopolist profitably sustain a SSNIP?
    - If no, market is defined
    - If yes, include additional products and retest SSNIP
  - How to identify additional products?
  - Those closest to the product in an N dimensional space based on diversion, critical loss, etc. Use your favorite theory
  - BE AWARE OF *CELLOPHANE* WHEN DOING THIS
- Critical Loss Analysis – Given a price increase of X, what percentage loss in unit sales would be necessary for the price hike to be unprofitable? Two factors:
  - 1) Infra-marginal Sales: Revenue increases from the price increase
  - 2) Marginal Sales: Revenues lost from the price high
    - Is 1 bigger than 2?
- Contemporary Notions
  - Functional Substitutes – Do the products serve the same general purpose
  - Qualitative Evidence
    - Treatment of the market by the firms themselves (Documents)
    - Customer and Competitive Testimony
- Econometric Analysis (entry or exit of a competitor)
- Bidding Data (wins and losses), who bids on what – *Illumina Grail*

- What is the theory of harm?
  - There is overlap in defining theory of harm and market definition, i.e., what is the harm within the relevant market. A claim under Sherman or Clayton must have a theory of harm.
  - Unilateral Effects – the post-merger entity can profitably raise prices
  - Coordinated Effects – the post-merger *market* will be conducive to collusion
  - Section 7 does not require proof that a merger caused higher prices. What is necessary is the creation of an appreciable danger based on a probabilistic judgement. – *Hospital Corporation of America v FTC*
- Do we have a Unilateral Effects Theory (Section 6 of the Horizontal Merger Guidelines)?
  - This theory of harm relates to the elimination of especially close competitors (i.e., elimination of substitutes)
  - For Differentiated Products: merged firm may profitably raise price of one or more products above the pre-merger level (HMG 6.1)
  - For Undifferentiated Products (commodities): merged firm may find it profitable to unilaterally suppress output and elevate market price (HMG 6.3)
  - This is a Williamsonian tradeoff



  - HHI – Herfindahl-Hirschman Index. Two ways the merger guidelines will consider HHI. Best citation for HHI usage is *Promedica*
    - Change in HHI
      - Increase in HHI < 100 – unlikely to have an effect
      - Increase in HHI (100 – 200) – Potentially raises competitive concerns
      - Increase in HHI > 200 – presumed to enhance market power

- Level of HHI
  - 0 < HHI < 1500 – Unlikely to have an effect
  - 1500 < HHI < 2500 – Unlikely to have an effect if the increase in HHI is less than 100, Potentially raises concerns if the change is greater than 100
  - HHI > 2500 – Presumed to enhance market power
- Formulas Follow – All of these are a screen indicating further analysis is needed
  - Diversion Ratio when P_1 increases in price – $DR_{12} = \frac{\%\ Sales\ Gained\ P_2}{\%\ Sales\ Lost\ P_1}$
    - This is the percent of sales that go to P2 when P1 increases price
  - Value of Diverted Sales $(VDS) = DR_{12} * (P_2 - C_2)$
    - This is the profit captured by firm selling P2
  - Gross Upward Pricing Pressure Index
    - $(GUPPI) = \frac{DR_{12}*(P_2 - C_2)}{P_1}$ or $(GUPPI) = \frac{VDS}{P_1}$
    - Remember that the GUPPI doesn't assume oligopoly. It keeps demand linear and serves as a poor man's merger simulation
- Exemplar invocation of unilateral effects is *FTC v Staples*
  - Market was exclusively superstores with wide selection, low prices, and inventory
    - Staples unsuccessfully argues that the market should include everyone. In practice, Staples did not react to the presence of Walmart, Costco, et al in the market. Only other office superstores
  - KEY FACT: Staples charged higher prices where it operated alone. Staples charged lower prices in locations where it had competition from Office Depot (merging party) and Office Max (remaining competitor).
    - Lower prices where it faced competition
  - If WRIGHT asks for issues with direct pricing evidence put on your economist hat
    - Endogeneity – omitted variables, reverse causality
    - How to design an experiment in these setting?
      - Random entry / exit of a competitor

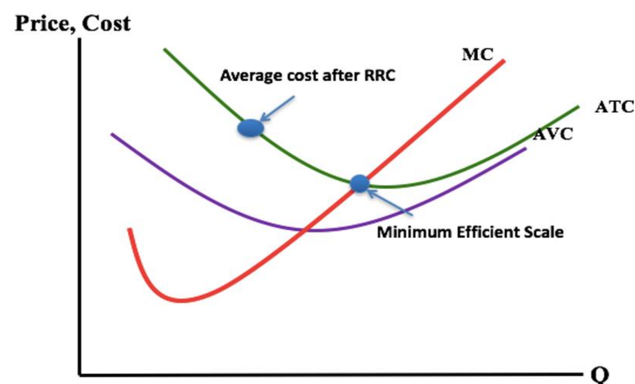
- Do we have a Coordinated Effects (Section 7 of Horizontal Merger Guidelines) theory?
  - Theory of harm is that the merged entity creates additional incentive to coordinate
  - This theory will almost always rely on a maverick firm being in play
    - A maverick firm will disrupt coordination in the market by not playing along
    - Drops price when other firms raise price. Spikes output when others lower output
  - Three conditions are necessary from the HMG for coordinated (ALL ARE NECESSARY)
    - i) Merger would likely significantly increase concentration or lead to a moderately / severely concentrated market (see above definitions of HHI)
      - Could also do this PNB style presumably
    - ii) Market shows vulnerability to coordinated conduct
      - Previous Collusion
      - Failed previous attempts at collusion
      - Is there visibility of rival firm action (price or output transparency)
      - Competitors can discipline each other for breaking the collusion
      - Short contract lengths
    - iii) Agencies have a credible basis to conclude the merger enhances vulnerability (elimination of a maverick)
      - You will not meet this prong if the maverick is the acquirer – *T-Mobile*
- Are there ways to rebut the PNB Presumption given Baker Hughes? Yes!!!!
  - Structural abnormalities in the market – *General Dynamics Corporation*

        - In GDC all the acquired coal was tied up in long term contracts so the newly merged entity would not be able to compete for new business. Foreclosure…
    - Defendant can attack the market definition and show statistics do not accurately represent the market – *FTC v Whole Foods*
        - This is your most successful path to success. Bear in mind, plaintiff is not compelled to claim the market is larger when competition can be defined smaller. *Sysco; FTC v. Peabody Energy*
    - Failing Company Defense – WRIGHT WILL NOT INVOKE – Acquired entity was failing (bankruptcy et al) and had already lost in the competitive market – *US v General Dynamics; Brunswick v Pueblo Bowl-O-Mat*
        - There's a general sense that as long as you hit Chapter 7 you can invoke failing firm. If the firm is really on its way down, but not filing yet, there will be questions of if others tried to buy. Be prepared.
    - Powerful buyers – (Section 8 of HMG) – Monopsony downstream purchasing – An extremely powerful buyer exists in the market (e.g., Wal-Mart, Amazon) which can discipline the raising of prices.
    - Ease of Entry – Structural presumption is immaterial because there are no real barriers to entry – *US v Waste Management* (Section 9 of HMG)
        - In *Waste Management*, there were other companies just outside the geographic market which could almost costlessly enter the focal market and compete.
        - "Prospect of entry into the relevant market alleviates concerns […] only if such entry will deter [the potential harm]"
        - Entry must be **timely, likely, and sufficient**
    - Efficiencies – The merger will result in economic efficiencies which will either decrease prices or increase output – *FTC v HJ Heinz*
        - Efficiencies Must Be Cognizable (Three Factors, need all three):
            - i) Merger Specific – Cannot plausibly happen without the merger
            - ii) Verifiable – Not theoretical, can be verified by the court by **reasonable means** (i.e. both likelihood and magnitude)
            - iii) Not arising from anticompetitive reductions in service
        - Only *T-Mobile* has ever succeeded with this argument, but you still have to meet it
        - These can be fixed cost efficiencies or marginal cost efficiencies
        - Out of market efficiencies do not count. Have to be in the relevant market – *Philadelphia National Bank*
- Has plaintiff met the standards for a preliminary injunction?
    - Government's burden for <u>preliminary injunction</u> is lenient – *FTC v Whole Foods*
        - "Raising questions […] so serious, substantial, difficult, and doubtful as to make them fair grounds for a thorough investigation"
    - Plaintiffs Burden at Trial is much higher – *Baker Hughes*
- Is there a *Cellophane* fallacy in the theory of harm?
    - Recall, if prices are already set at monopoly, test results will be poisoned
    - All Analysis should be conducted at the competitive price, not the monopoly price

Vertical Mergers

Background

- Vertical mergers get litigated far less often. *AT&T* was the first litigated vertical merger in the last 20 years (as of 2022). FTC says they are going to bring more
    - BORK doesn't even mention Vertical Mergers in the Antitrust Paradox
    - *Illumina Grail* is the current animal
- A vertical merger will combine firms that are up or downstream of each other, or those involving complements broadly
- <u>There is no *Philadelphia National Bank* 30% presumption here. There is no *Baker Hughes* burden shifting framework.</u>
    - If there is any substitute part of the merger, merging parties can / will simply divest.
- In short, we are in a world of Coasian Transaction costs. The theory of harm will generally be that the merged entity can raise rival's costs (RRC) or foreclose rivals from accessing an important input (a la Williamson asset specificity). If the input is ubiquitous, not so much of a problem.



Questions to Ask

- Where do we start?
    - Whatever you do, go straight to *AT&T* in a vertical merger.
- Does the party have standing?
    - Clayton and Sherman can be enforced by the FTC, DOJ, or Private Parties
        - Private parties must show that they are harmed (a la *Brunswick*)
- What effects might stem from this merger?
    - Does the merger create efficiencies?
        - You need this to merge
        - Merger firm lowers prices or increases output
    - Merged firm may be able to raise rivals costs (RRC) and do so profitably.
        - This is harmful for rivals and consumers
- What are the efficiencies that you can argue?
    - Reduce transaction costs by vertically integrating the firms…
        - Simple make or buy decision
        - The rub with this argument is that it raises the possibility of foreclosing highly specific asset to competitors
    - Elimination of double marginalization
        - You have two monopolists on top of each other. Both mark up prices. By eliminating the double mark-up consumers pay less.
        - The practical upshot is that coordination with a single monopoly (perhaps done through contract) or by ownership (merger) can result in lower prices
        - You will see lots of arguments like this. It's basic Cournot (Cost) equilibrium

- What is the theory of harm?
    - In a vertical merger, we are going to be arguing asset specificity leads to RRC (a la Ollie Williamson). The costs of contracting rises.
    - *AT&T* gives us two theories of harm that can arise (unilateral)
        - Input foreclosure (or partial foreclosure) – merged entity can deny content (inputs) to rivals
        - Raising Rivals Costs – merged entity can raise the fee for content (inputs)
- Remember that there is no *Baker Hughes* burden shifting framework in a vertical merger
    - We don't get *Philadelphia National Bank*.

Restraints of Trade (Cartels)
Horizontal Restraints of Trade – Background

- Sherman Section 1 has some funky burden shifting laws. Its more complicated than Section 7. Remember that the better plaintiff's evidence is the stiffer the burden will be on defendant.
- Sherman makes ALL CONTRACTS illegal, but Courts read in a "reasonable" clause into Sherman.
  - Personal Editorializing: Just like Con Law, this is where they are making it up [facepalm]
- Punchlines on Section 1:
  - Life starts with two buckets: rule of reason and per se. There were bright line rules
    - Per se (*Socony Vacuum)*
    - Rule of Reason (*Chicago Board of Trade*)
  - Modern approach: WRIGHT claims there is one rule of reason. I have no idea what this means. But his push is that there are *per se* issues, rule of reason issues, and quick look issues. We will end up doing the analysis to determine what bucket we are in.
    - Per se treatment is an irrebuttable presumption of anticompetitive effects. Requires no market definition. Just illegal. This is presumed from i) facial inference, ii) judicial learning and evidence, and iii) inferred from market power and circumstances
    - Quick look is a truncated rule of reason. This is structured burden shifting. Does not require a market definition. Just an assessment of anticompetitive or procompetitive effects.
    - Rule of reason is a full-blown trial. Requires market definitions and plaintiff to prove anticompetitive effects

Questions to Ask

- What is the statutory authority we are dealing with?
  - Sherman Act (Sec 1): Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract [..] shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding $100m if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the Court.
- Does the party have standing?
  - Clayton and Sherman can be enforced by the FTC, DOJ, or Private Parties
    - Private parties must show that they are harmed (a la *Brunswick*)
- Plaintiff's burden, how do we determine the bucket we are in (Per se, Quick Look, Rule of Reason)?
  - Determination of the bucket will depend on the type of evidence or the source of the inference. We have three potential sources:
    - A naked restraint where we can facially infer that a contract is anticompetitive
    - Direct Evidence (prices or output change) after a contract is enacted
    - Circumstantial Evidence that a contract has resulted in anticompetitive blah…
  - Note that we can bring up multiple forms of evidence.
  - **Personal Intuition**, per se and quick look are truncated ways of applying rule of reason philosophy. Because we know X is bad (or good), we don't need to go through the whole rigmarole
- Facial Inference – How to determine the Standard of Review from a naked restraint of trade which affects prices or outputs?
  - Per Se – Per Se violations are contracts which explicitly restrain trade (price or quantity)
    - *Superior Court Trial Lawyers Association* (SCTLA) – includes boycotts to raise prices
      - In SCTLA, DC private lawyers were assigned as public defenders. Their fees were low so they organized a boycott to increase fees.

            - Such group boycotts designed to raise prices (distinguished from organized labor strikes) are per se violations
        - *Palmer v BRG of Georgia* – includes agreements not to compete geographically
            - In BRG, bar prep companies entered into an agreement for one to not operate in Georgia and the other not to operate outside of Georgia. There is a profit-sharing agreement between them.
            - Agreements to allocate geographic markets to eliminate competition are per se violations.
        - *Catalano v Target Sales* – includes stopping competing on things
            - In Catalano, been wholesalers, as a group, decided to stop supplying credit to retailers. Credit supply was something that they previously competed on.
            - Agreements to stop competing on an aspect of pricing is a per se violation
        - MY READ: Agreeing, as a group, to change anything about how you compete == *per se* violation
    - Quick Look to Condemn Behavior - obvious anticompetitive effect from the face of the horizontal restraint but there are some "plausible" efficiencies. We are looking to condemn.
        - In short, we are looking at inherently suspect restraints (*Polygram*). The Quick Look permits the plaintiff to avoid full rule of reason analysis (including pleading and proof of market power) if it demonstrates the conduct at issue is inherently suspect or bears a close family resemblance to conduct previously held illegal. Defendant must provide a procompetitive justification for their action.
            - There are limitations to the "close family resemblance" logic - *1-800 Contacts*
                - "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets"
                - A tangential relationship to price (e.g., some general advertising restriction) does not satisfy Plaintiff's burden
                - Trademarks, for example, can be viewed as procompetitive
                - Per *Actavis,* general policy goals of relevant IP laws must be considered
        - *FTC v Polygram* – joint cessation of marketing is anticompetitive
            - Polygram and Warner developed a joint venture to distribute the 1998 Three Tenors concert recording. In doing so, they jointly decided to cease all marketing and promotions on the prior Three Tenors concerts they respectively held the licenses for.
            - Court determines the joint cessation of marketing efforts by the firms has no procompetitive justification
            - Note, differentiate the agreement (marketing) from the joint venture (which would be dealt with under Clayton)
        - *NCAA v Oklahoma Board of Regents*
            - NCAA limited the number of football games ABC and CBS would broadcast (14 each). Oklahoma and UGA independently setup a contract with NBC. NCAA moves to discipline them
            - NCAA's arguments are completely rejected by the Court:
                - NCAA must protect amateur sports competition
                - NCAA must protect the market for college football through mutual agreements of member universities
                - NCAA must maintain competitive balance across schools through access to TV (OK and UGA cant be the only ones)
                - NCAA must protect ticket sales for the in-person games

- If you are making a "maintain competitive balance argument" or a "out of market efficiencies argument" you will ALWAYS LOSE
    - *Arizona v. Maricopa County Medical Society* – you cannot set maximum prices
      - In Maricopa, competitors agreed to set MAXIMUM prices (i.e. max fees for services that physicians could receive).
      - Maricopa's arguments are rejected because they are unlikely to enhance competition. Setting max price can harm quality and thus the competitive process. Rejected arguments
        - Setting the max fee will make it possible to provide consumers of healthcare with a form of insurance that otherwise wouldn't exist
          - Complete coverage and lower premiums
        - Carveout: if congress had done this, certainly ok
    - *National Society of Professional Engineers*
      - In *Engineers*, society did not allow PEs to engage in competitive price bidding. Price information was only shared after hiring was made. The society argued that this improved safety by preventing undercutting
      - Argument is rejected because the society is short circuiting competition.
      - You cannot implement an unreasonable restraint on trade by saying that competition is not reasonable.
  - Quick look Variant 3 – Facial inference says that there are restraints in the contract but there are TONS of pro-competitive justifications. We are looking to exonerate in these cases.
    - WRIGHT notes no case law here. Use your best judgement
- Direct Evidence – How to determine the standard of review when there is direct evidence of prices or output changing as a result of the contract?
  - Per Se Illegality – There is an explicit agreement which has resulted in prices changing, and zero pro-competitive efficiency arguments
    - *Socony Vacuum*
      - Board set up agreements which eventually matches each oil producer with a refiner through the spot market for gasoline to stabilize prices and the availability of gasoline
  - Quick Look Variant 2 – There is an explicit agreement which has raised prices but *de minimis* procompetitive justifications. We are looking to condemn this based on direct evidence
    - WRIGHT notes no case law here. Use your best judgement
  - Quick Look Variant 3 – There is an explicit agreement which has raised prices (or changed output) but there are TONS of procompetitive justifications for doing so.
    - *Continental TV v. GTE Sylvania*
      - Vertical Restraints are subject to rule of reason.
      - *Sylvania* is a TV manufacturer. Continental is a retailer. Sylvania decides to stop selling to wholesalers and begins selling to franchisees. Things go bad and Sylvania pulls Continentals franchise license.
      - Counterbalance this with *Monsanto*, where vertical restraints were held as anticompetitive
    - *BMI*
      - BMI creates a market for music and does blanket licensing of hundreds of artists that could not do it alone. Flat price. In effect it is doing price fixing.
      - This is permissible because without the price fix **the market would not exist**
- Circumstantial Evidence – How to determine the standard of review when there is circumstantial evidence that prices or output may be changing as a result of a contract?
  - Full Blown Rule of Reason Across the Board – *Chicago Board of Trade*

- What is the standard of review for Per Se illegality?
    - *Socony Vacuum* is our original case.
        - SV set up a committee, which eventually matches each oil producer with a refiner through the spot market for gasoline to stabilize prices and the availability of gasoline
    - Two requirements (both required):
        - An agreement between competitors
        - "raising, fixing, pegging, or stabilizing prices"
            - This can be done through prices or quantity produced
    - There are no defenses if we are in this situation. It is an **<u>irrebuttable presumption</u>** of an unreasonable restraint of trade.
- What is the standard of review for Quick Look?
    - You still need an agreement between competitors
    - There is no definition of relevant markets, market power, etc.
    - The presumption that a restraint of trade is reasonable is **<u>rebuttable</u>**
- What is the standard of review for Rule of Reason?
    - Requires an analysis of the state of competition within a well-defined agreement. Four things are required:
        - (i) definition of the relevant product and geographic market,
        - (ii) market power of the defendant(s) in the relevant market,
        - (iii) and the existence of anticompetitive effects.
    - The court will then shift the burden to the defendant(s) to show an objective procompetitive justification.
- What is Defendants Rebuttal Burden?
    - As discussed above, if we are in a per se violation situation, there is no rebuttal.
    - Procompetitive effects can get you out of a violation, but there is a strong presumption against a procompetitive effect
        - *BMI* is about the only one. The price fixing was necessary to create the market
        - You cannot state that competition in the market is the problem you are trying to solve – *Engineers*
        - You cannot fix prices (even maximum prices) by saying that this will improve competition in an already established market – *Maricopa*
        - Both *Maricopa* and *Engineers* limit the scope of efficiency defenses available to defendants
        - Scope of the *Engineers* holding…
            - The argument is that buildings will fall down if we compete on price. Court rejects this. Per se illegal. It is not cognizable that eliminating competition is reasonable. You cant say "we are not going to compete and that will have benefits"
            - You cant say "this is good because competition is bad"
        - What limits does *Maricopa* place on rebuttal arguments?
            - Factual filter, it must be true that the agreements are necessary to get the efficiency benefits.
- Are we dealing with a single entity?
    - If we are dealing with a single entity, then you have no issue whatsoever
    - This also applies to wholly owned subsidiaries – *Copperweld*
        - You will not get the same benefits out of partially owned subsidiary. Emphasis on WHOLLY owned
    - There are limits, *American Needle*

        - In American Needle, the NFL granted an exclusive license to Reebok. The court struck this down because the TEAMS all compete with each other
        - This is different from say, General Motors, where there is competition between the individual brands, but the individual brands are wholly owned by the parent firm
- Is there actual evidence of an agreement?
    - If no agreement, we don't have a violation of Section 1.
    - To prove an antitrust conspiracy, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." – *US v Apple*
        - *Apple* is kind of boring because they actually met and set prices.
    - Opposing views on inferring an agreement from behavior (Posner Turner Debate)
        - *Brooke Group* – Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism [is] *not itself unlawful*
        - *American Tobacco* – The results are what matters. Is the result parallel pricing and raising prices by competitors? If so, that's illegal
            - Note that *American Tobacco* requires more than just concomitant movement. See below. It is a necessary but not sufficient condition.
    - Two standards exist for inference of an agreement. Parallelism Plus and Hub and Spoke
    - Parallelism Plus Model (I do not have citations for this)
        - 1) You must have parallel pricing or output
        - Plus Factors can Include (see similarity to HMG definitions of markets that facilitate coordinated actions)
            - Communication or opportunity to collaborate
            - Rational motive to act collectively (e.g. inelastic demand, barriers to entry)
            - Actions inconsistent with self-interest sans collusion
            - Past History of collaboration
            - Oligopoly industry with homogenous products
            - Industry Performance
    - Hub and Spoke Agreement – *Interstate Circuit*
        - An agreement and a letter which called for mutual action on the part of parties (coupled with conduct) will prove an actual agreement
    - Caveat –agreements must be ***economically rational*** for the colluding parties to enter into. Evidence must **"tend to exclude the possibility"** that the parties acted independently *Matsushita; Monsanto*
        - In *Matsushita*, the court held that there must be both:
            - i) direct or circumstantial evidence that reasonably tends to prove the existence of an agreement
            - ii) plaintiff must present evidence that tends to exclude the possibility that parties acted independently
        - In *Monsanto;* the court held that a plaintiff must show direct or circumstantial evidence that **tends to exclude the possibility** that the manufacturer and other distributors were acting without coordination.
            - Monsanto had confronted several distributors and threatened to stop providing herbicide if the distributors continued to sell below Monsanto's desired price.
            - Monsanto approached Spray-Rite about Spray-Rite's discount prices based solely on the complaints of competing distributors, (NOT CUSTOMERS) which serves as circumstantial support for a conspiracy to fix prices.

            - As a result, there was sufficient evidence to find that Monsanto conspired with distributors to fix prices, and the judgment of the court of appeals is affirmed.
        - Because the conspiracy would have been economically irrational, and super risky to try, there was no agreement
    - Synthesizing Plus Factors
        - Factors that distinguish between agreement and conscious parallelism
            - Communication or opportunity to communicate (trade associations)
            - Conduct too complications to be explained by mere parallelism
            - Conduct lacking an evidence efficiency explanation
        - Factors suggesting the industry is conducive to coordination
            - Industry features (few products, homogenous products, barriers to entry, price transparency, frequent and small transactions)
            - Past history of coordination
            - Rational Motive to behave collectively (e.g. inelastic demand)
    - *Twombly* is lurking around here too. Defendant can demand that Plaintiff show the agreement is economically rational prior to discovery. So, you can get summary judgement before discovery if the alleged agreement is not economically rational
        - In *Twombly,* the court held that state a claim under § 1 of the Sherman Act, the complaint must contain enough factual material to suggest that an agreement existed between the defendants. This is before discovery! Can get summary judgement!
    - Always remember, a vertical agreement is just fine! They are subject to the Rule of Reason - *Continental TV v. GTE Sylvania*

Monopolization – Section 2
Background

- NEVER FORGET: It is not illegal to be a monopoly. It isn't even illegal to charge monopoly prices (*Trinko*). It is only illegal to use your monopoly power to unfairly hinder trade.
  - "Simply possessing monopoly power and charging monopoly prices does not violate § 2" – *United States v Grinnell Corp*
- Section 2 of Sherman starts getting into the lane of doing stuff on my own. There can, of course, be more than one party, but the intuition is that Defendant is doing something that raises rival's costs or somehow hinder competition.
  - Section 2 is thus the struggle between distinguishing exclusionary conduct and monopoly power that is earned through outcompeting others and illegal conduct to attain or maintain a monopoly.
- At root, most of Sherman 2 is either a Raising Rival's Costs (RRC) or a Predation paradigm
  - Predation is sort of poo poo'd
    - The issue with predation arguments is that once the rival is driven out of business the firm needs to make up the dollars (presumably by charging monopoly prices). But other firms can just enter the market and prevent monopoly prices
  - RRC is a bigger issue. Four step framework:
    - Step 1: Calculate RRC
    - Step 2: Determine power over price
    - Step 3: Determine any efficiencies
    - Step 4: Determine overall effect on consumers
- Never forget the *Grinnell* Formulation
- Note also that in Section 2 doesn't have clear burden shifting rules. The closest thing we have is life after *Microsoft*. (see below)

Questions To Ask

- What is the statutory authority?
  - Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ."
  - Section 2 establishes three offenses, commonly termed "monopolization," "attempted monopolization," and "conspiracy to monopolize."
- Does the party have standing?
  - Clayton and Sherman can be enforced by the FTC, DOJ, or Private Parties
    - Private parties must show that they are harmed (a la *Brunswick*)
- Have we met the Grinnell Formulation? Does Defendant have both:
  - i) possession of monopoly power in the relevant market
  - ii) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product
    - This does not include luck, skill, foresight, better products, or business acumen
- How To Determine Exclusionary Conduct - *Microsoft*
  - If you asked 100 attorneys, and asked why the DC Circuit opinion is important. They will say, *Microsoft*, because it produced a burden shifting framework
  - TO BE CONDEMNED AS EXCLUSIONARY, A MONOPOLIST'S ACT MUST HAVE
    - AN ANTICOMPETITIVE EFFECT.
    - IT MUST HARM THE COMPEITITIVE PROCESS AND THEREBY HARM CONSUMERS.
    - IN CONTRAST, HARM TO COMPETITORS WILL NOT SUFFICE
  - Flow for Unitary framework from Microsoft

                - Plaintiffs Burden
                    - Step 1: establish theory of harm to competition, not just to competitors
                        - For private plaintiff, establish antitrust injury
                    - Step 2: establish anticompetitive effects
                - Defendants burden
                    - Step 3: Establish procompetitive justifications
                - Step 4: back to plaintiff, establish that anticompetitive harm outweighs procompetitive justification
                    - This differs slightly from *Trinko* and *Aspen* (where there is no real Step 4)
                - Note that writing usually does not get to step four from opinions, judges will attack step 3 and step 4 to determine the way that they are going
                - This differs from rule of reason cases, where you will get deep into step 4
- What constitutes monopoly power in the relevant market?
    - "Market power is the ability to raise prices above those that would be charged in a competitive market" *NCAA (1984)*
    - See above market formulation questions from Clayton (Mergers) Section - LINK
    - Direct Methods
        - Staples-Office Depot
        - Infer from effects of the action
    - Indirect or Structural
        - ALCOA 30(no)-60(probably)-90(definitely) rules
        - Entry conditions
        - Changes in prices and cost mark ups
    - Mind the *Cellophane* Fallacy!
    - Note: Even if a firm lacks monopoly power in a primary market, it can possess monopoly power in a secondary aftermarket based on purchasers being locked in.
        - In *Eastman Kodak*, independent groups began to offer to service Kodak equipment on the cheap. Kodak didn't like this and decided the only sell parts to buyers who hire them to service things (or self service)
        - Court knocks this down. Holds: there is no legal presumption that a single brand cannot constitute a single market, and here, the relevant market is specific to Kodak's equipment.
- What is plaintiff's theory about how defendant is harming competition?
    - Exclusive Dealing – Exclusive dealing is saying to deal with me you cannot deal with them.
    - Unilateral Refusal to Deal – Firm (by itself) makes the decision no longer to interact with a business partner (or potentially not start)
    - Tying (Bundling) – Agreement that a party will sell one product but also if the purchaser buys a different product.
    - Predation
        - NOTE: Innovation based theories of harm have a watered-down standard. It isn't but for. In *Microsoft*, it is inferred from the foreclosure. But if someone is innovating, they get some extra credit and the court is more lenient
- How do I show Anticompetitive Effects?
    - Method 1: proof of actual effects (price and output data are visible)
    - Method 2: indirect evidence of actual or likely effects
        - Inference from substantial foreclosure and barriers to entry OR
        - Foreclosure relative to MES (i.e. RRC)
            - This is where the lawyering will happen
- How to calculate the foreclosure rate?

- Market foreclosure or vertical foreclosure, is the production limitation put on a producing organization if either it is denied access to a supplier (upstream foreclosure), or it is denied access to a downstream buyer (downstream foreclosure)
- Foreclosure rates of less than 40% typically grant summary for the defendant (*Areeda and Hovencamp*)
- Naïve Foreclosure – Percent of the market participating in the allegedly illegal program
  - This could be discounting etc.
  - This is wholly detached from an RRC theory of harm.
- But-for Foreclosure – Percent of the market share gained from the exclusive dealing program (i.e. firm normally would have 45%, ends up with 60%, thus, 15%)
  - More accurate representation of exclusive dealing
- Contestable Share – What fraction of the market that we actually compete over did the exclusive dealing program get you?
  - Firm A always has 35%, Firm B has 25%. We are competing over 40%
- No Foreclosure Argument – Always argue there is no foreclosure because we will compete again. Contract length becomes a big deal here.
- NOTE: plaintiff and defendant get two bites at foreclosure
  - First, calculate the foreclosure the way that I want (the way I look good)
  - Second, say even if you calculate it the other way, it doesn't matter

- Was the alleged conduct illegal exclusive dealing or exclusive contract?
  - Don't forget the *Grinnell* formulation
  - You are going to need to show the foreclosure rate. How was the competitor harmed?
    - If foreclosure is less than 40%, you generally get summary for Defendant - *Areeda and Hovencamp*
    - The theory of harm here is going to be that foreclosure has raised rival's costs sufficiently that they can no longer operate at minimum efficient scale
  - "First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice" - *Microsoft*
  - Prima Facie Rule of Reason for Exclusive Dealing Based on Foreclosure
    - Monopoly power in the market (*Grinnell*)
    - Substantial Foreclosure based on the restraint. Examples:
      - Qual or Quant Assessment of the foreclosure
      - Asset Specificity of the resource
      - Duration of the agreement (how soon until we can compete again)
        - Contracts terminable at will or for less than a year are going to be presumptively lawful
      - Entry conditions
    - Proof of an anticompetitive effect
  - There are procompetitive effects that can come from exclusive dealing
    - Alignment of incentives between vertically integrated parties
    - Intensified competition for the distribution
    - Put on your economist hat. Are we eliminating double marginalization? Are we increasing competition?
  - Competitors are prohibited from colluding or excluding another competitor in restraint of trade - *JTC Petroleum*
    - In JTC, there is evidence that the pavers and producers engaged in both collusive and exclusionary conduct. The evidence of the unjustified higher prices charged to alleged cartel members and the pretextual denials of business to JTC are a sufficient basis on which a reasonable jury could conclude that the pavers illegally colluded

    - Essentially, defendants paid local asphalt suppliers not to deal with JTC, a rival, because JTC would not join the cartel.
- Firms with existing monopoly power cannot use said power to destroy a nascent competitor. *Loraine Journal*
    - Generally, a private business has the right to refuse business partners, but in the case of a firm with market power, the right to unilaterally refuse to do business with others is limited
    - Plaintiff must prove defendant engaged in anticompetitive conduct with:
        - i) the intent to monopolize
        - ii) a dangerous probability of successful monopolization
    - Loraine had 99% newspaper market share. When a radio station opens (WEOL) Loraine refuses to accept advertisements from anyone who partners with them.
    - The Journal's policy is not merely a form of aggressive competition. Rather, the Journal's policy is intended to eliminate competition altogether.
- A firm is violative of Sherman if it possesses monopoly power and maintains it with exclusionary conduct. Conduct that has the effect of preventing competition can also be exclusionary – *ALCOA*
    - ALCOA creates two foreign subsidiaries (no direct ties, board overlaps) to control the secondary aluminum market. ACLOA monopolizes the primary aluminum market
    - Alliance members entered into agreements in 1931 and 1936 concerning aluminum manufacture and sale. The 1936 agreement set production quotas for each member that included aluminum imports into the United States
    - ALCOA then uses its monopoly on the primary market to control the secondary market.
- Exclusive dealing contracts are not permissible when a firm has monopoly power and is using exclusive contracts to maintain it by preventing entry – *McWane*
    - McWane had a ~90% market share in pipe fitting. When an international rival entered it tied all its distributers up in exclusive contracts (threats of shut downs and raised prices for violation) and marked up prices.
    - The theory of harm in *McWane* is a vanilla RRC argument. *McWane* has a full support program. If you have an exclusive deal, prices drop
- Exclusive dealing law is frequently applied to conduct that is not exclusive dealing (buyer is free to buy elsewhere), but there is a significant penalty for doing so – *McWane*
    - The theory of law is the same as if there actually was exclusive dealing
- An exclusive-dealing arrangement is unlawful if the accused monopolist uses the arrangement to maintain or expand monopoly power – *Dentsply*
    - In *Dentsply*, the monopolist began terminating relationships with dealers (fake teeth) that also stocked the firm's competitors
    - District court found no foreclosure, but the appellate court reasoned that although competitors could still directly access dental laboratories, the benefits provided by dealers, including reduced transaction costs and discount pricing, significantly decreased the competitive feasibility of selling directly to labs.
    - The effect was thus to foreclose potential competition by excluding competitors from the market
- Foreclosure in software. You can create foreclosure through de facto exclusive deals – *Microsoft*
    - This was the culmination of the default browser being installed, the default browser not being able to be uninstalled, and Microsoft's exclusive contracts with Internet Service Providers which required IE to be used 85% of the time.

        - The default browser, at this time at least, also means that it is overwhelmingly likely to be the browser that is used by people
        - I am seriously doubtful that defaults would carry this form of weight today
- Was the alleged conduct Unilateral Refusal to Deal?
    - Don't forget the *Grinnell* formulation
        - Unlike the others, we only need to show monopoly power. We do not need to show the maintenance prong. Plaintiff's prima facie burden is lessened here
    - "In the absence of any purpose to create or maintain a monopoly" Sherman does not restrict who we trade with – *US v Colgate*
    - What constitutes "In the absence of any purpose to create or maintain a monopoly"
        - There is a circuit split as a result of *Aspen* v *Trinko*
            - Under the *Aspen* rules, pure, there's a violation if you have a profitable course of conduct and it is terminated with no business justification
            - More liberal circuits, you sacrificed profits from a potential course of action… why?
            - Be wary of questions about "ALL COURTS" in here
    - Was there a profitable course of dealing that is ended with no legitimate business purpose?
        - If there is no legitimate business purpose for ENDING a relationship, this is a violation of Sherman 2 – *Aspen Ski*
        - There's no burden of proof for the plaintiff
        - Thus, the existence, or lack thereof, of a legitimate business purpose for ENDING a business relationship is dispositive
            - In *Aspen Ski*, defendant killed a ticket sharing program with a competitor once it had a local monopoly. Aspen argued that Plaintiff offered an inferior product and refusal to include Highland in the all-mountain pass was an attempt to disassociate from an inferior product. Numerous witnesses at trial contested claims of Highland's inferiority, and Ski Co. admitted to its willingness to associate with inferior products in other markets. This argument is rejected by the court.
    - Is the claim that the firm failed to initiate a potentially profitable operating agreement?
        - Defendants refusal to coordinate with competitors does not generally violate § 2 (unless there is another theory of harm besides unilateral refusal to deal) - *Trinko*
            - In *Trinko,* Verizon had been dragging its feet about complying with the 1996 Telecommunications Act. It was subject to FTC consent decrees, but nothing in the Telecom Act created an antitrust liability as well.
    - NOTE: Unless a statutory provision compelling coordination between firms specifically adds antitrust scrutiny language, there is no such additional antitrust scrutiny – *Trinko*. This is also known as an implied immunity doctrine – *Credit Suisse*
        - The 1996 Act in *Trinko* expressly states that this obligation does not affect liability for antitrust violations, meaning it is subject to ordinary antitrust standards.
        - Thus antitrust does not impose a duty to deal. Verizon was still violating the telecom act. But not Sherman.
        - Bearing this in mind, statutes and contract can impose a duty to deal. But they must do so explicitly
    - NOTE: A Broad Reading of *Aspen Ski* suggests any evidence of profit sacrifice might violate Section 2 (10th Circuit says this extends to offers). Keep in mind if WRIGHT gets sneaky
        - There is a circuit split in here (9th). In *FTC v Qualcomm*, the 9th held that you need a unilateral termination of a voluntary and profitable prior course of dealing, the only conceivable rational or purpose for termination is to sacrifice short term benefits in order to obtain higher profits in the long run

        - In *Qualcomm*, Defendant had a chip monopoly (90% CDMA). It only sold to OEM manufacturers if they paid a licensing fee as well (patent exhaustion issue). FTC alleges refusing to deal with rivals by not licensing its patent portfolio to them unless they agreed to the licensing policy.
      - Thus, refusal to deal products that the defendant already sells in the existing market to other similarly situated consumers is not an immediate violation.
- Is there a tying (bundling) issue?
  - Always remember the *Grinnell* formulation.
  - For tying, the agreement must mandate that in order to get product A, you must also purchase product B – *Northern Pacific*
  - Tying cases can often be cast as exclusive dealing cases. Be creative in which one you want to argue based on burden.
  - Why do firms tie products? (Keep in mind for competition arguments)
    - Anticompetitive Arguments
      - Maintain Monopoly
    - Procompetitive argument
      - Quality (franchising)
      - Production Efficiency (automobiles)
      - Consumer preference (shoes)
      - Evasion of price controls
      - Price discrimination (razors and blades, video games and consoles)
  - Plaintiffs Burden (*Per Se* test for a tying arrangement) – This is a strange per se test because it permits the defendant to rebut. Odd wording
    - There are two products being sold
    - Plaintiff was required to buy both to get the one it wanted (coercion)
    - Defendant has "power" in the tying products market
    - Arrangement affected a "substantial" amount of commerce
      - If these elements are shown, then defendant may rebut with business justification for the tying
        - Elimination of Double Marginalization
        - Price Discrimination (video games and consoles)
    - If the defendant does not have significant market power OR the arrangement doesn't strongly hinder competition we are subject to rule of reason
      - This ends up just meaning "lower bar" because *per se* is watered down in tying and permits a defense.
    - Tying arrangements involving software-platform products will be judged under rule-of-reason analysis - *Microsoft*
  - How do we determine if there are two products being sold?
    - The inquiry "turns not on functional relationship between the [products], but rather the character of the demand for [them]" *Jefferson Parish*
    - There are only two products if there is "sufficient consumer demand so that it is efficient for a firm to provide [them] separately" *Eastman Kodak*
      - Thus, products are only "separate" if they could be profitably marketed separately
        - You'd never get surgery without anesthesia – *Jefferson Parish*
        - Cars and tires are separate. Computers and keyboard are separate
      - So, the DC circuit carves out an "exception" on the two products test for software. End up with rule of reason for tying claims in software as opposed to a per se rule. – *Microsoft*
  - How do we determine if there has been coercion (requirement)?

        - Refusal to sell or tremendous penalties for buying independently
        - First priority price matching agreements – *International Salt*
        - Penalties in the primary market for not buying in the secondary market – *United Shoe Machinery Corp*
            - In *United Shoe*, the company tied repairs and other input stuff to the shoe manufacturing machine. Huge penalties if you didn't use their materials for maintenance and production.
    - How do we determine if there is power in the tying market?
        - This is going to be standard rule of reason monopolist stuff.
    - How do we determine a substantial amount of commerce?
        - This is stupidly low
        - $60,000 - *United States v Lowe's*
        - "Not an insubstantial amount of commerce" *Northern Pacific Railway*
    - What about tying that permits the tied product to be purchased elsewhere if the seller doesn't match lowest price?
        - This is a per se violation *International Salt*
        - In *International Salt*, the firm tied "salt tablets" (unpatented) for use to their leased (patented machines). You could buy the tablets elsewhere if IS was unable to meet the lowest price bid from a competitor.
        - Thus, requiring lessors of patented machinery to purchase unpatented products is an unlawful tying. A lawfully conferred monopoly cannot be used to foreclose competition in the market for additional, unpatented products.
        - Even though some of the leases allow a lessee to purchase salt on the open market if International Salt does not match the lowest price, the lease agreement gives International Salt a first priority on all salt purchases of equal price.
    - You cannot have an unlawful tying arrangement if the company lacks market power – *Jefferson Parish*
        - In JP, 70% of local patients went to OTHER hospitals
        - Plaintiff bears the burden of showing the arrangement unreasonably restrains trade
    - Is the tied product software based?
        - If so, you get rule of reason, or a deeper rule of reason – *Microsoft*
        - The "per se" nature of tying is a little flawed because defendant can present efficiency defenses. This is something of a vestigial hold over from *International Salt* and *United Shoe Machinery*. But *Microsoft* seems to suggest more "rule of reason" is allowed due to the commonality of bundling in software
- Is the issue predatory pricing?
    - Never argue predatory pricing unless you want to lose, arbitrage your way out of predation if at all possible. Make another argument
        - As plaintiff, I want to avoid predation. As defendant, I want to be in *Brook Group*
    - Remember the *Grinnell* formulation
        - The Grinnell formulation is strange in predation though, because I do not need to show market power (monopoly) if I meet the other elements
    - Basics of a predation argument
        - Make sales unprofitable by competing below costs
        - Induce Rival's Exit
            - Recall, in exclusion we do not need the rival to exit
        - Means to recoup dollars after the exit of a rival – *Matsushita*
            - This is unlikely because future benefits are speculative and asymmetric costs disfavor the competitor
    - TEST FOR PREDATION – *Brooke Group.* Also called a *Areeda-Turner* test
        - I must price below cost or the relevant measure of cost

    - There must be a ***dangerous*** probability of recoupment
- Is the defendant charging different prices to different purchaser?
    - This can be a violation of the Robinson-Patman Act if the effect of the price discrimination is to substantially harm competition. Two options from *Utah Pie*
        - Competition is immediately harmed
        - The price discrimination slowly drags prices to unreasonably low levels
            - The slow drag can be viewed as evidence of predatory intent
    - A plaintiff can make a predation claim based on this even if their sales are rising during the supposed period of predation (they also had to cut prices to move product) – *Utah Pie*
- What if pricing is not the mechanism for exclusion, what if it is discounts or pricing?
    - The rule of reason standard is still the standard we apply – *ZF Meritor*
        - In *Meritor,* Defendant was offering rebates to purchasers that hit a certain threshold percentage of sales. Defendant was permitted terminate the agreement if that percentage was not met. These agreements also required Defendant to be listed as a preferred vendor, required some competitors to be removed, and offered preferential pricing
        - Court determined that a jury could reasonable find that such agreements harmed competition, and that agreements could be analyzed under rule of reason.
        - *Meritor* is not the law of the land. Its just a court whose head exploded trying to deal with these problems
        - Importantly, we can apply such analysis in predation to bundling, exclusive dealing, discounting, monopsony, etc.
- Are there loyalty discounts at play?
    - These can come in two forms
    - When you hit X threshold, you get a discount on all future purchases
    - When you hit X threshold, you get a discount on all made purchases and all future purchases
    - SCOTUS has endorsed the aggregate calculation – *Brooke Group*
        - You sum up all the revenues, and you sum up all the costs, if the revenues are more than the costs then you are made in the shade
- Keep in mind that you need to be considering the "relevant market"
    - So, if you are using a loss leader (e.g. X-Box to make the money on games), you might survive the first prong that you are pricing below costs
    - But you are unlikely to survive the second prong of *Areeda-Turner* because there is no plausible way you are going to make the dollars up on the console sales

Horizontal Merger Guidelines

§1 – Overview

- These guidelines outline the techniques and practices for DOJ and FTC re Clayton, Sherman, and the FTC Acts. Primarily, if under Clayton, a merger "substantially lessens competition"
- There is a balancing act in this predictive exercise between lessening and promotion competition
- There is no one size fits all approach. It is a fact specific process in applying numerous tools

§2 – Evidence of Adverse Competitive Effects

- Agencies can consider any reasonably available and reliable evidence. This is not exhaustive
- **2.1 Types of Evidence**
  - **Actual Evidence Post Merger –** observed price increases. Likely imminent harm
    - **Direct Comparisons based on experience**
      - What has happened in similar markets. Natural Experiments. Impact of recent mergers, entry, expansion or exit in the relevant market
      - Market Share and Concentration (See Sections 4 and 5)
      - Substantial head to head competition – are the merging parties competitors or would they likely have been (Section 6). Look to market definition (Sec 4
      - Disruptive Role of a Party – elimination of a maverick firm
- **2.2 Sources of Evidence**
  - **Merging Parties** – Documents, testimony or data from the parties through review. Organic documents are more persuasive than advocacy materials. This could relate to intent to raise prices, change output or capacity, change R&D efforts, or change product holdings
  - **Customers** – How customers will likely respond to the merger or a price increase. Be aware of customer conflicts of interest
  - **Other Industry Participants –** Suppliers, analysts, trade associations. Rival firms are typically discounted, but they can provide relevant and instructive facts.

§3 – Target Customers and Price Discrimination

- When examining potential adverse effects, realize different customers can be affected differently
  - Not all customers need to be affected for something to be anticompetitive
- For price discrimination to be feasible, we need two conditions
  - Suppliers engaging in price discrimination must be able to price differently to targeted customers. (large v small buyers, for example). If small buyers are hurt, this counts
  - The targeted customers must not be able to arbitrage the price increase by purchasing through other sellers (i.e. outside option).

§4 – Market Definition

- Market definition assists the agency in determining the line of commerce which might be affected and identify relevant market information (shares, concentration, etc). This focuses exclusively on issues of demand substitution and the willingness / ability of customers to select away
- **4.1 Product Market Definition –** Relevant product substitutes
  - **Hypothetical Monopolist –** Does the product market contain sufficient substitute products that the firm cannot profitably raise prices. This is done with a small but significant non-transitory increase in price (SSNIP). Maximization
    - Close products will be included in the relative market. Further products will not
  - **Benchmark Prices and SSNIP Size –** SSNIP starts with prices absent the merger. Usually this is current prices but it could be something else based on market factors. SSNIP is usually 5%. This is based on the prices of the value added activities of the firm, not the component inputs.
  - **Implementing HMT**

        - Determining substitution away can be based on market research, surveys of buyers, conduct of participants, historic data, downstream competition, etc.
        - Can also do a critical loss analysis (do profits rise based on X).
    - **Product Market Definition with Targeted Customers –** If a HMT could profitably target a subset of customers the agency can define the relevant market around those customers
- **4.2 Geographic Market Definition –** This is somewhat obvious if there are relevant bounds on the physical market either due to penetration or limitations on a product. It can depend on tariffs, transportation costs, reputation, etc.
    - **Geographic Market Test Based on Supplier Location –** an HMT of the relevant market will consider product markets, as discussed above, and geographic markets, if no other suppliers exist within that market. Things to consider
        - How consumers have shifted geographic purchasing in the past
        - Cost of transporting the product
        - Need for supplier-customer geographic proximity
        - Evidence of customers making business decisions based on supplier locations
        - Costs and delays of supplier switching across geographic markets
    - **Geographic Markets Based on Locations of customers** – an HMT could further discriminate based on customer location. Can this be defeated by customer arbitrage
        - **ARE WE TALKING ABOUT CASH AND CARRY**
        - Do suppliers have many locations and discriminate based on customer location
        - Merging parties are in Cities X and Y, but transportation between X and Y is prohibitive.
        - Do foreign competitors operate within the market, or do regulatory prohibitions keep them from operating within the market?

§5 – Market Participants, Market Shares, and Market Concentration

- **5.1 Market Participants –** all firms that earn revenues in the relevant market
    - This also firms not in the market, but could diversify in without significant sunk costs. This is a rapid entrant. Rapid entrants might
        - sell out of the geographic market
        - sell to different customers
        - possess the assets necessary to supply with a relatively homogenous good
- **5.2 Market Shares –** Percent of the market serviced by the firm.
    - This is usually based on historical evidence, but ongoing changes can be considered
    - Thus, market share will be based on the best available indications of competitive significance
    - Revenues will dominate this measurement, but per unit sales may also be considered
    - If there is considerable switching costs or long term contracts, we might consider only new contracts coming in, or the capacity to service the relevant market upon expansion
- **5.3 – Market Concentration –** What is the post-merger level of concentration based on HHI
    - Standard structural presumption argument
    - Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual firms' market shares
    - HHI - Thresholds
        - Unconcentrated Markets: HHI below 1500
        - Moderately Concentrated Markets: HHI between 1500 and 2500
        - Highly Concentrated Markets: HHI above 2500
    - Based on Changes
        - Small Change: HHI increase of less than 100. Usually nothing more needed
        - Unconcentrated Markets: Mergers resulting in unconcentrated markets are usually good to go

        - Moderately Concentrated Markets: Mergers resulting in moderately concentrated markets that increase HHI more than 100 points potentially raise competitive concerns and warrant scrutiny.
        - Highly Concentrated Markets: Mergers resulting in highly concentrated markets that increase HHI of between 100 points and 200 points warrant scrutiny. Mergers resulting in highly concentrated that involve an increase in the HHI of more than 200 points will be presumed to be to enhance market power. The presumption may be rebutted by persuasive evidence

§6 – Unilateral Effects

- Unilateral effects are those that happen simply as a result of the merger.
- **6.1 – Pricing of Differentiated Products**
    - Are we merging two firms where a significant fraction of customers purchasing A would switch to B based on a price increase (next best choice). What is the diversion ratio? Value of diverted sales.
- **6.2 – Bargaining and Auctions**
    - A merger between competing sellers can prevent buyers from playing sellers off each other. Anticompetitive unilateral effects are based on who is the runner up in the auctions, etc
- **6.3 – Capacity and Output of Homogenous Products**
    - In commodity markets

§7 – Coordinated Effects

- Mergers can diminish competition by facilitating coordination that harms consumers. KEY DIFFERENCE: Unilateral doesn't require competitors to do anything. This involves the other competitors in the market.
- Coordination includes: explicit negotiation, common understanding, parallel accommodation (wherein reactions are rational but weakens competitions), and conduct not otherwise condemned
- Agencies examine whether a merger will change the way participants interact. What is the risk of coordination based on market concentration and vulnerability.
- The Agencies are likely to challenge a merger if the following three conditions are all met:
    - (1) the merger would significantly increase concentration and lead to a concentrated market;
    - (2) that market shows signs of vulnerability to coordinated conduct (§7.2); and
    - (3) Agencies have a credible basis to conclude that the merger may enhance that vulnerability
        - Acquisition of a maverick firm is a classic example
- Three types of coordinated effects
    - Express Agreement – Smoke filled rooms
    - Tacit Agreement – cozy oligopoly
    - Parallel Accommodating Conduct no agreement but likely (A raises prices and B goes along)
- Evidence a Market is Vulnerable
    - Parties prior engagement in express collusion in the relevant market
    - Previous express collusion in another geographic market
    - Failed previous attempts at collusion in the relevant market
    - Parties previous collusion or attempted collusion in another product market
    - A market typically is more vulnerable to coordinated conduct if each firm's competitive initiatives can be observed by that rivals (e.g. prices, customer terms / conditions, territory) .
    - A market typically is more vulnerable to coordinated conduct if a firm's reward for attracting customers away from its rivals will be undercut by competitive response
        - The firm is more likely to anticipate strong responses if there are few significant competitors, if products in the relevant market are relatively homogeneous, with de minimis switching costs

- A market is more vulnerable to coordination if the firm initiating a price increase (decrease) will lose relatively few customers after rivals respond to the increase
- The Agencies regard coordinated interaction as more likely, the more the participants stand to gain from successful coordination. Coordination generally is more profitable, the lower is the market elasticity of demand.
- Coordinated conduct can harm customers even if not all firms in the relevant market engage in the coordination. The prospect of harm depends on the number of colluders and can be undercut by a **maverick**
- Buyer characteristics and the nature of the procurement process can affect coordination (think more on this idea, aggressive bidding)
- Recall – price visibility arguments in *H&R Block*
- Recall – co lobbying against "free for all" filing in *H&R Block* → *cooperation*

§8 – Powerful Buyers

- It is possible that powerful competitors may constrain the ability of the merging parties to raise prices (through their own negotiating power)
- If a CUSTOMER (downstream) has been able to negotiate great prices, and this merger harms the ability of the powerful CUSTOMER, then
    - You are ending the monopsony power the buyer previously then there could be harm
    - But if they are super powerful, and can dictate terms, or self supply, then you can argue the merger harms no one, because the purchaser is setting the terms.

§9 – Entry

- The issue here is that firms may rapidly and easily enter the market in response to a SSNIP.
- This will be determined by:
    - Barriers to entry
    - History of entry (successful or otherwise)
    - [Timeliness, likelihood, sufficiency]
- All factors are realistically on the table: planning, design, and management; permitting, licensing, or 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
- We will benchmark against prior entrants if such data is available
- Timeliness – would it be rapid enough to make the SSNIP unprofitable
- Likelihood – would it be profitable for the new entrant in the presence of a SSNIP
- Sufficiency – will the entrant produce at sufficient scale, and not be so wildly differentiated from the merging firm, that the SSNIP will be unprofitable

§10 – Efficiencies

- This is a big game of WHATABOUTISM to some extent.
    - The alternatives the govt can use to shoot holes in you. They have to be realistic. Cant just be theoretical. But if it is reasonable, then fire away as the government.
- Does the merged entity morph such that the merger enhances the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products (e.g. do two weak competitors become one strong competitor (*T-Mobile* (Deutche Telekom)))
    - Emphasis on cheaper products, better products, anything that leads to differentiation
- These efficiencies only count if they could not be accomplished without the merger. Is there a less restrictive means that is not purely theoretical?

- Because the efficiencies must be future looking, it is incumbent upon the merging firms to demonstrate to the Agencies that they are likely and plausible to manifest!
  - Vague, speculative, or unverifiable. These don't count
  - They also cannot come from anticompetitive reductions in output or service
- The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market
- Efficiencies will never justify monopoly or near monopoly
- There are efficiencies that are more likely to be cognizable
  - Shifting production among facilities to lower costs
- Costs relating to research and development are hard to valuate.
- Those relating to procurement, management, and capital cost are unlikely to be merger specific

§11 – Failure and Exiting Assets

- Acquisition wont enhance market power is one firm (and its assets) are likely to exit the market
  - Because the firm is on its way out (0 market share) this is asset acquisition
- Following are required for recognition
  - Failing firm would be unable to meet financial obligations in the near future
  - Failing firm would not be able to successfully reorg under Chapter 11
  - Failing firm has made good-faith efforts to elicit reasonable alternative offers
- We can also conceptualized "failing firm" as "failing division" Two conditions:
  - Division has persistent negative cash flows and is not economically justified by benefits like goodwill or market completements
  - Failing division has made good-faith efforts to elicit reasonable alternative offers

§12 – Mergers of Competing Buyers (Monopsony)

- The framework for buying power is consistent with the framework for selling power (market definition). Diversion ratios on sellers etc.
- If there are numerous attractive outlets, not an issue. Otherwise, no good.
- Same as others, there can be efficiencies which come. They must be merger specific.

§13 – Partial Acquisitions

- This is a case when we are not completely acquiring the target firm.
- If the acquirer, for all purposes, has controlling interest then standard rules apply
- Acquisitions that result in partial control may also matter, three key issues of note
  - Influence of competitor conduct (e.g. board of director votes)
  - Reduction of incentive for the partial acquire to compete
  - Access to sensitive non-public information
- Cognizable efficiencies will also be considered

Vertical Merger Guidelines

- Why talk about these given that they are withdrawn? They outline some really nice theories of harm. The theories will still be raised by plaintiff and will need to be addressed by defendants

Three Key Elements in the Analysis

- Ability of the merged firm to weaken its rivals?
- Incentive to weaken the rival?
  - Does denial of the upstream asset to a rival make you more profitable downstream
- Efficiencies eliminated through double marginalization?
  - So can we deny the input to a downstream competitor or raise prices…

Case Law

Standing and Antitrust Injury

Brunswick Corp. v. Pueblo Bowl-O-Mat (1977)

- PARTIES
  - Brunswick Corp – Evil bowling conglomerate with its eyes set on the American mid-west!
  - Pueblo Bowl-O-Mat – Banal bowling conglomerate who is losing the American mid-west!
- FACTS
  - 1950s. Brunswick sold bowling materials (lanes, ball returns, etc.) across the country
  - Most sales were on secured credit, and when the market began to change alleys closed
  - Brunswick began acquiring and operating these underwater firms and opening them
  - Pueblo operated in other markets that Brunswick was purchasing in. Suit for violating Clayton. If Brunswick allowed the centers to close, Pueblo would be more profitable
- PROCEDURAL HISTORY
  - District court finds for Pueblo, penalty x3 → Reverse by 3rd Circuit → Cert
- ISSUE
  - If a business violates antitrust laws, can any competitor sue?
  - Did the court of appeals err in determining that Pueblo was entitled to compensation for any profit loss linked to an alleged violation of Section 7 of Clayton? YES!!!!
- HOLDING
  - Plaintiffs must prove an antitrust injury, which is an injury antitrust laws were designed to prevent. This is just competition happening in a market and overtake of distressed business
  - Thus, complainant must prove that the injury was "of the type" the antitrust laws were meant to prevent and injury must flow from conduct unlawful under antitrust law

Illinois Brick Co. v. Illinois (1977)

- PARTIES
  - Illinois Brick – concrete brick manufacturer with nothing to lose except face (and dollars)!
  - Illinois – The home whose Bulls, have been putting up bricks since the mid-2000s
- FACTS
  - IB was a concrete brick manufacturer who sold to masonry contractors. They, along with others, are engaged in a massive price fixing game
  - The state of Illinois awarded construction contracts to contractors who has such contracts with IB, thereby making IB an indirect supplier of the state.
  - State alleges that IB engaged in unlawful price fixing to defraud the state
- PROCEDURAL HISTORY
  - Summary judgement for IB from the 7th Circuit → Cert
- ISSUE
  - Do indirect purchasers of overpriced goods have standing in antitrust? NO!
- HOLDING
  - Only direct customers of products or services can seek antitrust remedies against the product manufacturers or service offerors.
- REASONING
  - The issue is multiple recoveries. An overcharge might be collected by more than one entity
  - There are two exceptions
    - The control exception (Footnote 16) – The indirect purchaser maintains right to an antitrust action in situations where the direct purchaser is owned or controlled by its customer
    - The preexisting cost plus exception – an indirect purchaser may have standing when the costs initially borne by the direct purchased are passed along pursuant to a

preexisting cost-plus contract and the overcharge is not absorbed by the direct purchased

- TAKEAWAY
    - You must directly interact with the offending firm unless they (the offender) controls the intermediary or there is a cost plus exception

<u>*United States v EI DuPont (1956) – aka Cellophane*</u>

- PARTIES
    - United States – Country that just couldn't wrap this situation up
    - DuPont – Peaceful, Delaware based, petrochemical conglomerate
- FACTS
    - The Sherman Act broadly prohibits monopolies without defining them
    - Dupont makes cellophane for food production, and controls 75% of the market. This is a fraction of their overall sales for "flexible packaging materials"
    - Between 1928 and 1950, DuPont's cellophane sales exploded with use in commodity packaging. It also produced and patented a moisture proof cellophane
    - Govt files suit alleging that DuPont's sales of cellophane violates Sherman (2)
- PROCEDURAL HISTORY
    - District court views DuPont's 20% market share of "flexible packaging" is not a monopoly and dismisses. → Cert
- ISSUE
    - Does a firm have monopoly power under Sherman (2) if it controls price or competition in that market? YES!!!
- HOLDING
    - Determination of the competitive market for commodities depends on how different commodities are in use and how far buyers will go to substitute one commodity for another.
    - In this case, it was determined that DuPont didn't have a monopoly (cellophane fallacy). The fallacy comes from the fact that DuPont was already charging monopoly prices.
- REASONING
    - The first step in determining whether a firm can control prices or exclude competition is determining the relevant product market.
    - A product market is largely determined by the interchangeability and cross-elasticity of demand for the products.
    - In determining the market for commodity goods, consideration must be given to the differences between potential product substitutes. The characteristics and prices of product substitutes can differ considerably. However, commodities that are viewed by customers as reasonably interchangeable for the same purpose are part of the same product market, regardless of any differences.
    - The government argues that the relevant market for determining whether du Pont possesses a monopoly should be limited to the market for cellophane. It is a unique product with unique characteristics that lacks a reasonably interchangeable substitute.
    - But Govt fails to consider the purpose of cellophane as a wrapping material and the functional interchangeability between cellophane and substitute products for this purpose.
        - For instance, the district court found that an increase in the price of cellophane would lead to an increase in the demand for alternative wrapping materials
        - This suggests customers view cellophane and other wrapping materials as reasonably interchangeable products for wrapping goods.
    - Accordingly, the proper product market for assessing the government's claim of a monopoly is the market for flexible packaging materials, a market in which du Pont is unable to control the price of cellophane.
    - Thus, du Pont does not have a monopoly in the relevant market.

- The district court's judgment in favor of du Pont is affirmed.

Horizontal Mergers

Brown Shoe Co v United States (1962)

- PARTIES
  - Brown Shoe – Small time retailer with big shoes to fill
  - United States – Country who fears comically large feet
- FACTS
  - Brown was making about 4% of the nation's footwear owns several thousand retail outlets
  - In 1955, they merge with the Kinney Company which operates 400 stores (1.6% of shoes)
  - Govt files suit under Clayton (7), establishes that product in scattered, but a small number of manufacturers had a commanding position. Plus, manufacturer dominated stores were taking away business from independent producers (vertical merger acquisitions)
  - Brown argues that the industry is robust and competitive
- PROCEDURAL HISTORY
  - District Court finds that the merger violates Clayton → Cert
- ISSUE
  - Does the merger violate the Clayton Act? YES!!!!
  - In a fragmented market, may the govt block a merger that achieves a very small percent of market control if there is a growing trend? YES!!!
- HOLDING
  - In a fragmented market, govt may block a merger that achieves a very small percentage of market control if the merger reflects a potential trend toward concentration in the industry
- REASONING
  - § 7 of the Clayton Act was intended to establish a tool for the government to curb market concentration by preventing mergers that are likely to produce anticompetitive effects.
  - Congress intended for § 7 to provide greater protection to small businesses
  - The relevant market was the national market for shoes. In the 118 cities where Brown and Kinney currently compete, the merger would result in a market share of over 5 percent. However, in 32 of these cities, the post-merger market share would exceed 20 percent.
  - The approval of the merger here could lead to the approval of additional mergers. The merger in this case would combine the largest independent retail store with a large manufacturer, increasing the likelihood of more substantial market effects
- TAKEAWAY
  - The emphasis in this case is on trend. The purpose is to stop the trend early on.
  - "it is competition, not competitors, that the act protects. But we cannot fail to recognize Congresses desire to promote competition through the protection of viable, small, locally owned businesses"

United States v Philadelphia Nat'l Bank (1963)

- PARTIES
  - United States – Mean old country not letting these big ole' banks merge
  - PNB – Guys from Philly just trying to get by. Probably super relaxed. Just like Philly
- FACTS
  - In Nov of 1960, PNB and Girard Trust sought to merge. Second and third largest commercial banks in Philadelphia. Under the merger, PNB-Girard would be the largest commercial bank in Philly with over 30% market share

- The proposed merger was authorized by the comptroller of the currency. Per statute, the comptroller required approval from banking agencies and the AG who argue that there will be anticompetitive effects in Philadelphia.
- The Comptroller approves because there are numerous alternatives in Philly, but the US challenges this under Sherman and Clayton

- PROCEDURAL HISTORY
  - District Court finds in favor of PNB → Cert
- ISSUE
  - Does the proposed merger violate Clayton by substantially lessening competition? YES!!!
- HOLDING
  - The statutory test of whether a proposed merger is lawful under § 7 of the Clayton Act, 15 U.S.C.S § 18, is whether the effect of the merger may be substantially to lessen competition in any line of commerce in any section of the country
  - The proper question to be asked in determination of the appropriate section of the country is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. This depends upon the geographic structure of supplier-customer relations. The area of effective competition in the known line of commerce must be chartered by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplier
- REASONING
- TAKEAWAY
  - Look for the 30% mark (or % standard)
  - Nothing in *Brown Shoe* tells us about levels or undue percentages. Brown Shoe was about trends. PNB is about levels. 30% clearly meets it. (THIS IS THE CASE THAT LIVES ON)
    - This is a black letter rule

<u>*United States v Von's Grocery (1966)*</u>

- PARTIES
  - United States – Country deeply worried about getting food from one place
  - Von's Grocery – Green grocers that don't mess around with market share lightly
- FACTS
  - This case is set against an increase in LA grocery markets in the 1950s and increased acquisitions by larger groceries. Von's and Grocery Bag had both doubled their stores owned, controlling 7.5% of the LA grocery market. In 1960, Von's moves to purchase
  - Govt sues to prevent this. Argument is that the acquisition will worsen the general trend
- PROCEDURAL HISTORY
  - District Court finds for Von's (no reasonable likelihood of decrease in competition) → Cert
- ISSUE
  - Does a merger between two competitors violate 7 if it will lessen competition? YES!
- HOLDING
  - A merger between two firms violates section 7 of Clayton if it is likely to lessen competition in the relevant market in the future. Von's meets this definition (Reversed)
- REASONING
  - A merger between two competing firms violates § 7 of the Clayton Act if it is likely to lessen competition in the relevant market in the future. § 7 forbids one corporation from acquiring another if the acquisition is likely to create a monopoly or substantially lessen competition.
  - In 1950 Congress passed the Celler-Kefauver Anti-Merger Act to close the asset acquisition loophole and to protect small businesses. One of the concerns of Congress in passing the Celler-Kefauver was that courts should look beyond present effects of mergers

- If a merger is likely to lessen competition in the relevant market in the future, it violates § 7.
- The acquisition of Shopping Bag by Von's is part of this trend, and it is reasonable to expect that the merger will lessen competition in the Los Angeles grocery market in the future.

- DISSENT
  - Potter Stewart – "the only consistent thing I can find is that the govt always wins"

United States v General Dynamics Corp (1974)

- PARTIES
  - United States – Big bullies who hated god, WV, and coal, even in 1974
  - General Dynamics – Sweet, unassuming, defense contractor just trying get by, with coal.
- FACTS
  - Material Services Corp is a coal mining firm. In 1954 it began to buy stock in United Electric Coal which operated strip mines. It soon had a controlling share.
  - General Dynamics then purchased Material Services Corp and United Electric be default
  - US Sues. Claim → Material Services takeover of United violates Clayton
    - Market data shows that coal is extremely concentrated, and the acquisition increased
  - GD does not dispute this. But raises other evidence about how the takeover has no effect.
- PROCEDURAL HISTORY
  - District Court finds no violation → Cert
- ISSUE
  - Is market-concentration data the only factor analyzed for an unlawful merger? NO!!
- HOLDING
  - Market-concentration data is not the only factor analyzed to determine whether a merger unlawfully lessens competition under § 7 of the Clayton Act.
    - Still, it is one of the primary and most important tools
- REASONING
  - In addition to market-concentration data, the court must also consider the competitive attributes of the merging firms and the market in which the merger takes place
  - The district court found that, at the time of the merger, United's competitive position was weak. United lacked sufficient coal reserves to compete for new requirements contracts
  - Several changes in the coal industry have decreased the viability of market concentration as a primary indicator of whether GDC's acquisition will substantially lessen competition.
    - First, coal faces increased competition from alternative-energy sources.
    - Electric-utility companies have become the primary purchaser of coal, and nearly all the coal purchased by electric utility companies is sold under long-term contracts
      - Thus, the amount of coal that a firm actually has available for sale is the appropriate measure of future competitive strength.
  - GDC is not in a position to increase its reserves or obtain new supplies.
  - Judgment of the district court is affirmed.
- TAKEAWAY
  - If a structural abnormality of the market, such as heavy reliance on long term contracts, prevents the merged entity from competing, the market share presumption can be rebutted

United States v Marine Bancorp (1974)

- PARTIES
  - United States – Country who knows the sun does not set on bankers in the west
  - MB – Clandestine Bank with the goal of getting that good Spokane dollar
- FACTS
  - This is a POTENTIAL COMPETITION case
  - Spokane was a highly concentrated banking market (42%, 37%, 19%)

- Defendant, second largest bank in WA State, was precluded from entering Spokane due to state law and could not hold more than 25% stock in another bank
- They thus bought Washington Trust, the number tree bank. Suit filed under Clayton 7
- Governments argument was that defendant could potentially deconcentrate the market through a foothold acquisition which would ease entry
- Two arguments
  - Perceived potential competition: Argument NBC is already influencing Spokane even though it isn't there. So theres a threat of entry (even though state law prevents it). Thus, an acquisition dilutes the market.
  - Actual Competition Doctrine: Spokane's potential entry into markets post merger
    - Falls away and not used

- PROCEDURAL HISTORY
  - District Court dismisses → Cert
- ISSUE
  - Must courts take into account industry regulations which restrain entry in a line of commerce (banks in this case) when applying potential competition doctrine? YES!!
- HOLDING
  - A merger does not violate § 7 of Clayton Act eliminating potential competition if the acquiring firm could not enter the market independently or through a foothold acquisition.
- REASONING
  - The potential-competition theory says a merger may violate antitrust laws if the market at issue is
    - highly concentrated,
    - if the acquiring company could enter the market as an independent competitor or by a foothold acquisition,
    - and if the acquiring company's potential to enter the market influenced the current competitors to act in some procompetitive manner.
      - HERE, They cannot possibly enter because of local banking rules, so they cannot possibly be perceived as a potential competitior
  - Government contends that NBC could have entered the Spokane banking market as an independent competitor or through a foothold acquisition.
  - Under state law, NBC could not open a Spokane branch as an independent competitor, and its parent company, MB, cannot hold more than 25% of stock of another bank.
  - Thus, NBC could only acquire Washington Trust Bank or two other banks, and neither of the alternative banks would provide NBC with alternative benefits.
  - Thus, there is no feasible way for NBC to enter the Spokane banking market without acquiring Washington Trust
  - Due to the nature of bank regulation, it can be assumed that the other banks operating in Spokane were aware that NBC had limited means of entry, making it unlikely that the potential for its entry had any procompetitive impact on the market.
  - Because the government fails to satisfy the requirements for the potential-competition theory, namely establishing that NBC had an alternate method of entering the target market, no violation of § 7 of the Clayton Act occurred
- TAKEAWAY
  - This is the defining potential competition case
  - Couple with "entrants"

Unilateral Effects

<u>*FTC v Staples (1997)*</u>

- PARTIES

- FTC – Soulless bureaucrats who hate office supplies even as they use them
  - Staples – Red shirted barons of commerce who put Dunder Mifflin under
- FACTS
  - Section 7 of Clayton prevents mergers where they "may substantially lessen competition." This is the first case of new age unilateral effects. They invoke the PNB structural stuff. But this the first real case is about unilateral effects.
  - The FTC challenges the merger of Staples and Office Depot, the two largest office suppliers
    - Office Max was the only remaining store (3→2)
  - The issue at root is the definition of the product market. Geographic market is uncontested
- PROCEDURAL HISTORY
  - FTC files for a preliminary injunction in the DC Circuit
- ISSUE
  - Can the relevant product market be narrowed if the submarket more accurately reflects the line of commerce? YES!!!!
- HOLDING (2)
  - A relevant product market can be narrowed if the sub-market more accurately reflects the lines of commerce affected by the merger
  - The FTC is not required to prove, nor is the court required to find, that the proposed merger would violate Sec 7, only that it is likely to successfully do so.
- REASONING
  - Following *Brown Shoe,* SCOTUS held that a well-defined market might be considered in antitrust enforcement. This is hard when identical products are sold by many vendors
  - Staples argues that the relevant product market is for consumable office products, FTC contends that the market should be narrowed to consumable office products in superstores.
  - Evidence
    - Office superstores tend to price their consumable office products higher in areas without competition from other office superstores
    - In areas where Staples and Office Depot charge higher prices, customers do not take their business to other types of retailers with lower prices.
  - Thus, the FTC demonstrated that the line of commerce primarily affected is the market for consumable office products sold at office superstores. In this market, there are only three major office superstores, and the merger would reduce that number to two. Absent, Staples showing post-merger cost savings passed to consumers, the threat to competition is significant, and the FTC's request for a preliminary injunction

United States v H&R Block (2011)

- PARTIES
  - US – Beneficiaries of taxes that won't let tax preparers merge
  - H&R Block – Accountants trying to not get their merger H&R Blocked
- FACTS
  - We are trying to define the relevant product market.
  - HRB is the leading retailer in tax services. It does assisted tax prep and DIY (digital)
    - The top 3 DIYs are Turbotax, HRB, and TaxAct (90% market share)
  - HRB moves to acquire Tax Act.
- PROCEDURAL HISTORY
  - DOJ moves to enjoin acquisition in DC Circuit. Allegation is violating Section 7 (Clayton)
- ISSUE
  - Were TaxAct and HRB services sufficiently interchangeable to violate 7? YES!!!
- HOLDING

- Two products must be reasonably interchangeable to be included within the same product market in an antitrust analysis under the Clayton Act.
- To establish the undue share presumption, plaintiff must show that the merger would produce a firm controlling an undue share of the relevant market, lessening competition
- Once the government has established this presumption, the burden shifts to the defendants to rebut the presumption by showing an inaccurate account of the merger's effects

- REASONING
  - Two products must be reasonably interchangeable in order to be included within the same product market for the purposes of an antitrust analysis under the Clayton Act. Section 7
  - To determine whether a proposed merger is likely to violate § 7, a court must first determine the relevant product market in which to assess the likelihood of anticompetitive effects.
  - The boundaries of the relevant product market are defined by establishing the reasonable interchangeability of a product and potential substitutes for the product.
    - Under the hypothetical-monopolist test, courts examine whether it would be hypothetically profitable for a defendant to have a monopoly power over a proposed set of substitute products.
  - Govt argues that the proper product market is the market for DDIY tax preparation products, while H&R contends that the market should be all tax-preparation methods.
  - Ends up being DDIY for several reasons
    - H&R's and 2SS's own documents show that their business strategies have been developed in response to competition in the DDIY tax market.
    - Both H&R and 2SS have planned their marketing strategies and priced their products based on the actions and pricing practices of DDIY competitors.
  - Thus, even a substantial increase in the price of DDIY products would not persuade a large number of DDIY customers to switch to assisted tax preparation.
  - This supports the § 7 claim with sufficient evidence, and an injunction was issued

ProMedica Health System v FTC (2014)

- PARTIES
  - ProMedica – Evil hospital which will control ALL of the obstetric services
  - FTC – Bureaucratic liberator of obstetricians everywhere, with a careful eye on HHI
- FACTS
  - ProMedica merges with St Luke's in 2010 in Lucas County Ohio. Already has nearly 50% market share. Breaches 50% afterwards (80% for OB post-merger)
  - Post-merger, FTC files suit to unwind based on a violation of the Clayton Act.
- PROCEDURAL HISTORY
  - ALJ determines that the merge was anticompetitive and orders divestment → Appeal
  - Commission examines the evidence of primary services, secondary services, and specialty services using the HHI. Affirms ALJ → Appeal to Article III judge
- ISSUE
  - Is the clustering of similar markets using HHI to measure concentration acceptable when determining if a horizontal merger is anticompetitive → YES!!!
- HOLDING
  - The clustering of similar markets using the HHI to measure market concentration is appropriate for determining if a horizontal hospital merger is competitive.
  - $HHI = s_1^2 + s_n^2 + \cdots + s_n^2$ ← Note that Legal does HHI on whole numbers
- REASONING
  - Under Clayton Act, if a merger has the potential to reduce competition or create monopoly, then the merger is prohibited. We first identify the geographic and product market.

- In medicine, these cannot be separated. Thus, if a hospital offers similar services and is co-located, the services can be clustered to analyze competitive effects.
- HHI provides a measure concentration to establish presumption of anticompetitive harm.
- The FTC was correct in separating primary, secondary, and OB services into different clusters because each one has different barriers of entry and different competitors
- FTC was also correct in relying on the HHI as concentration increases, the higher leverage one has to make anticompetitive rates.

United States v Waste Management (1984)

- PARTIES
  - United States – A nation that makes and creates trash by the wagon load
  - Waste Management – Humble mobsters trying to clean it up more efficiently
- FACTS
  - WMI and EMW merged, that's how all these cases start
  - Issue is that after the acquisition WMI had ~50% market share in Dallas (per se issue) in the geographic market
- PROCEDURAL HISTORY
  - District court determines that barriers to entry are *de minimis*, but this ease of entry is insufficient to rebut prima facie illegality. Thus, violation of 7.
- ISSUE
  - If barriers to entry are low can this rebut prima facie illegality? YES!!!
- HOLDING
  - De minimis barriers to relevant market entry can rebut *per se* illegality under Section 7
- REASONING
  - A firm's market share resulting from a merger can establish a prima facie case that the merger is illegal. However, the merged firm can rebut the presumption of illegality by showing that the merger will not be anticompetitive.
  - Ease of entry works because the merged firm would not be able to raise prices without losing business to new entrants
  - The district court erred by finding that WMI failed to rebut the prima facie illegality
  - There is no dispute that a 48.8 percent market share triggers a presumption of illegality under Clayton. The district court correctly found that entry into the Dallas County trash-collection market is easy, because not only can an entrepreneur begin a trash collection operation out of his home, but also large trash collection firms in nearby areas can easily expand into Dallas County.
  - WMI and other trash collectors in Dallas County cannot raise prices indiscriminately without fear of losing business. Thus, no monopoly power

Hospital Corporation of America v FTC (1986)

- PARTIES
  - Hospital Corp – Sweet organization trying to get those sweet sweet insurance dollars
  - FTC – Ghouls who want no economies of scope and scale in medicine!
- FACTS
  - Defendant is a hospital chain in Tennessee. In 81 and 82 it acquires additional Chattanooga hospitals and management contracts for more. Controls 5 of 11 Chattanooga hospitals
  - FTC files complaint under section 7 because the transaction lessened competition
  - Evidence
    - Hospital Corp.'s market share increased from 14 percent to 26 percent.
    - Combined market share of the four biggest hospitals in the Chattanooga market increased from 79 percent to 91 percent.

        - Chattanooga hospitals' cooperative tradition and other economic aspects of the hospital-services market are market to collusion.
    - Hospital Corp. argued the mergers did not threaten competition, because differences in services and organizational structure made collusion difficult or unappealing.
- ISSUE
    - Economically, is the primary question whether the merger increases the likelihood of collusion in the affected market? YES!!!
- HOLDING
    - Section 7 does not require proof that a merger caused higher prices. What is necessary is the creation of an appreciable danger based on a probabilistic judgement.
    - A merger is unlawful under antitrust law, the primary question is whether the merger increases the likelihood of collusion in the affected market.
- REASONING
    - Sec 7 of Clayton prohibits mergers that are likely to substantially lessen competition
    - Plaintiff must show that a merger creates a significant danger of anticompetitive effects.
    - Hospital Corp.'s acquisitions reduced the number of competing hospitals from 11 to 7.
    - The market was highly concentrated, the four largest competitors had 91% market share (up from 79%). Fewer competitors makes it easier to coordinate
    - The problem by Tennessee statute that requires changes to hospital capacity be approved
    - The nature of hospital services makes it infeasible for customers to merely switch to hospitals in other cities if the hospitals in the Chattanooga area collude and increase prices. This is especially true in the event of medical emergencies.
    - Hospital Corp. argues that collusion between hospitals is unlikely, because the market for hospital services is diverse, and the services at each hospital are not interchangeable.
    - Hospital Corp. did not distinguish hospital services from other complex markets where the likelihood of collusion supports a finding that a merger is unlawful under antitrust law.
    - FTC order finding the acquisitions to be a violation of § 7 of the Clayton Act is affirmed.
- TAKEAWAY

Vertical Mergers

United States v AT&T (2019)

- PARTIES
    - AT&T – Humble telecom company with dreams of making it big
    - United States – Mean old regulators who want to keep the little guy down
- FACTS
    - In 2016, AT&T is set to acquire Time Warner in a vertical merger. TW owns WB, HBO, Turner and a bunch of other stuff
    - DOJ files suit to enjoin. Argument is that the merging of programming and distribution would harm competition at the distribution and content generation. Two theories of harm
        - Input foreclosure (or partial foreclosure). Denying access to CNN and HBO to rival distributors (Comcast, Hulu, Netflix, Direct TV)
        - Raising rivals costs: No denying access to this programming but raising the fee
    - Carl Shapiro shows a bargaining game. Concludes the merger would allow Time Warner to increase its bargaining power with other distributors, charging competitors higher prices for distribution of content. As AT&T would own Time Warner's content, consumers seeking that content were likely to switch to AT&T from other distributors.
    - AT&T and TW counter that the merger would lead to lower consumer prices.
- PROCEDURAL HISTORY
    - The district court found in favor of AT&T and Time Warner (govt failed to show the merger would lessen competition)
- ISSUE

- Will a plaintiff alleging that a vertical merger violates § 7 of the Clayton Act prevail if it does not show the merger is likely to substantially lessen competition? NO!!!

- HOLDING
  - A plaintiff (DOJ, FTC) alleging a vertical merger violates section 7 will NOT prevail if it does not show the merger is likely to substantially lessen competition.
- REASONING
  - There is a burden shifting framework established in *United States v. Baker Hughes*, but that doesn't apply in the case of vertical mergers.
  - District court held that the government failed to establish the first part of its § 7 claim: that the proposed merger between AT&T and Time Warner is likely to lessen competition
  - District court did not clearly err in finding that Shapiro's theory claiming that the merger was likely to increase consumer prices was not supported by evidence.
  - Court determined that the evidence submitted by AT&T and TW was more accurate.
  - The judgment of the district court is affirmed.
- TAKEAWAY
  - Keep in your mind that this is a vertical merger, but we don't get structural presumption from PNB when we are dealing with vertical
    - Litigation without the safety net.
    - Market concentration is still important here, but it is conceptually less important
  - What we are looking for is significant disruption to the cost structure of a rival
  - KEY ARGUMENTS
    - How much do you get out of efficiencies through eliminating double marginalization?
    - How much is the penalty to consumers that might come from raising prices to competitors and do they have outside options?
  - What did the judge decide, and why?
    - Judge accepted that post-merger, EDM would cause AT&T to reduce price
    - Judge rejected prediction that AT&T would have an incentive to RRC by increasing price of TW programming to rival MVPDs. Why?
      - ***Real World Evidence #1:*** Judge said "real world evidence" rejects RRC prediction (e.g., "various industry witnesses testified that the identity of a programmer's owner does not affect the negotiating dynamic").
      - ***Real World Evidence #2:*** Judge claimed that "vertically integrated corporations have previously determined that the best way to increase company-wide profits is for the programming and distribution components to separately maximize their respective revenues."
      - ***Vertical Merger Retrospective:*** Judge claimed that "[Carlton's] analysis of [previous vertical integration shows that it]did not affect affiliate fee negotiations or content prices."
      - ***Found Data Unreliable:*** Judge rejected the values Shapiro used as inputs into the bargaining model.

Efficiencies

<u>*New York v. Deutsche Telekom AG (2020)*</u>

- PARTIES
  - NY – Big state with big dreams of few mobile providers. They came for Trinko first…
  - Deutsche Telekom – Stupid way of saying T-Mobile
- FACTS
  - Second attempted merger by T-Mobile. Had previously attempted to be acquired by AT&T

        - Fun fact, they money they made from that deal falling through got them here
    - State's case (The case is settled with FTC and DOJ, NY and California move forward)
        - Moving from 4 to 3.
        - Unilateral effects, combining the low end of the market (also prepaid markets)
        - Coordinated Effects (susceptibility, etc.)
        - High barriers to entry
    - Response
        - No response on 4 → 3
        - Unilateral Effects → pricing will be driven by the need to fill capacity. It's cheap on the margin to service an additional consumer,
        - There is no evidence of cell switching is based on price. Example, lot of 35 year old men switching between minivans and motorcycles. Not competitors, just switching
        - Coordination → we are making a powerful maverick. There is heterogeneous network quality, and this is hard to observe by competitors. How do you punish?
    - Litigation strategy. Don't fight facts. Pick the battles. The synergies of the networks were the best option, so all in on that. This is not a winning strategy usually.
- ISSUE
    - Are the efficiencies provided by the merger sufficient to justify the increased concentration?
- HOLDING
    - YES!!!!
- REASONING
    - Basically, T-Mobile loses on almost everything except threes
    - Efficiencies stemming from the spectrum merger. You get HUGE efficiency gains by merging the assets. The two networks have different types of infrastructure that are super additive
        - You almost always lose efficiencies. Efficiencies are generally not viewed as an affirmative defense. This has never happened before and will never happen again
    - Sprint is on the way down (not a failing firm defense but sort of)
    - DISH will enter the market
    - The heart of the case becomes the benefits of merging Sprint's capacity with T-Mobile's coverage map. T-Mobile is everywhere, and sprint has excess spectrum that is unexploited

Horizontal Restraints of Trade

US v Socony-Vacuum Oil (1940)

- PARTIES
    - US – Gassy country who needs defendant's oil to go go go go go
    - Socony Vacuum – Midwestern hucksters out to spot that market into profitability
- FACTS
    - Socony-Vacuum sold gas in the Midwest. In 1926, oil and gas were over produced driving prices down. In 1933, congress passes NIRA, which permitted POTUS to regulate wages and prices in the oil industry.
    - In 1934, Socony Vacuum is asked to setup public hearings to stabilize prices and stop prices wars in local markets. SV sets up a committee, which eventually matches each company with a refiner through the spot market for gasoline. They will purchase gas at market spot price
    - In effect:
        - Each major gets assigned an independent region
        - If there was excess gas, it was a purchased and it was not released
    - As a result, there is price fixing through fixing output.
- PROCEDURAL HISTORY
    - SV convicted by jury → Appeals reverses → Cert

- ISSUE
  - Are horizontal price-fixing agreements per se violations of Sherman? YES!!!
- HOLDING
  - Price fixing is *per se* illegal. Fixing prices through output is *per se* illegal
- REASONING
  - Following *US v. Trenton Potteries* a price-fixing arrangement between competitors is a per se antitrust violation.
  - In this case, the oil companies have coordinated to purchase gas in spot markets to ensure that certain price ranges can be charged for gasoline at the retail level.
  - Counterargument: *Appalachian Coal v. US*, and *Chicago Board of Trade v. US* excuses coordinated actions.
  - Distinguishing factor: The oil companies actually implemented their coordinated plan, which had the anticompetitive effect of raising the prices of gasoline at retail.
  - Fairer competition and reasonable prices are not defenses to a price-fixing scheme.
  - A price-fixing arrangement does not have to create uniform prices in order to violate antitrust law, and prices fixed within a range may still be *per se* violations

Palmer v BRG of Georgia (1990)
- PARTIES
  - Palmer – Law student who hasn't realized how pricey bar review materials are
  - BRG – People who are just the worst. And know they are the worst.
- FACTS
  - Here we are doing bar review courses in Georgia.
  - Harcourt (Barbri) is the largest provider of bar review services. They compete directly with BRG in Georgia for bar review courses.
  - In 1980, Barbri permitted BRG to market its materials in Georgia under the Barbri name
  - They entered into an agreement for HBJ to not compete with BRG in Georgia and vice versa outside of Georgia. BRG subsequently raises prices (100 →400). There is a profit-sharing agreement
  - UGA Law students universally sue the parties.
- PROCEDURAL HISTORY
  - District Denies Summary Judgement → 11th circuit affirms → Cert
- ISSUE
  - Does an agreement to halt competition in a geographic market violate Sherman? YES!!!
- HOLDING
  - An agreement between competitors to halt competition in a geographic market of prior competition violates § 1 of the Sherman Act.
- REASONING
  - Market-allocation agreements are akin to price-fixing agreements because they raise prices and have no pro-competitive justification
  - As soon as BRG entered into the agreement with HBJ, BRG was able to dramatically increase the price of its bar-review class.
  - Logic flows directly from *US v. Topco Associates*, which held market-allocation agreements to be *per se* unlawful, was designed to prevent. *Topco* is different because this does not divide Georgia among BRG and HBJ, but rather halts competition in Georgia altogether
  - Judgment of the court of appeals is reversed, and the case is remanded

United States v Standard Oil (1911)
- PARTIES
  - US – country just trying to bring the winners down into the trash with the rest of us

- Standard Oil – More money more problems for Mr Rockefeller
- FACTS
    - DOJ brings suit under Sherman. Accusation is that they are sustaining a monopoly. Restraining trade. Etc. Charge against Rockefeller is that they formed an oil trust that would drive competitors out of business with predatory prices upon entry
- PROCEDURAL HISTORY
    - Convicted at trial.
- ISSUE
    - Under the rule of reason, do business arrangements that unreasonably restrain trade violate the Sherman Act? YES!!!!
- HOLDING
    - Under the rule of reason, business arrangements that unreasonably restrain trade violate the Sherman Act.
- REASONING
    - The Sherman Act prohibits monopolies, contracts, and trusts that restrain trade.
    - Section 1 declares every contract or combination "in restraint of trade" illegal.
    - Section 2 makes it a crime for "any person" to monopolize or attempt to monopolize any part of interstate trade or commerce.
    - Historically, contracts in restraint of trade meant someone voluntarily agreed to a contract that restrained the person's right to engage in a trade or business.
    - The term restraint on trade eventually came to mean any contract that had the effects of a monopoly or its consequences—price-fixing, limited production, and reduced quality. Courts recognized individual rights to contract freely absent those issues.
    - Read together, Sec 1 and Sec 2 of Sherman show Congress intended the rule of reason to provide the applicable touchstone—meaning the Sherman Act prohibits only unreasonable restraints of trade. That test appropriately balances freedom-of-contract rights against undue restraints on trade.
    - The Court accordingly adopts the rule-of-reason test for antitrust cases.

NCAA v Oklahoma Board of Regents (1984)

- PARTIES
    - NCAA – bad people who exploit student athletes
    - OK and UGA – bad people who exploit student athletes
- FACTS
    - Since 1905, the NCAA regulates college sports. In 1938, Penn began televising their home games. This was met with resistance by the NCAA. They appoint a committee
    - Determination is that televising games adversely affects attendance.
    - Thus, the NCAA limited the number of televised games per season. They enter into agreements with ABC and CBS to broadcast 14 games per season. Schools could negotiate with these networks but not with other networks
    - OK and UGA, affiliated also with CFA, negotiate a television deal with NBC. NCAA disciplines then
- PROCEDURAL HISTORY
    - OK and UGA sue under Sherman → District says this is per se → Affirm → Cert
- ISSUE
    - Is a horizontal restraint of trade created via NCAA members subject to rule of reason? YES!!
- HOLDING
    - Holding that the NCAA's television plan violated the Sherman Antitrust Act and was an unreasonable restraint of trade.

  - A horizontal restraint of trade created by member institutions of the NCAA is subject to a Rule of Reason antitrust analysis, but not a complete rule of reason analysis
- REASONING
  - It is obvious that NCAA's actions constitute a "restraint of trade." Is it unreasonable? We MIGHT have reasonable restraints of trade
  - By participating in the NCAA, which prevents member institutions from competing against each other, the institutions have created a restraint horizontal trade
  - The restraint places a limit on the number of games member universities may televise and thus creates a limit on the quantity of televised football that is available to broadcasters
  - By restraining quantity, the NCAA has limited output. Horizontal price fixing and output limitation are generally viewed by courts as per se illegal
  - Still, a Rule of Reason analysis must be utilized because the restraints might be reasonable. This ends up being a Quick Look Analysis than a full Rule of Reason. NCAA argues:
    - There are transaction cost savings
    - Protecting the sales of tickets through live attendance at games. If we put them all on TV it will decrease ticket sales (out of market efficiency argument)
    - Amateur Competition: NCAA and its member universities market amateur athletic competition.
    - Protect the product: the "product" marketed is college football. To protect the "product," the NCAA and its members must reach mutual agreement on best practices.
    - Maintain Competitive Balance - If UGA and OK are the only ones on TV, we might see decreased output an only these teams are on TV. Must be true that the people care about this
  - The NCAA went too far with its television restrictions. By fixing a price for television rights to all games, the NCAA created an unreasonable, anticompetitive price structure.
  - The judgment of the court of appeals is affirmed.

FTC v Polygram (2005)

- This case reduces the difference between Quick Look for Plaintiff and Per se
- PARTIES
  - PolyGram – Hoity toity record label who wants us to forget the old music
  - FTC – Old timers who know the music was better in the 90s
- FACTS
  - Polygram and Warner distributed concert albums for the Three Tenors. PolyGram does the 1990s concert and Warner does the 1994 concert. Both distributed the 1998 concert and they agree to consult each other on marketing and promotional activities (Joint Venture).
  - At one such meeting, Polygram argues that promoting the old album might cannibalize sales
    - They both subsequently stop doing promos on the earlier albums for several weeks.
  - Warner's international division goes rogue, does an aggro marketing campaign. Poly comes back and threatens to cut prices. But this gets smoothed over.
  - FTC brings suit arguing they have violated section 5. Argues such agreements are no bueno
- PROCEDURAL HISTORY
  - ALJ for FTC → Commission Affirms → DC Circuit
- ISSUE
  - Did Polygram violate the FTC act when it entered into an agreement with Warner to temporarily suspend advertising of old albums? YES!!!
- HOLDING
  - If it is obvious that a restraint of trade likely impairs competition, there is a rebuttable presumption that the restraint is unlawful.
  - Essentially, we don't focus on category. It is about competition and whether the facts

- REASONING
  - At the top: The Joint Venture is completely legal but could be analyzed as it relates to Section 7 of Clayton. It probably wouldn't be a big deal under Section 7 though.
  - Quick look analysis raises the option for defendant to rebut the presumption of *per se* illegality by presenting evidence of the restraint's procompetitive benefits that offset any likelihood of anticompetitive harm.
  - In this case, FTC correctly determined upon a quick look that PolyGram's agreement with Warner had a likelihood of harming competition (thus presumptively unlawful).
  - PolyGram and Warner claim that the agreement is procompetitive because it will increase the overall profitability of the Three Tenors' concerts. But a restraint on trade cannot be deemed lawful because it increases the profitability of the entity that introduced the restraint.
  - No procompetitive benefit means PolyGram has not rebutted the presumption
  - DC Circuit accepts the inherently suspect framework. We are looking for a "close family resemblance" between the suspect practice and another practice that already stands convicted in the court of consumer welfare (facial inference)
    - Footnote 52: We have compiled every economic study, cited them, and shown a naked restriction on advertising between competitors and found bad things happen

(BMI) Broadcast Music Incorporated v CBS (1979)

- RULE - A blanket license for an entire market of goods is not a per se antitrust violation if the license does not inevitably produce anticompetitive effects.
  - Here, they created the market by having the agreement
- FACTS: BMI creates blanket licenses for music so that individual artists and users didn't have to negotiate copyright rules. In effect, they created the market.
- This is not *per se* illegal, even though they are setting prices, because they created the market itself. They market would not exist without this agreement. We are thus subject to rule of reason analysis. This market is permissible because there are huge procompetitive effects

National Society of Professional Engineers v US (1978)

- PARTIES
  - NSPE – corrupt society trying to increase prices under the guise of safety
  - US – plucky upstarts who see through their flim flam machine
- FACTS
  - NSPE was an organization that promoted the economic and professional interests of PEs
  - There were roughly 12,000 engineers working in consulting roles. Professional ethics rules required that engineers not share price information with potential customers until after hire
  - This prohibited competitive price bidding. This was to short circuit undercutting (safety)
  - US sues the society, arguing that this violates Section 1 (Sherman), illegal restraint on trade
- PROCEDURAL HISTORY
  - US wins at district level → Appellate Level Confirms → Cert
- ISSUE
  - May a defendant defend an unreasonable trade restraint by claiming that competition within a relevant market is NOT reasonable? NO!!!
- HOLDING
  - A defendant may not defend an otherwise-unreasonable trade restraint by claiming that competition itself is unreasonable in the relevant market.
  - The rule of reason is used to give Sherman Flexibility. But this does not open up inquiry to any "reasonable" restraint. What matters is the restraints effect on competition (prices).
- REASONING

- In rule-of-reason analysis, potential pro- and anticompetitive effects are considered case by case. The reasonableness of competition is not considered.
- In this case, the Society refused to discuss prices until after employment.
- ARGUMENT: necessary to prevent deceptively low bids that would incentivize cutting corners, which would endanger the public.
  - KEY: Society is arguing that competition itself is unreasonable
  - This is not a recognized defense
- If every market that contained dangerous goods was subject to an exception to antitrust liability, then the breadth of the Sherman Act would be diminished considerably
- The anticompetitive nature of the Society's agreement is obvious
- While the Society's agreement does not fix price directly, the agreement effectively removes price as an aspect of competition among members
- Appellate decision on ban on competitive bidding is affirmed.

Catalano, Inc. v. Target Sales (1980)

- PARTIES
  - Catalano – Manly men with the goal of keeping that beer flowing (on credit)
  - Target Sales – Unscrupulous hucksters whose plan to harm the American consumer fell flat
- FACTS
  - In 1967, beer wholesalers simultaneously stopped extending interest free credit to retailers
  - Retailers (incl Catalano), had previously had a Net 42 tab (credit) situation with wholesalers
  - Terms of the credit extensions were generally viewed as a form of wholesaler competition
  - Catalanto sues, argument is that the nullification of the agreement is anti-competitive
- PROCEDURAL HISTORY
  - Catalano loses at the district → Affirmed at Court of Appeals → Cert
- ISSUE
  - Does an agreement among competing wholesalers to require cash payments in advance violate Sherman 1? YES!!!
- HOLDING
  - An agreement between sellers to stop competing on an aspect of transactions other than price (e.g. credit) is a violation of Sherman 1.
    - MY READ: Agreeing to change anything about how you compete == bad idea
- REASONING
  - Price-fixing agreements are per se antitrust violations. Thus, plaintiff only needs to prove the existence of a price-fixing agreement
  - Price fixing does not need to be direct, and an agreement between competitors that has the effect of fixing prices also constitutes a per se antitrust violation
  - In this case, the credit was an inseparable component of the price of beer, and when the competing wholesalers mutually agreed to stop providing the credit, the effect was to fix prices paid by retailers at a higher level.
  - Court of appeals reasoned that the removal of the credit term could actually increase competition by removing a barrier to entry, which would incentivize new market participants
  - While it is conceivable, the more immediate effect of the arrangement was to remove a form of competition
  - Reversed and remanded.

American Needle v NFL (2010)

- PARTIES
  - American Needle (AM) – spinsters who lost their needles
  - NFL – Who would have thought antitrust rules would come home to roost here.

- FACTS
  - The NFL is an unincorporated association of 32 football teams, each of which has IP
  - Prior to 1963, each team did its IP and marketing differently. In 1963, they form the NFLP to collectively develop, license, and market property
  - Until 2000, non-exclusive licenses were granted to vendors (including AM) to make apparel
  - Then the NFLP granted an exclusive license to Reebok to manufacture headwear
  - AM sues NFL alleging that the agreement violates the Sherman Act. Conspiracy to restrict the distribution of IP rights. Rebuttal, we are a single
- PROCEDURAL HISTORY
  - Summary judgement for NFL at district → affirmed at appellate (does the conduct in question deprive the market independent sources of economic control) → Cert
- ISSUE
  - Regardless of the legal structure, can any contract or conspiracy which is useful to the entity can violate section 1? YES!!!
- HOLDING
  - The NFL's licensing of IP constitutes concerted action that is not beyond Sherman
  - Regardless of the legal structure of an entity or a set of entities, any contract, combination, or conspiracy useful to the entity ***MAY*** violate § 1 of Sherman Act if the agreement deprives the marketplace of independent decision-making on the part of participants (here, TEAMS).
- REASONING
  - The sole issue is whether the NFL and the NFLP are a single entity or are capable of engaging in a "contract, combination . . . or conspiracy,"
  - Concerted action under § 1 does not turn on whether the parties are legally distinct entities. The question is how the parties involved operate together.
  - The inquiry is thus whether the agreement, the "contract, combination . . .or conspiracy," is created through separate decision-makers with the result depriving the marketplace of independent centers of decision-making.
  - The NFL teams are independently owned and managed with unique economic interests and goals. The teams compete with each other on and off the field (coaching, fans, tickets).When each NFL team markets its intellectual property, it seeks to further its individual interests.
  - Thus, a decision made by all of the teams to grant exclusive license to one vendor stifles competition. The fact that the NFL created the NFLP to collectively market teams' merchandise does not mean that the structure escapes § 1 liability.
  - The fact that there could be no "NFL football" without the cooperation among the many teams is not relevant to whether that cooperation is concerted or independent action.
  - The NFLP's agreement to be the sole agent in charge of licensing the teams' logos is the only thing preventing each separate team from managing its own licensing of trademarks.
  - Reversed and remanded

<u>Interstate Circuit v United States (1939)</u>

- PARTIES
  - Interstate – Collective which want us to pay high prices for the talkies
  - US – Country that knows the importance of a day at the movies.
- FACTS
  - Interstate and others were affiliated movie theatres for first and second run showings in Texas and generally dominated the landscape. They showed films from 8 distributors who controlled about 75% of the market.
  - Interstate subsequently faced challenges from lower priced movie theatres
  - So, Interstate sends a letter to the distributors demanding the following:
    - Distributors would never distribute first run films to second run theatres which charge less than a small fee (25 cents)

        - Never be part of a double feature
    - All the distributors were named on the letter. This is a direct attack on the second run theatre models.
    - The distributors and Interstate are charged with conspiracy under Sherman I
- PROCEDURAL HISTORY
    - Trial Court issues injunction → SCOTUS
- ISSUE
    - Under Sherman, may an agreement to participate be inferred from the course of conduct by the alleged co-conspirators? YES!!!
- HOLDING
    - Entering into such agreements, as a matter of law, constitutes conspiracy in restraint of trade
    - An agreement to participate in a conspiracy may be inferred from the course of conduct of the alleged co-conspirators
- REASONING
    - The Court explained the legal requirements for finding a hub-and-spoke conspiracy, but did not use that term:
        - While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that, in the circumstances of this case, such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy.
        - It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, . . and, knowing it, all participated in the plan

US v Apple (2015)

- PARTIES
    - US – Fun loving country who wants America to read!
    - Apple – Company trying to undercut Amazon's low low prices.
- FACTS
    - In 2007, Amazon promoted new books and best sellers on its Kindle at $9.99. This is equal to or lower than the wholesale price. Publishers were pissed.
    - The publishers subsequently went to Apple when the iPad was released.
    - Apple released the iPad in 2010 and also released the bookstore. Doing a price match on amazon would undermine profits. So, it approaches the big six publishers with a plan
    - Agency Model: Publishers set retail prices subject to caps and then pay Apple a fixed commission. This also included a favored nation clause for distribution (no higher prices elsewhere). All publishers get the same deal. 5 publishers agreed, and then forced amazon to do some amount of matching. Prices of physical and electronic books rise eventually
    - Publishers settle, apple goes to court
- PROCEDURAL HISTORY
    - District (per se violation of Sherman) → Appeal to Second circuit
- ISSUE
    - Did this scheme violate Sherman I? YES!!!!
- HOLDING

- A hub-and-spoke conspiracy intended to fix prices horizontally is a per se unlawful
- To prove an antitrust conspiracy, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective."

- REASONING
  - The plaintiffs must show:
    - "a combination or some form of concerted action between at least two legally distinct economic entities" that
    - "constituted an unreasonable restraint of trade either per se or under the rule of reason."
  - Concerted action between two entities that constitutes an unreasonable trade restraint.
  - Horizontal price fixing between entities at the same market level is a per se violation
  - Vertical price fixing between entities at different market levels may be unlawful under rule-of-reason analysis.
  - Apple encouraged the Big Six to simultaneously sign identical contracts to fight $9.99 e-book pricing. No one publisher had enough bargaining power to do so alone.
  - Entering an MFN clause showed intent to take collective action against Amazon.
  - Apple devised the MFN clause to make exactly that happen.
  - The resulting vertical agreements thus establish horizontal price fixing of e-book prices concerted and organized by Apple. Its efforts increased prices not only immediately but for the next two years.
- TAKEAWAY
  - Don't be stupid. Don't fix prices at Per Se. It's a per se violation

<u>*Monsanto v Spray-Rite Service (1984)*</u>

- PARTIES
  - Monsanto – You knew they were going to be the bad guys all along
  - Spray-rite – Just a little guy killing some bugs (and causing cancer)
- FACTS
  - Separating price fixing conspiracies from legitimate interactions among suppliers
  - Spray Rite was a distributor of Monsanto Herbicides. In 1967, Monsanto sets up a new program of distribution. They would get a one-year contract and there would be renewal based on various factors.
  - Spray Rite was very small, and Monsanto got a lot of complaints about their low prices. Other distributors begin complaining and Monsanto terminates the contract distribution
  - Suit is launched under Sherman by conspiring with non-terminated distributors to fix
- PROCEDURAL HISTORY
  - Jury finds for Spray Rite → Appeals affirms based on complaints (*Interstate*) → Cert
- ISSUE
  - Does inference of concerted act require direct or circumstantial evidence? YES!!!
- HOLDING
  - An inference of conspiracy under Sherman 1 requires direct or circumstantial evidence that parties were engaged in an unlawful scheme to restrain trade / competition
- REASONING
  - SCOTUS has established two important distinctions when applying the language of § 1 to situations in which a manufacturer refuses to sell to a distributor.
    - First, there must be some coordination between the manufacturer and other distributors.
    - Second, a conspiracy to fix prices must be distinguished from an agreement aimed at non-price restrictions.

- Price-fixing schemes are per se violations of § 1, while non-price restrictions are governed under rule-of-reason analysis, which assesses an action on a case-by-case basis.
- Spray-Rite alleges that Monsanto engaged in a price-fixing conspiracy with several of Spray-rite's competing distributors.
- Appeals court held that a manufacturer's termination of a distributor following complaints from competing distributors was a sufficient basis to infer concerted action.
  - This is problematic as allowing complaints by a distributer to infer a conspiracy runs the risk of punishing lawful conduct (e.g. manufacturer that imposes lawful non-price restrictions in order to ensure that distributors meet criterial)
- A plaintiff must show direct or circumstantial evidence that tends to exclude the possibility that the manufacturer and other distributors were acting without coordination.
- Monsanto confronted several distributors and threatened to stop providing herbicide if the distributors continued to sell below Monsanto's desired price. Additionally, Monsanto approached Spray-Rite about Spray-Rite's discount prices based solely on the complaints of competing distributors, which serves as circumstantial support for a conspiracy to fix prices.
- As a result, there was sufficient evidence to find that Monsanto conspired with distributors to fix prices, and the judgment of the court of appeals is affirmed.

Matsushita Electric v Zenith Radio (1986)

- HOLDING
  - To survive a motion for summary judgment, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.
- TAKEAWAY
  - Case raised the standard for surviving summary judgment to unambiguous evidence that tends to exclude an innocent interpretation. Specifically, the issue was whether there was a horizontal "agreement" between Matsushita Electric and other Japanese television manufacturers. The Court held that the evidence must tend to exclude the possibility of independent action to be sufficient to survive summary judgment.

Bell Atlantic v Twombly (2007)

- PARTIES
  - Bell Atlantic – Friendly phone company who is collaborating with some baby bells
  - Twombly – Angry old man
- FACTS
  - Twombly, files suit alleging that Bell Atlantic violated § 1 of Sherman
  - Allegation is that Bell Atlantic conspired with other local telephone companies by means of conscious parallelism to inhibit the growth of upstart telecommunications companies and to eliminate competition with each other.
  - The alleged purpose of the conspiracy was to allow each involved local telephone company to dominate a specific market.
  - Twombly did not introduce any more evidence of an agreement between the companies.
- PROCEDURAL HISTORY
  - Dismissed under 12(b)(6) at the district court → overturned → Cert
- HOLDING
  - A complaint states a claim only if it includes sufficient facts to make the claim plausible.
    - (1) To state a claim under § 1 of the Sherman Act, the complaint must contain enough factual material to suggest that an agreement existed between the defendants.

        - (2) To prove an illegal conspiracy under § 1 of the Sherman Act, the plaintiff must introduce evidence that tends to exclude the possibility that the alleged conspirators acted independently.
- REASONING
    - A complaint states a claim only if it includes sufficient facts to make the claim plausible.
    - This is an interpretation of Rule 8. This is used in conjunction with a motion to dismiss for failure to state a claim
    - Here, the complain contained on conclusory allegations, and did not include enough facts to plausibly suggest the existence of an agreement.
    - Further, although Twombly introduced evidence of parallel conduct, he did not introduce evidence that could **exclude the possibility that companies acted independently**
- TAKEAWAY

Chicago Board of Trade v United States (1918)

- PARTIES
    - Chicago Board of Trade – When has anything illegal ever happened in Chicago?
    - United States – Hoodlums who demand trading after dark.
- FACTS
    - We are about market regulations and if / how it can become an illegal restriction on trade
    - In the early 1900s, Chicago was the biggest grain market. The Board of Trade is where most of the trading of this grain was done
    - The board created grain market rules (there are more but the one below is critical)
        - Grain that is to arrive at the exchange, but isn't there yet, can't be bought or sold between 2pm (market close time) and the next business day
    - Before this rule, bids had to be fixed at closing time. What this does in effect is killing bidding which occurs after the market closes.
    - DOJ sues on the basis that it violates Sherman. Board argues they are breaking up after-hours grain monopoly some traders had created
- PROCEDURAL HISTORY
    - District Court creates injunction → Appeals affirms → Cert
- ISSUE
    - Is an agreement or regulation that restrains trade solely determinative of violations of antitrust law? NO!!
- HOLDING
    - The fact that an agreement or regulation restrains trade is not solely determinative of whether the agreement or regulation violates antitrust law.
    - The "call rule" of the Chicago Board of Trade was ultimately procompetitive and did not violate the Sherman Act.
- REASONING
    - Nearly all agreements and regulations related to trade will result in some restraint
    - The question for antitrust is whether the restraint will promote or destroy competition.
    - Thus, consideration must be given to the nature and scope of the restraint
    - The board's restraint prohibits members of the grain exchange from setting prices after the market's close until the market reopens the next day. But it does not prevent members from sending bids during after-market hours, it simply creates a stronger incentive for members to attend the exchange during market hours and determine the price that the members would be willing to pay for to-arrive grain before the next business day.
    - The scope of the restraint is limited to to-arrive grain, which constitutes only a small part of the grain shipped from Chicago on a daily basis.
    - The scope of the restraint is limited to a small part of the overall day and has no effect on grain shipped in and out of any market other than Chicago.

        - Most importantly, the effects of the restraint are mainly pro-competitive and opens up the market for to-arrive grain to a much larger number of buyers, which increases bids
        - Thus, the competitive benefits of the restraint outweigh the temporal restriction that the restraint imposes on price setting for to-arrive grain
        - The judgment of the district court is reversed.
- TAKEAWAY
    - This is rule of reason
    - Elements in trying rule of reason - This test focuses on the state of competition within a well-defined relevant agreement. It requires a full-blown analysis of
        - (i) definition of the relevant product and geographic market,
        - (ii) market power of the defendant(s) in the relevant market,
        - (iii) and the existence of anticompetitive effects.

      The court will then shift the burden to the defendant(s) to show an objective procompetitive justification.

Monopolization (Sherman 2)

Exclusionary Conduct / Contracts

<u>*JTC Petroleum v Piasa Motor Fuels (1999)*</u>

- PARTIES
    - JTC – Big paving
    - Piasa – Big asphalt
- FACTS
    - JTC is in the paving business and brought a suit against other paving companies and asphalt producers. Claim is pavers were paying off suppliers not to sell to JTC.
        - This was punishment for not joining a paving cartel.
    - JTC presents evidence that the pavers paid significantly higher prices to the producers than pavers did in a nearby region with similar operating costs. JTC posits that these higher prices included compensation to the producers for their agreement to not sell to JTC.
    - JTC also claims the producers' reasons for not selling to JTC are pretextual and insubstantial.
        - A producer used JTC's credit history as an excuse not to sell to the company, but then still declined to sell to JTC when JTC offered to pay cash.
- PROCEDURAL HISTORY
    - The district court grants summary for Piasa → JTC appealed.
- ISSUE
    - Is it an illegal restraint of trade for competitors to colluding to exclude another competitor from the market? YES
- HOLDING
    - Competitors cannot collude or exclude another competitor in restraint of trade.
- REASONING
    - Collusive conduct includes price fixing and dividing markets.
    - Exclusionary conduct includes boycotts and exclusive dealing.
    - Trial court erred in granting summary judgment to the pavers.
        - There is evidence that the pavers and producers engaged in both collusive and exclusionary conduct. The evidence of the unjustified higher prices charged to alleged cartel members and the pretextual denials of business to JTC are a sufficient basis on which a reasonable jury could conclude that the pavers illegally colluded
    - While the pavers contest much of JTC's evidence, the weight of the evidence would be appropriately resolved at trial.

Loraine Journal v US (1951)

- PARTIES
  - Lorain Journal – Newspaper who wanted the writing to stay off the wall
  - US – Angry country who is angrier because the AM radio is being stifled.
- FACTS
  - This case is about attempted monopolization – Plaintiff must prove defendant engaged in anticompetitive conduct with
    - i) the intent to monopolize
    - ii) a dangerous probability of successful monopolization
  - Lorain Journal is a newspaper publisher in Lorain Ohio. In 1932 they buy the only other newspaper in Lorain. They then capture 99% market share. They tried to open a radio station too, but they failed.
  - In 1948, the FCC issued a license to WEOL to broadcast in Lorain and other areas. This increased the competition for news and advertising on top of music broadcasts.
  - Journal then refused to accept advertisements from those who partner with WEOL
  - US brings a challenge under Section 2 of Sherman alleging that Denying ad space to businesses was an attempt to monopolize. Destroy WEOL
- PROCEDURAL HISTORY
  - District Enjoins the Journal → Direct to Cert
- ISSUE
  - Under Sherman (2), can a firm with existing monopoly power use that power to destroy a new competitor? NO!!!
- HOLDING
  - Firms with existing monopoly power cannot use said power to destroy a nascent competitor.
- REASONING
  - Attempted monopolization violates § 2 of Sherman
  - A monopoly firm that attempts to eliminate an emerging threat to the firm's dominance inflicts a direct harm on economic competition.
  - Generally, a private business has the right to refuse business partners, but in the case of a firm with market power, the right to unilaterally refuse to do business with others is limited
  - The Journal knows that if it exercises market power by denying advertising space to local businesses, those local businesses will have no choice but to stop advertising with WEOL. Advertising dollars represent WEOL's major source of revenue.
  - The Journal's policy is not merely a form of aggressive competition. Rather, the Journal's policy is intended to eliminate competition altogether.

US v Aluminum Co of America (1945) – ALCOA

- PARTIES
  - US – Country trying to get sneaky bigger by policing Canada and Europe too
  - ACLOA – How can you not trust us? We're practically Standard Aluminum
- FACTS
  - US files suit against ALCOA and Canadian firm (Aluminum Ltd) for violating Sherman (2)
  - ALCOA controls 90% of the market for raw aluminum (i.e. non-recycled metal). ALCOA created Limited (spin out) as a vessel to sell its foreign assets. No legal ties between the firms but there was definitely overlaps in leadership and shareholders.
  - Worst evidence is from "the Alliance" in Europe, which was created by ALCOA's president
    - He pushes Limited to join the alliance.
  - In both 1931 and 1936, Alliance members fixed prices by capping production. This was to limit the amount of aluminum in the US from Europe and Canada. Limited evidence tho
- PROCEDURAL HISTORY

- District Court dismisses the case after trial → Cert is petitioned but all the justices had to recuse themselves → Case get shunted to the second circuit.

- ISSUE
  - Does a firm violate Sherman (2) if it has monopoly power and maintains that power using predatory or exclusionary conduct? YES
- REASONING
  - An entity violates the monopolization prohibition in § 2 if it possesses monopoly power and willfully maintains that power with predatory or exclusionary conduct.
  - The relevant market for determining monopoly should be limited to the primary market of a product, to the exclusion of the secondary market, but includes both goods sold and used by the company itself.
  - Exclusionary conduct is not limited to conduct meant to prevent competition.
    - First, the relevant market should be limited to virgin ingot, and should include virgin ingot that Alcoa fabricates itself.
    - Thus, when controlling how much virgin ingot it produced, Alcoa also effectively had significant control over how much secondary ingot would be on the market in the future. When Alcoa's market power is calculated in this way, its market share is 91 percent. This equates to monopoly power.
    - Although Alcoa may not have actively excluded competitors from the virgin ingot market, it willfully maintained its monopoly power by increasing production. Accordingly, as Alcoa possesses monopoly power and willfully maintained that power with exclusionary conduct, it has violated section 2 of the Sherman Act.
    - It is irrelevant that Alcoa did not make more than a fair profit on its ingot. It is the monopoly and conduct that are material to the Sherman Act.

McWane Inc v FTC (2015)

- PARTIES
  - McWane – Persons for whom laying pipe is not a euphemism
  - FTC – The jokes write themselves here. Do something with Footloose.
- FACTS
  - McWane is a monopolist for domestic pipe-fitting in the late 2000s.
  - In 2009, Star Pipe fitters (international competitor) enters the domestic market
  - In response, McWane creates exclusive dealing contracts (distributors are temporarily shut out or lose rebates) and raises prices. Maintain 90% share despite Star's prices being lower.
- PROCEDURAL HISTORY
  - FTC wins at FTC → We are in Appeal
- ISSUE
  - Are exclusive dealing contracts permissible when a firm has monopoly power and it appears that they are using those contracts to maintain it? NO!!!
- HOLDING
  - Exclusive dealing arrangements are unlawful when monopolists use them to maintain monopoly.
- REASONING
  - Exclusive dealing is not per se illegal, and can even be beneficial, but in a non-competitive market they can harm competition.
  - Exclusive-dealing arrangements are analyzed under the rule of reason, with the addition that courts must also consider whether competitors have been substantially foreclosed.
  - Under the rule of reason, the government has the initial burden of showing that the conduct harms competition. The company can rebut by demonstrating procompetitive justifications

- In this case, McWane had monopoly power in the domestic pipe-fitting market and used exclusive dealing to maintain that power are supported by substantial evidence.
- Two years after Star's entry McWane still possessed 90 percent of the relevant market, a market share that constitutes monopoly power. The fact that McWane's prices went up after Star's entry into the market—which coincided with the start of the exclusive-dealing program—is evidence that McWane used the program to maintain its monopoly power.
  - Despite Star's prices being lower than McWane's, many purchasers bought pipe fittings solely from McWane out of fear of the 12-week ban.
  - This constitutes substantial foreclosure of Star from the pipe-fitting market.
- It reasonably appears that McWane's program prevented Star from gaining a foothold
- McWane's exclusive-dealing program violates the FTC Act. The FTC's order is affirmed.

United States v Dentsply (2005)

- PARTIES
  - United States – Country which knows we do not want to become the UK with dental
  - Dentsply – Big teeth, and not in a Guy Smiley kind of way
- FACTS
  - Dentsply is the leading denture manufacturer with an ~80% market share. (12 competitors)
  - Dentsply begins terminating relationships with dealers who stock Dentsply's competitors
  - Subsequently, all major denture dealers exclusively purchase from Dentsply
  - US brings suit seeking injunction. Contends this is a violation of Sherman 2
- PROCEDURAL HISTORY
  - Dentsply prevails at District Level, did not foreclose competition → On appeal
- ISSUE
  - Under Sherman (2), does a monopolist who uses exclusive dealing to maintain monopoly power foreclose the market? Potentially
- HOLDING
  - An exclusive-dealing arrangement is unlawful if the accused monopolist uses the arrangement to maintain monopoly power.
- REASONING
  - Section 2 of Sherman prohibits anticompetitive actions aimed at maintaining a monopoly.
  - To prove a violation,
    - plaintiff must show that a defendant possesses monopoly power.
    - plaintiff must then show that the defendant engaged in anticompetitive behavior that could reasonably be viewed as an attempt to maintain monopoly power.
      - plaintiff must also show that the allegedly unlawful actions actually harmed competition, not merely competitors.
  - Exclusive-dealing arrangements are not inherently unlawful
  - Focal case
    - Monopoly power can be inferred from Dentsply's large share of the market
    - Dentsply used monopoly power to pressure dental dealers into exclusive-dealing arrangements that substantially excluded Dentsply's competitors
    - Although competitors could still directly access dental laboratories, the benefits provided by dealers, including reduced transaction costs and discount pricing, significantly decreased the competitive feasibility of selling directly to labs.
  - Accordingly, the effect of the exclusive-dealing arrangements was to foreclose potential competition by excluding competitors from entering the market by either selling to dealers or directly to dental labs.
  - Judgment of the district court is reversed and remanded.

Unilateral Refusal to Deal

Aspen Ski Co v Aspen Highlands Skiing (1985)

- PARTIES
  - Aspen Ski – Big skiing that doesn't want to share passes!
  - Highlands – Slightly smaller skiing that wants to share passes!
- FACTS
  - Highlands owns one of the resorts in Aspen Colorado. Aspen Ski owns the other three. From 58-64, these resorts were operated separately. In 1962, the companies introduced an interchangeable multi-mountain pass. In 64, Aspen Ski buys third mountain
  - By 1971 a fourth mountain is opening. The pure interchange mountain pass is killed in 78.
    - Aspen stops doing group ticketing with Highlands, and stop accepting vouchers
  - Highlands dies and files suit under Section 2.
- PROCEDURAL HISTORY
  - Jury finds for Highlands → Affirmed on Appeal
  - CLAIM: Aspen Ski Co is exercising monopoly power, and they are attempting maintain that monopoly by refusing to continue the profitable agreement.
- ISSUE
  - Does refusal to cooperate with competitors constitute monopolization claims under section 2 if that refusal does not serve a legitimate business purpose? MAYBE!!!
- HOLDING
  - A unilateral refusal claim under Section 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 operation resulting from a superior product, business acumen, or historic accident
  - KEY: DO VALID BUSINESS REASONS EXIST TO NOT ENTER A JOINT OPERATING AGREEMENT OR KILL A JOINT OPERATING AGREEMENT
    - Refusals to deal with no efficiencies defense are unlawful.
    - There's no burden of proof for the plaintiff in this case…
- REASONING
  - A business's refusal to cooperate with competitors may constitute monopolization under § 2
  - A business that has established a monopoly position in a particular market is not prohibited from utilizing its position to create a superior product or experience or to harness economies of scale that make it more difficult for competitors to compete.
    - While a business is under no legal obligation to cooperate, a refusal to cooperate may be used as evidence to establish a business's use of monopoly power to further an anticompetitive purpose.
  - Aspen Ski does not dispute that they are a monopolist for skiing in Aspen. They argue that Highland offered an inferior product and refusal to include Highland in the all-mountain pass was an attempt to disassociate from an inferior product.
  - Numerous witnesses at trial contested Aspen Ski's claim of Highland's inferiority, and Ski Co. admitted to its willingness to associate with inferior products in other markets.
  - Thus, Aspen Ski did not provide evidence of a legitimate business purpose for its refusal to cooperate, and the decision appears to have been motivated primarily by a desire to harm a smaller competitor and reduce competition long term.
  - The judgment of the court of appeals is affirmed.
- TAKEAWAY
  - What is the plaintiff's burden then?
    - The EFFICIENCIES DEFENCE IS DISPOSITIVE.
  - Note that under section 2, a valid business defense allows you to win

        - This is different from the burden shifting under section 1 and 7. No balancing like *Baker Hughes*. Here, the game is over.
        - Little bit of a safe harbor

Verizon Communications v Law Offices of Curtis Trinko (2004)

- PARTIES
    - Verizon – Reasonable non maverick phone service company that's dragging its feet
    - Trinko – This guy… really?
- FACTS
    - Verizon is a large telecom firm which is in competition with AT&T. Trinko is a law firm and a customer of AT&T
    - The 1996 Telecommunications Act required local exchange competitors (local phone companies) to help new competitors enter the market. Required things like sharing network
    - Verizon signed interconnection agreements with rivals, but didn't comply long term
    - This leads to a series of orders and consent decrees. Brought with it reporting requirements and a bunch of liabilities to the local exchanges
    - Trinko brings suit arguing that Verizon schemed to discourage customers from becoming or being part of competitive local exchanges.
- PROCEDURAL HISTORY
    - Summary at SDNY for Verizon → Appeals overturns → Cert
- HOLDING
    - Two elements of a section two claim for refusal to coordinate:
        - (1) Defendant's refusal to coordinate with competitors generally does not violate § 2
        - (2) There is no additional antitrust scrutiny in industries that have regulatory structures in place to address anticompetitive conduct.
    - I can charge whatever price I want if I have lawfully acquired monopoly
        - Price setting is not an exclusionary policy
- REASONING
    - Refusal to coordinate with competitors generally does not violate § 2 of Sherman
    - To prove a violation, a plaintiff must show that the defendant actually possessed monopoly power and obtained or maintained that power using anticompetitive means.
    - In a free market, allowing a firm to lawfully obtain and profit from monopoly power is a strong incentive for firms to take risks that result in innovation and economic growth.
    - Verizon is charged with refusing to cooperate, and Verizon is bound by the 1996 Act, which requires LECs to provide competitors with certain types of access to networks.
    - The 1996 Act expressly states that this obligation does not affect liability for antitrust violations, meaning it is subject to ordinary antitrust standards.
    - Sherman 2 does not restrict the right of a firm to choose business partners (exception *Aspen*)
    - But Aspen Skiing is the outer boundary of § 2 liability for refusals to deal with competitors, and the facts of the present case do not fall within that exception.
    - There is no evidence that Verizon's refusal to coordinate with competitors was fueled by
        - anticompetitive intent or
        - that Verizon ever would have coordinated with competitors in the absent the Act
        - The public is not losing something that was previously available
    - In summary, while Verizon's actions may violate provisions of the 1996 Act, Verizon's actions do not violate § 2 of Sherman Act.
    - Thus, Trinko has failed to state a claim under the Sherman Act. The judgment of the court of appeals is reversed.
    - There is no additional antitrust scrutiny in industries that have regulatory structures in place that are designed to address anticompetitive conduct, unless expressly stated in the statute
- TAKEAWAY

- Antitrust does not impose a duty to deal. A contract might impose such a duty. A regulatory framework might impose such a duty. But unless a statute imposes additional antitrust law, the rules are standard.
- KEEP IN MIND: Difference between killing a profitable deal and not picking up a new and potentially profitable deal.

FTC v Qualcomm (2019)

- PARTIES
  - FTC – These guys just wont quit with the antitrust
  - Qualcomm – We make these here chips.
- FACTS
  - Qualcomm is an inputs manufacturer that holds a patent portfolio on modem chips in phones, etc. made by OEM manufacturers
  - Qualcomm is not an OEM seller. It sells chips exclusively at the OEM level and has ~70% market share in the LTE modem chip market, and 90% market in the CDMA chip market
  - Qualcomm contracted with the OEMS, allowing them to pay a royalty rate to practice Qualcomm's patent without fear of Qualcomm suing.
  - Qualcomm enforces this agreement through a "no license, no chip" policy
  - Basic idea, there is a patent exhaustion problem, if you license it upstream then you cant double charge downstream when the licensed person sells it. Qualcomm doesn't want this.
  - Thus, two things are sold
    - For non chip people – a suite of patented services are sold
    - For chip people – you have to have a license for using the chip
  - FTC alleges in 2017 that Qualcomm has violated Sect 1 and 2 of Sherman
    - Entrenching monopoly power by raising rivals cost through royalty rate
    - Refusing to deal with rivals by not licensing its patent portfolio to them unless they agreed to the licensing policy
- PROCEDURAL HISTORY
  - FTC at District → 9th Circuit Appeal
- HOLDING and REASONING
  - 9th circuit ends up going narrow interpretation of *Apen*
    - You need a unilateral termination of a voluntary and profitable prior course of dealing
    - The only conceivable rational or purpose for termination is to sacrifice short term benefits in order to obtain higher profits in the long run
    - The refusal to deal products that the defendant already sells in the existing market to other similarly situated consumers
  - Clean sweep, FTC goes down. Appellate court says there is no previous course of dealing. Qualcomm's behavior is a reasonable response to patent law. Qualcomm applied its "no license, no chips" policy to all consumers.
    - It really helps if you were doing the questionable thing before you had monopoly power.
  - Note also the courts treatment of the business justifications. The defendants providing a business justification for the behavior is dispositive in a section 2 refusal to deal claim. THIS IS A SAFE HARBOR BUT ONLY FOR REFUSAL TO DEAL

Tying

International Salt v United States (1947)

- PARTIES
  - IS – Company that had the good patent on that good salt

- US – Country who needs salt but only becomes more salty
- FACTS
  - International Salt was the largest producer of industrial salt in the US. It also leased machines for salt processing. But, if you leased a machine you had to purchase unpatented "salt tablets" from International Salt
    - Leases required IS to match the lowest price or allow the lessee to buy elsewhere
  - US launches suit, alleging violation of Sherman 1 and Clayton 3
  - IS argues that the leases do not create a monopoly because the lessors can buy elsewhere if there was no price match and it ensured the use of high quality salt
- PROCEDURAL HISTORY
  - District court grants summary judgement → Cert
- ISSUE
  - Does a firm create an unlawful tying arrangement by bundling the purchase of unpatented products to the use of patented machinery? YES!!!
- HOLDING
  - The Sherman Act prohibits tying arrangements as per se antitrust violations
- REASONING
  - Requiring lessors of patented machinery to purchase unpatented products from the lessee constitutes an unlawful tying. A lawfully conferred monopoly cannot be used to foreclose competition in the market for additional, unpatented products.
  - International Salt's lease agreements tie an unpatented product to a lawful monopoly on patented machinery. But International Salt has no patent on salt or salt tablets.
  - Even though some of the leases allow a lessee to purchase salt on the open market if International Salt does not match the lowest price, the lease agreement gives International Salt a first priority on all salt purchases of equal price. International Salt can maintain its market share by simply meeting prices, while other firms can compete only by pricing so low that International Salt will not be able to meet that price.
  - This tends to create a monopoly and constitutes an unlawful tying arrangement.
  - The salt quality argument is flawed, as there would be nothing wrong if the lease agreement only required that salt of a certain level of purity was used in the leased machines. However, International Salt's leases go much further and prohibit lessors from purchasing salt of identical purity from firms other than International Sale.

US v United Shoe Machinery Corporation (1953)

- PARTIES
  - US – Country who knows that these shoes are made for walking
  - United Shoe – Firm that knows walking is what they'll do
- FACTS
  - United Shoe makes machines that make shoes. It has an exhaustive product line and controls about 90% of the market
  - United's machines were only available for lease, and there were incentives in the leases to maintain a relationship with United
    - The leases were long term, required full capacity use, repair services were priced in, and there were significant penalties to the termination of a relationship
  - This success caused UM to branch into tanning and other markets, where it was successful largely because of its established relationships
  - US files suit in district court arguing that this violates Sherman 2.
- PROCEDURAL HISTORY
  - This is a district court case (Massachusetts)
- ISSUE

- Does a defendant violate Sherman 2 if it has the power to exclude competition and that power reduces actual and potential competition? YES!!
- HOLDING
  - Even if USMC did not intend to be predatory, it created barriers to competition and thus violated Sherman. Thus, acquiring or maintain the power to exclude others is an unreasonable restraint of trade
- REASONING
  - Three-part test.
    - First, the plaintiff must show that the defendant actually has monopoly power, or the power to exclude competition in the relevant market.
    - Second, the plaintiff must show that the defendant's market power excludes potential competition and limits some amount of actual competition.
    - Third, the plaintiff must show that the defendant's market strength was not solely obtained by natural consequences, such as the defendant's business ability or the industry's conditions.
  - USMC controls 75% of the market for shoe machinery.
  - Because of long-term leases and customer familiarity and satisfaction with USMC's service, significant barriers to entry exist. Thus, USMC has the market strength to exclude competition in the market for shoe machinery.
  - Evidence suggests USMC's market strength does exclude competition and potential competition, through long-term leasing agreements prevents potential competitors from accessing the market.
  - USMC has also maintained a discriminatory-pricing policy of maintaining lower profit margins in areas with greater competition and higher profit margins in areas with less competition.
  - The government's order of a consent decree is granted, and USMC is required to adjust its business practices accordingly.

Jefferson Parish Hospital District No. 2 v. Hyde (1984)

- PARTIES
  - Jefferson Parish – Do you really trust Louisiana Medicine?
  - Hyde – Do you trust it more or less than Dr Hyde?
- FACTS
  - Hyde is an anesthesiologist. He applies for a job at Jefferson, application is denied because it has a contract with Roux Associates to supply anesthesiologist (exclusive)
  - Suit argues that this is illegal tying because patients trying to get surgery are compelled to purchase another good (the anesthesiologist of Roux)
- PROCEDURAL HISTORY
  - Hyde Wins at District → Appellate overturns → Cert
- ISSUE
  - Does an exclusive contract between two business partners create an illegal tying? NO!!
- HOLDING
  - The key characteristic of invalid tying is seller's exploitation of control over the tying product when forcing the buyer into purchasing a product the buyer did not want or might have preferred to purchase elsewhere. The forcing is critical!
  - A tying arrangement is not a per se violation of antitrust law if the arrangement does not result in a clearly unreasonable restraint on competition, because the company lacks market power in the tying market.
- REASONING
  - There must be some potential for anticompetitive effects in order to justify subjecting a tying arrangement to the per se rule without inquiring into the actual market conditions.

- Jefferson Hospital packaged the hospital services offered to patients with the services of a specific group of anesthesiologists. Anesthesiologic services were just part of an integrated package of services, not a tying arrangement.
- 70% of patients in the area select hospitals other than Jefferson, it does not enjoy a market share sufficient to support an inference of market power.
- Thus, the tying is not per se illegal, and Hyde bears the burden of showing that the arrangement unreasonably restrains trade.

United States v Microsoft (2001)

- PARTIES
  - United States – Country easily spooked by technology, and browsers
  - Microsoft – Bill Gates finally being the big bad man Fox News says he is
- FACTS
  - Microsoft is a leading OS seller. In the 1990s, it bundled its web browser with the OS. OEMs could only buy windows with Internet Explorer on them.
  - It clearly has market power in OS, but does not have a monopoly on internet browsers
  - US bring suit arguing that the bundling is a restraint on trades.
- PROCEDURAL HISTORY
  - District court determines this is a per se violation and restricts MS conduct
  - Immediately after, interviews with the trial judge appear in the press, its not a good look
  - We are now at the DC Circuit
- HOLDING
  - Tying arrangements involving software-platform products should be judged under the rule of reason.
  - Microsoft engaged in an illegal tie.
- REASONING
  - Tying involving software-platform products should be judged under rule-of-reason
  - If a seller possesses market power in the market for the tying product and only sells the tying product alongside the tied product, a buyer desiring the tying product is forced to also purchase the tied product. Market power exists if a seller can force a buyer to behave in a way that the buyer would not behave in a competitive market.
  - Generally, if a seller is determined to have market power in the market for the tying product, the tying arrangement is considered to be a per se violation of antitrust law.
  - To establish the existence of a tying arrangement, plaintiff must show that the defendant is tying together the sale of two products and not selling a single product.
  - But, not all tying arrangements are anticompetitive, as the bundling of products can offset restraint of trade by creating efficiencies for sellers and reducing transaction costs
  - Thus, a defendant accused of an unlawful tying may present evidence of efficiencies or other business justifications in order to refute the alleged anticompetitive effects.
  - Microsoft's bundling of the Windows operating systems and IT is a per se violation
    - But the district court failed to consider the special circumstances surrounding technologically integrated products. The efficiencies claimed by Microsoft are achieved through the integration of Microsoft's software
  - This type of integration appears to be a regular practice in the market for software platforms, even among firms that lack market power. Although this practice is pervasive in the market, the competitive effects of technological integration are not an area of familiarity for judicial tribunes. As a result, subjecting the arrangement to a per se analysis is inappropriate.
  - In other words, there is simply not enough information regarding either the competitive benefits or the potential trade restraints resulting from technological integration to subject the entire class of actions to a per se analysis.

- Thus, the arrangement should be assessed under the more discerning rule of reason, with proper inquiry into the actual anticompetitive effects and efficiencies created by Microsoft's challenged bundling policy.

Eastman Kodak v Image Technical (1992)

- PARTIES
  - Eastman Kodak – Clever camera company doomed to bankruptcy
  - Image Technical – Whiney nerds
- FACTS
  - Can a company have an illegal monopoly on parts and services for its equipment when the equipment itself is not a monopoly.
  - Kodak sells photocopiers and other electrical equipment which had to be maintained. It did this with service and part offerings. Some parts Kodak made. Some parts others made
  - In the 1980s, independent groups began to offer to service Kodak equipment on the cheap. Kodak didn't like this and decided the only sell parts to buyers who hire them to service things (or self service)
  - Kodak also cut off independent service groups from buying parts from the OEMs
  - ISOs file suit under Sherman 2
    - Tying argument – service was tied to the sale of parts
    - Monopolizing the sale of service for Kodak Machines
- PROCEDURAL HISTORY
  - District Grants summary for Kodak → Appellate reversal → Cert
- ISSUE
  - If a company lacks a monopoly in a primary market, can it still possess sufficient market power in a subsidiary market to violate antitrust law? YES!!!
- HOLDING
  - Even if a firm lacks monopoly power in a primary market, it can possess monopoly power in a secondary aftermarket based on purchasers being locked in.
- REASONING
  - Antitrust law disfavors presumptions that ignore commercial realities of relevant markets. This means antitrust violations are assessed on a case by case basis
  - §1 claim contends that Kodak unlawfully tied the sale of parts and services for Kodak's equipment. A tying arrangement exists when a seller agrees to sell one product on the condition that the buyer will also purchase a different product from the seller
  - Kodak argues that it does not have considerable economic power in the subsidiary market for parts and services, because the primary market for equipment is highly competitive.
  - Yet, Kodak failed to provide evidence that competition in the primary market precludes Kodak from exercising monopoly power in the subsidiary market for parts and services
    - And there is evidence that Kodak has used its power to exclude competition from the subsidiary market, given that many ISOs were forced out of business
  - § 2 claim was that Kodak has monopolized or attempted to monopolize the subsidiary market, Kodak argues that a single brand cannot be considered a market for antitrust
  - However, there is no legal presumption that a single brand cannot constitute a single market, and here, the relevant market is specific to Kodak's equipment.
  - Kodak is not entitled to summary judgment on the claims under § 1 and § 2 of the Sherman Act, and the judgment of the court of appeals is affirmed.

Predatory Pricing

<u>*Brook Group v Brown & Williamson (1993)*</u>

- PARTIES
    - Brook Group – Cheap cigarette firm who lost at its own game
    - Brown and Williamson – Cheaper cigarette firm who is in it to win it
    - I miss cigarettes
- FACTS
    - Predatory pricing is when you force people out of the market so you can increase prices later
    - There is no specific statute that prevents this, but it has implications for Sherman and Robinson-Patman
    - In 1980, L&M (which became Brook) began selling cigarettes at dramatically lower prices
        - Primary product were Black and Whites (completely generic cigarette)
    - In 1984, Brown and Williamson enter the generic market. Brown offers lower prices and wholesaler rebates. L&M matches and they get into a price war.
    - L&M files a complaint based on trademark, unfair competition
- PROCEDURAL HISTORY
    - Jury finds in favor of L&M but loses as a matter of Law → Affirms → Cert
- ISSUE
    - Does a plaintiff alleging an antitrust violation based on predatory pricing need to show that the defendant had a reasonable probability of recouping the losses suffered during the predatory-pricing period? YES!!!
- HOLDING
    - Plaintiff must show that:
        - (1) the defendant's prices are below a fair measure of the defendant's costs, and
        - (2) the defendant had a reasonable probability of recouping its losses from charging low prices. This generally requires a showing of collusion with competitors.
- REASONING
    - Under Sherman, the issue is whether the defendant pricing has or likely harmed competition Plaintiff must show that:
        - (1) the defendant's prices are below a fair measure of the defendant's costs, and
        - (2) the defendant had a reasonable probability of recouping its losses from charging low prices, which generally requires a showing of collusion with competitors.
    - Without collusion over price, customers could merely take their business to a competitor.
    - Liggett argues Brown used predatory pricing to force Liggett to raise the prices of generic cigarettes, which allowed Brown to preserve the prices for Brown's branded cigarettes.
    - Liggett alleges that Brown passively coordinated with other cigarette companies to pressure Liggett to raise Liggett's generic cigarette prices.
    - To stay solvent, Liggett would have needed to raise prices on Liggett's generic cigarettes, which would decrease the price gap between generic and branded cigarettes and make generic cigarettes less attractive.
    - Generally, antitrust liability for predatory pricing can arise if competitors coordinate to establish or preserve prices above a naturally competitive level.
    - Here, there is sufficient evidence to support a jury determination that Brown entered the market for generic cigarettes with anticompetitive intent and used wholesaler rebates to bring prices below the competitive market rate.
        - However, Liggett failed to show that Brown had a reasonable chance to recoup the losses suffered during the alleged predatory-pricing period, because Liggett did not establish the existence of any collusion between Brown and other competitors.
    - Judgment of the court of appeals is affirmed.

Utah Pie v Continental Baking (1967)

- PARTIES
  - Utah Pie – Local Pie who is not getting a sweet deal
  - Continental Baking – Big Pie, who wants an even bigger slice
- FACTS
  - Utah Pie (plaintiff) is one of several Salt Lake frozen pie companies
  - Continental Baking (defendant) is a large national frozen Pie firm
  - Utah accuses Defendant of predatory pricing in the Salt Lake Market.
  - Utah Pie presented evidence indicating the defendants were pricing below cost to drive Utah Pie out of business. However, during the time of the alleged price discrimination, Utah Pie's sales continued to increase.
- PROCEDURAL HISTORY
  - Jury finds for Utah → Appeals reverses → Cert
- ISSUE
  - Can a plaintiff make a predatory pricing claim (under Robinson Patman) even if their sales are increasing? YES!!!
- HOLDING
  - A plaintiff can make a claim for price discrimination even if their sales are rising
- REASONING
  - The Robinson-Patman Act prohibits charging different prices to different purchasers if the effect of the discrimination is to substantially harm competition.
  - The price-discrimination ban applies if either:
    - (1) competition is immediately harmed or
    - (2) the price discrimination slowly drags prices down to unreasonably low levels.
    - A sustained period of pricing below cost may be evidence of predatory intent and primary-line price discrimination.
  - Utah Pie alleges anticompetitive price discrimination during a period in which Utah Pie's sales continued to grow.
  - Although Utah sustained its business during the time of price discrimination, it presented evidence of predatory intent by the defendants in conjunction with rapidly declining prices.
  - The jury was justified in concluding the defendants harmed competition by charging unreasonably low prices in the Salt Lake City market for frozen pies.
  - Judgment of the court of appeals is reversed, and the jury verdict is reinstated.

ZF Meritor v Eaton Corp (2012)

- PARTIES
  - Meritor – We've got a big ole convoy, rolling through the night… but are they?
  - Eaton Corp – Even bigger transmission company, who wants to be listed!
- FACTS
  - Eaton (defendant) is a manufacturer of heavy duty truck transmissions. It has long term agreements with each of the four HD transmission purchasers.
  - These agreements provide rebates to purchasers if they purchase to some threshold %
  - Two of the agreements permit Eaton to terminate the agreement if a % is not met
  - Agreements also required purchasers to list Eaton as their standard transmission in their purchase books, some required competitors to be removed, and a preferential pricing
  - Meritor is competitor with 8% market share. Brings suit arguing that the agreements are *de facto* exclusive dealing arrangements
- PROCEDURAL HISTORY
  - Jury finds for Meritor → Appeal arguing that Eaton was not pricing below costs
- ISSUE

- Do we apply rule of reason standards for antitrust actions where pricing is not the mechanism of exclusion? YES!!
- REASONING
  - The rule of reason, and not the price-cost test, is the proper standard to be applied in an antitrust action based on exclusive dealing where pricing is not the exclusion mechanism.
  - Under the price-cost test, a plaintiff challenging a defendant's pricing practices must prove that the defendant's prices are below an appropriate measure of the defendant's costs.
    - This test is not dispositive if price is not the primary exclusionary mechanism.
  - Even if the defendant's prices are above its costs, the defendant may be able to exclude other firms by entering into exclusive dealing arrangements that prevent rivals from competing effectively.
  - Under the rule of reason, an exclusive dealing arrangement is illegal if the probable effect of the agreement is to substantially lessen competition. Relevant considerations include
    - the defendant's market power,
    - substantial foreclosure of competitors from the market,
    - the length of the agreement, and
    - a balancing of the agreement's procompetitive and anticompetitive effects.
  - Pricing is not Eaton's primary mechanism of exclusion, the agreement provisions are.
  - Thus, the court analyzes Eaton's conduct under the rule of reason.
  - Under the rule of reason, the probable effect of Eaton's agreements was to substantially lessen competition.
    - The agreements, while not expressly exclusive and not 100% exclusive, were de facto exclusive dealing arrangements because Eaton's market power ensured that no purchaser could function properly if Eaton withheld its products.
    - Express and 100% exclusivity are not prerequisites to antitrust liability.
    - All relevant factors weigh in favor of finding that Eaton's conduct was anticompetitive: Eaton had substantial market power; the agreements were of significant length; Eaton foreclosed competitors from the market, as evidenced by ZF losing market share after the execution of the agreements and eventually exiting the market; and there were no procompetitive benefits of the agreements that counteracted the anticompetitive data-book requirements and preferential pricing provisions.
  - In sum, a jury could reasonably conclude that the probable effect of the agreements was to substantially lessen competition. The judgment of the district court is affirmed.
- TAKEAWAY
  - The point of ZF Meritor is to watch a courts head explode based on price and total payment schedules
  - Most of this is to show that discounts are conditional in nature (either real exclusivity or partial exclusivity – see the slides for examples which can look a lot of ways)
    - All unit discounts are one of the most common (or triggering discounts)
  - The doctrinal game we are playing in section 2 (unlike section 1 and section 7) is that I can play the game of pushing myself towards a specific test

Big Tech – Google

US v Google (Complaint)

- Where are the fights?
- Sec 2 claim - Allegation is that Google has maintained and abused monopoly power in general search. This is a monopoly maintenance claim through conduct and agreements in mobile search
  - Same for general search, search text advertising market
  - Whole theory is an allegation of foreclosure
- So they have foreclosed distribution of search rivals, weakening them as competitive alternatives
- Foreclosure on iPhones
  - They pay a lot of money to be the default search on iPhones
- Argument google should make
  - Foreclosure is zero, defaults don't foreclose, the user can easily access a different search
  - Everyone was going to use google anyway, but-for argument
  - Google will also say, we paid $10B, it will lower the price of the phone
- WRIGHT promises, what happens in discovery, is that there is some apple exec saying we were going to make google the default anyway, their just offering to pay us for the truth
  - Google will WAVE this around
- DOJ comes back with what
  - The problem with the zero foreclosure argument, you GOOGLE paid 10B dollars, you must have done that for some reason. What is the reason you did it.
    - This will have to be consistent with previous argument
    - What we are getting is an OUTPUT increase in search that helps us service the market, this is OUTPUT increasing
    - Thus, reconcile the fact that you are saying it is zero foreclosure but youre paying 10B,

Monopsony

- If Monopsony comes up go to BRUCE's slides. This wasn't integrated with the remainder of the course. Keep your head on a swivel for a powerful buyer out there.
  - There is some of this that is starting (merger of Simon and Shuster with Penguin)

NCAA v Alston et al (2020)

- PARTIES
  - NCAA – Organization dedicated to the exploitation of student athletes
  - Alston – Aforementioned exploited student athlete
- FACTS
  - The NCAA has a monopoly over college athletics is hugely profitable. But, the NCAA restricts the compensation colleges can offer athletes
    - There are limits on education and NO PERFORMANCE RELATED PAYMENT
    - It also limits the types of employment athletes can pursue
  - Alston et al filed suit alleging that the NCAA's rules limiting student-athlete compensation involved anticompetitive price-fixing in violation the Sherman Act (1).
  - NCAA argues that its compensation limits promoted amateurism and distinguished college athletics from professional athletics.
  - Fact finding based on rule of reason determined that the NCAA's limits on education-related compensation violated § 1 by unreasonably restraining competition for college athletes.
    - Essentially, NCAA could adopt less restrictive rules while still promoting athletics.
- PROCEDURAL HISTORY
  - NCAA loses at district → Appeals affirms → Cert
- ISSUE

- Does the NCAA prohibition on compensation violate Sherman (1)? YES
- Should the Court conduct rule of reason analysis when a case is does not obviously fall into per se illegality or quick look? YES

- HOLDING
  - A court hearing a case brought under the Sherman Act should conduct a full rule-of-reason analysis of the challenged business practice unless the practice is per se illegal or so obviously decidable that a quick-look analysis is warranted.
    - This will be based on Judicial experience and economic learning on a subject
- REASONING
  - Sherman prohibits business practices that unreasonably restrain trade. Generally, courts apply rule-of-reason analysis to such situations
    - This weighs the procompetitive and anticompetitive effects of the practices.
  - Courts may apply a quick look to practices so obviously procompetitive or anticompetitive that they do not require a full rule-of-reason analysis (basically striking behavior if it is per se illegal without conducting any rule-of-reason analysis)
  - District court did not err in applying a full rule-of-reason analysis, evidence suggested that the NCAA's compensation rules were not per se illegal or so obviously procompetitive or anticompetitive to warrant a quick-look analysis. The district court appropriately weighed the procompetitive and anticompetitive aspects of the rules to find that the NCAA's rules limiting education-related compensation unreasonably restrained trade.
  - NCAA v. Board of Regents of the University of Oklahoma involved practices that were more obviously anticompetitive.
- TAKEAWAY
  - Non education related restrictions stay
    - Differentiate v House v NCAA and OBannon v NCAA
  - Education related restrictions are no mas
    - So, restrictions on meal money, or housing dollars
  - The monopsony issue is whether there can be heterogeneity in compensation for student athletes based on education related competition

<u>*American Tobacco v United States (1946)*</u>

- PARTIES
  - American Tobacco – Beaten up once by Sherman, we are back for round 2
  - USA – Channeling their inner Teddy, we are heading out again!
- FACTS
  - American tobacco was broken up in 1911 into four firms pursuant to Sherman
  - From 1931 – 1939 – three of these firms dominated cigarette production (90% market share)
    - They purchased 50-80% of domestically grown tobacco
    - Each held millions in tobacco in inventory, making them market independent
    - They refused to purchase unless all three firms purchased in the market
    - They set ceilings and floors on the price of tobacco
    - They sold at identical wholesale prices that increased in lockstep for decades
- PROCEDURAL HISTORY
  - Convicted of monopolizing at district → Appeals affirms → cert
- ISSUE
  - Can plaintiff prove conspiracy to monopolize without an actual agreement to create oligopoly? YES
- HOLDING
  - To prove a conspiracy to monopolize, plaintiff must establish conscious parallel conduct plus circumstantial factors that justify inference of an agreement

        - Proof of conscious parallelism alone is not sufficient for a conviction of conspiracy to monopolize.
- REASONING
    - To prove a conspiracy to monopolize, plaintiff must establish conscious parallel conduct plus other circumstantial factors that justify an inference of agreement.
        - Proof of conscious parallelism alone is not sufficient for a conviction of conspiracy to monopolize.
        - Additional factors used to achieve the monopoly need not be inherently criminal
    - In this case, there was sufficient evidence for a jury to find conscious parallel conduct plus other circumstantial factors
    - Parallel conduct - simultaneous raising cigarette prices to an identical price.
    - Circumstantial factors
        - the companies shared the method of selling only to jobbers.
        - the dominant cigarette companies' price-changing conduct was not only parallel but also unjustified by economic rationale. The identical and simultaneous price increases came during a historically inexpensive time to make cigarettes.
    - The fact that the prices increase in parallel may not always justify an inference of agreement.
- TAKEAWAY
    - You need parallelism AND some additional evidence. Economic irrationality is your friend