I. Does the court have standing and jurisdiction?
   A. Is the “interstate commerce” requirement met?
   B. Who has standing to complain (only the FTC can enforce the FTC Act)
      1. If the plaintiff is a private party, can she show antitrust injury?
      2. In the event of a government suit, can private parties sue for the same violation or intervene in the Government suit? What is the effect of a decree obtained by the Government?

II. Does the case involve a group of competitors or businesses within the same distribution channel acting in concert, or one competitor attempting to bring other businesses in line with its practices? (Section 1)
   Any person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.
   A. If the restraint is horizontal:
      1. Is there an expressed or implied contract, combination or conspiracy between competitors?
      2. Is there an anticompetitive purpose or effect?
         a) Should the anticompetitive purpose or effect be judged under the per se rule or the rule of reason?
   B. If the restraint is vertical:
      1. What legal relationship exists between the party imposing the restraint and the party against whom it is imposed?
      2. Is there an anticompetitive purpose or effect?
         a) Should the anticompetitive purpose or effect be judged under the rule of reason or the per se rule?
      3. What are the available defenses?

III. Does the case involve one competitor and its attempts or ability to substantially lessen competition for its own benefit? (Section 2) The firm possesses at least 65% market power sufficient to raise prices or exclude competition, and B) it commits an anticompetitive or exclusionary act.
   A. Market Power – Is 65% market power possessed in “relevant market”? (Grinell)
      1. Yes: Market Power, consider Anticompetitive Act (generally 65%, although could be as low as 33% (ALCOA) considering the firm’s control over the distribution of resources)
      2. No: Did the party specifically intend to commit an anticompetitive act with a dangerous probability that the act would result in the acquisition of a monopoly?
         a) Yes: Attempted violation
         b) No: No violation
   B. Anticompetitive Act – Is the anticompetitive act a willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historical accident? (Grinell)
      1. Yes: Price fixing, horizontal exclusive territory agreements, leveraging, refusal to deal or continue dealing with competitors without reasonable business justification, predatory pricing, Section 2 violation
      2. No: Specifically intended to commit an anticompetitive act with a dangerous probability that the act would result in the acquisition of a monopoly?
         a) Yes: Section 2 (attempt) violation
         b) No: Refusal to aid, refusal to provide access to proprietary information?
            (1) Yes: No violation

IV. Does the case involve one company acquiring any part of the stock or assets of another, or engage in any business relationship, in a manner that substantially lessens competition in any line of commerce (product market) in any section of the country (geographic)? (Section 7)
   A. If the merger is horizontal:
      1. Is the HHI < 1000?
         a) Yes: No violation.
b) No: Is the HHI between 1000 and 1800?
   (1) Yes: Does the HHI change by at least 100 after the merger?
      (a) Yes: “Potentially raises significant competitive concerns depending on the factors set forth in sections 2-5 of the guidelines.”
   (b) No: Is the HHI > 1800?
      (i) Yes: Does the HHI change by at least 100 after the merger?
         (a) Yes: “Likely to create or enhance market power or facilitate its exercise.” Per se lessening of competition, section 7 violation.
         (b) No: Does the HHI change by at least 50 after the merger?
            (i) Yes: “Potentially raises significant competitive concerns depending on the factors set forth in the guidelines.”
            (ii) No: No violation

B. If the merger is vertical:
   1. If more than a de minimis percentage share of the market is foreclosed, consider other economic and historical factors, especially the trend toward concentration and the nature and purpose of the merger.

C. If the merger is conglomerate:
   1. Is there any threat to potential competition; or
   2. Is there a threat of potential reciprocity; or
   3. Is there a showing of “unfair advantage”? and
   4. Will the merger substantially affect the character of competition in either the acquired firm’s market or the acquiring firm’s market?

V. Did the case involve a “clog on competition”, where the sales or lease arrangement is conditioned on an agreement not to use or deal in the goods of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale may be to substantially lessen competition or tend to create a monopoly in any line of commerce? (Section 3)
   A. Is the arrangement a tying arrangement?
      1. Were there two distinct products?
         a) No: No violation
         b) Yes: Did the firm have significant market power over the tied product?
            (1) No: No violation
            (2) Yes: Did the firm coerce a party to buy the tying product on the condition that it also buys the tied product?
               (a) Yes: Per se section 3 violation
               (b) No: No per se section 3 violation
   B. Is the arrangement an exclusive dealing arrangement?
      a) Does the offending firm require the other to deal only with it?
      b) Is the arrangement truly exclusive, or does it have a reasonable time limit?

VI. Determining remedies
   A. Is injunctive relief proper?
      1. What kind of injunctive relief is proper?
   B. Is an award of damages proper?
      1. What is the measure thereof?
      2. Are there any defenses to a damages action, such as the 4-year statute of limitations?
Antitrust is a means by which government can control the size and power of big business. Violations of antitrust laws can be litigated in both criminal and civil suits. Divestiture, injunctions and damages are potential remedies. The government encourages consent to judgment, settlement, to avoid costs of litigation. Either the DOJ or the FTC can bring government action. The FTC Act is open to a broader interpretation of anticompetitive conduct than the Sherman Act. The goals of antitrust law are to lower prices, create production efficiencies, create and protect jobs and small business, and to more efficiently allocate resources.

The 1930s structural analysis of antitrust focused on the size and shape of firms in particular markets, while neoclassical theory concentrated on the relationship if price to costs and uses theoretical models to consider optimal antitrust outcomes (allocative and distributive effects of monopoly). According to the theory, a monopolistic producer not threatened by immediate invasion of its market is likely to produce less than consumers wish to buy because the producer can make more money by selling a restricted quantity at a higher price. Given scarcity, increase in price leads to a decrease in the quantity demanded. Evaluate allocation in terms of supply and demand, and marginal revenue (decreases as more units are sold, because the price at which one unit is sold decreases, and that price applies to all units sold, not just the additional unit (no price discrimination), and assumes that the monopolist cannot charge different prices to different buyers for an identical product). Monopolist will set output at point where MC = MR, but will price at the corresponding higher point on the demand curve. The consequence is prices go up and quantity produced goes down. Consumer surplus represents quantity of goods consumers would like to buy but cannot afford. Deadweight loss is the loss consumer surplus resulting from change from competitive to monopoly, and consists of people who would have bought at the lower price if perfect competition, but instead switch to a substitute, therefore leaving the market.

There are several types of economies. The market economy considers private ownership and contractual freedom. There are several types of markets: the capital market (demand from businesses looking for $), labor market, goods & services, intermediate and final and voluntary exchange. In a competitive market, there are a high number of buyers and sellers, availability of information to both parties, the sole goal for both parties is maximizing profits, and it offers maximum satisfaction for both parties. A consistent theme throughout antitrust law is the ability of the market to correct itself. For this phenomenon to occur the assumptions behind neoclassical price theory must exist – how realistic is it to assume that consumers have access to sufficient information to regulate prices?

Market power is the power to exploit others. Antitrust presupposes a political consensus to leave markets alone when they are working well to achieve agreed upon goals, but intervene when failures have been identified and seem capable of being corrected by state action. The government responds to market failure in several ways: it does nothing, it encourages private rights to control, and it intervenes. The response to instability is fiscal or monetary policy or socializing unsatisfactory distribution of resources through social programs. It reacts to indivisibilities with socialized activity, and to externalities with government regulation. It responds to informational problems with consumer protection laws. Although divestiture seems like a good remedy, there are several reasons why divestiture is bad: benefits to society from union and the impossibility of breakup.

The structural consensus is that highly concentrated markets perform poorly. But according to Mason (ALCOA), structure influences conduct, conduct determines performance, implies need for a deep, thorough examination of each particular market. According to Barr, cross-industry studies aimed at showing economy-wide relationships between given levels of concentration and resulting price-cost-profit relationships. Market power can also be defined according to cross-elasticity of demand, where commodities are reasonably interchangeable by consumers for the same purposes make up that “part of the trade or commerce”, monopolization of which may be illegal. Defined by either product usage, or geographic limitations.

Intrabrand vs. Interbrand competition. Interbrand: among manufacturers of same type of product; Intrabrand: among distribution channel of one manufacturer. When an action stifles intrabrand competition, prices stay up! Higher interbrand competition leads to lower impact of RPM; higher intrabrand competition leads to higher impact of RPM.
According to early antitrust case law, exclusive dealing agreements, agreements not to compete and price fixing agreements were deemed unlawful due to the impact of these exclusions on prices, motivation to produce quality products, labor and customer satisfaction.

- Case of Monopolies – 11 Coke 84 (K.b.1603): power granted by the queen to be sole manufacturer and distributor is illegal.
- Dyer’s Case – YB 2.Hen.V (1414): Agreement not to compete as part of bond agreement is anticompetitive.
- Davenport v. Hurdis – 576 (K.B.1599): Restrictive dealing with members of tailors guild is illegal.
- King v. Norris – 2 Kenyon 300 (K.B.1758): price-fixing conspiracy among two manufacturers is wrongful.
- Schoolmaster’s Case – 11 Hen.IV (1410): the introduction of a competing school is not destructive or nuisance.
- Mitchell v. Reynolds – 1 P.Wms. 191 (K.B. 1711): a financial agreement that requires certain behavior on behalf of the debtor is permissible if the behavior results in a restraint of trade, and the restraints are ancillary to a valid purpose (contractual relationship must exist). Specific time and geographic constraints are permissible.

**Sherman Act Section 2:** According to the Sherman Act, a firm with 1) possession of monopoly power (65%) within the relevant market that 2) commits an anticompetitive or exclusionary act, is in violation of section 2, and such conduct is per se illegal if it substantially lessens competition or tends to create a monopoly. Apply characterization evaluation to determine if should be judged under rule of reason or per se rule.

| SECTION 2 |
|-----------|-----------------|
| **PER SE** | **RULE OF REASON** |
| Price Fixing | Refusal to deal, continue dealing |
| Horizontal Integration | Leveraging |

**Price fixing is a per se violation of section 2.**

US v. Transunion Freight – 166 US 290 (1897): An agreement that is intended to establish and maintain prices and regulations among competitors creates a restraint of trade/commerce in violation of the Sherman Act.

**Horizontal exclusive territory agreements are per se violations of section 2, unless the covenants are ancillary to a valid contract.**

US v. Addyston Pipe – 85 F 271 (6th Cir. 1898): An agreement between competitors that grants exclusive territories to members creates a restraint of trade in violation of the Act. Valid exclusionary clauses are: by seller of property/business not to compete with the buyer in such a way as to decrease value of thing sold; by a retiring partner not to compete; by a partner pending the partnership not do anything to interfere by competition or otherwise with the business of the firm; by the buyer of property not to use property in competition with seller’s business; and by employee not to compete with employer’s business after end of service.

**When a firm is part of a natural monopoly, it may be allowed to set prices to prevent price gouging.**

US v. JTA – 171 US 505 (1898)
Anticompetitive (exclusionary) acts include taking adverse steps to drive competition out of business and maintaining monopoly position in market.

Standard Oil – 221 US 1 (1911): A firm that intends to create a combination with the purpose of taking adverse steps to put its competitors out of business and maintain a stronghold over all aspects of distribution in violation of the Sherman Act.

A company that possesses patents (leverages proprietary information) that give it the exclusive ability to manufacture, and it enters into exclusive requirements contracts with companies and forms cartels that fix prices has the power and intent to monopolize in violation of Section 2, unless that market can be so loosely defined as to include all similar, comparable products.

Does not create a duty to share proprietary information or aid competitors. Simply having “natural” control of market based on superior ability is not justification for intentionally driving competitors out of the market. Honestly industrial conduct (ALCOA) can still violate section 2.

US v. ALCOA – 148 F.2d 416 (2dCir. 1945): Section 2 violation when dominated US market for aluminum and participated in international cartel that restrained imports and kept most foreign aluminum out of the states; if entry barriers are high and smaller competitors cannot increase output at current cost while the dominant firm can, 1/3 of a market might yield price-setting power.

US v. DuPont (cellophane case) – 351 US 377 (1956): If the market can be defined to identify a product as unique enough to warrant its own “market”, that product can be considered to have monopoly power in violation of Section 2.

Berkey Photo v. Kodak – 603 F.2d 263 (2dCir. 1979): Market could potentially be defined as a single brand. Using monopoly power in one market to gain a competitive advantage in another market is in violation of Section 2. Introducing new and inventive products, and refusing to give competitors access to those new products before release to the market is not an anticompetitive act or an attempt to monopolize the market; control of information flow is not anticompetitive unless used to leverage market power.

Using monopoly profits in one location to leverage position in another market is an anticompetitive act in terms of section 2 violations.

Griffith: the movie theater case: exclusive power, pricing lower in towns with competition (leverage), violates competitors’ right to compete, those who don’t have access to profit from other towns.

Even if the agreement/conspiracy is not realized, agreement can still constitute an attempt to monopolize, and conspiracies can be one-way (see American Airlines), but must be proven that defendant 1) committed an anticompetitive act, 2) had specific intent to harm competition (or to monopolize) and 3) that the offending act had a dangerous probability of successfully creating a monopoly.

When a company refuses to deal with one or all of its competitors, there must be a sufficient business justification; injury to the firm or to consumers signals a section 2 violation (injury to competitors does not).

The Essential Facility Doctrine erases any other justifications for refusals to deal: If a group of competitors act concertedly to create a facility that gives them a significant competitive advantage
over excluded competitors, those competitors must afford access to the excluded competitors on reasonable terms.

Lorain Journal Co. – 342 US 143 (1951): The refusal to accept local advertising from any customers who also advertised with competitors is an unlawful refusal to deal because there is no valid business justification, the firm was willing to incur a loss in order to injure competition more, and is therefore a violation of Section 2.

Otter Tail Power co. – 410 US 366 (1973): Refusal to provide competitors with access to essential services in a manner that prevented them from conducting their business (without incurring unreasonable, unconscionable or impractical costs) is in violation of the essential facility doctrine and is therefore in violation of Section 2.

Official Airline Guides Co. – 630 F.2d 920 (2dCir. 1980): A firm can discriminate against firms with which it does not compete either horizontally or vertically.

EI DuPont (Titanium Case) – 96 FTC 650 (1980): Expanding ones business in order to capture all of the growth in the market is not an anticompetitive act, because it would penalize technological success, and pricing strategies are directly related to production efficiencies, and it is nothing more than an expression of lawful monopoly demand from a superior competitive ability. Aggressive comments about ability to compete are not anticompetitive; however, must consider barriers to entry, and market definition.

US v. AT&T – 524 F.Supp 1366 (SDNY 1981): Used natural monopolies to leverage power in long distance and equipment, subsidized residential service fees with business service profits, controlling the standards by which competitors should operate and limiting access to advantageous information is an anticompetitive act specifically intended to discourage competition, in violation of the essential facility doctrine, and in violation of Section 2. Deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in absence of competition.

Any course of conduct a dominant firm designed to drive out, discipline or set back competitors by acts that, but for their anticompetitive impact, would not be economically sensible for the dominant firm; any tactic or set of tactics that would add more to the rivals’ costs than to the costs of the monopolist, or would diminish the rivals’ revenues more than those of the monopolist could be an effective predatory device.

According to the Chicago School, dropping prices below price to drive out competition is not feasible.

1936 Robinson-Patman Act – price discrimination is illegal where it may substantially lessen competition or lead to a monopoly.

Areeda-Turner Predatory Pricing Rule: 1) A short run profit-maximizing price is non-predatory even though below short run average total cost; 2) Either a price at or above short run average total cost or a price at or above reasonably anticipated short marginal and average variable costs is non-predatory even though not profit-maximizing in the short run; 3) A price below the reasonably anticipated short run marginal cost is predatory, unless the price is at or above short run average total cost; 4) Where accounting records are not adequate to compute short run marginal cost, reasonably anticipated short run average variable cost may serve as a surrogate for short run marginal cost. When such a substitution is made, the qualifying clause in 3) becomes irrelevant and the norm becomes: a price below reasonably anticipated short run average variable cost is predatory a price at or above that level is non-predatory.
A price is predatory if justification rests not on their effectiveness in minimizing losses, but on their tendency to eliminate rivals and create a market structure enabling the seller to recoup his losses before the monopoly profits it earns attracts new entrants to the market.

A firm has no duty to aid its competitors in the survival or expansion of their businesses by sharing plans for new products, or by limiting its service arrangements.

TransAmerica v. IBM – 698 F.2d 1377 (9thCir. 1983): A pricing policy is legal if new products are expected to return considerable profits, products were profitable, and prices exceed total cost of production, even if competitors were unable to realize same profits from their products.

Brooke Group v. Brown & Williamson (Tobacco Case) – 133 SCt 2578 (1983): Overrules Utah Pie; provides modern rule on primary line discrimination; reasonable possibility of substantial injury to competition is factor; offering huge pricing discounts to wholesalers that competitors cannot match, at prices below appropriate cost measures could injure competition.

A firm has a duty to continue dealing with its competitors and contractors, even if the failure to deal creates efficiencies for the firm; termination of well-established pattern of cooperation does not lead to efficiencies, so violation of section 2, unless contract creates right to do so, or agreements are not “permanent” in duration.

Kodak v. SPMC: Refusal to sell film to a film dealership when the dealership refused to sell Kodak its business was an anticompetitive reason for refusing to deal in furtherance of its purpose to monopolize the distribution of film.

Paschall v. Kansas City Star – 727 F.2d 692 (8thCir. 1984): Decision to terminate all paper carrier contracts and provide own paper delivery service, in conjunction with terms of contracts, is rightful act and does not violate Section 2 absent any proof of anticompetitive effects.

Aspen Skiing v. Aspen Highlands Corp. – 472 US 585 (1985): A monopolist firm has a duty to continue participating in a joint marketing agreement with a competing firm in order to avoid Section 2 liability, regardless of whether the failure to do violates the essential facility doctrine, if the act injures consumers and the monopolist firm.

There is no duty to provide proprietary information, so such information may be revoked at anytime.

Olympic v. Western Union – 797 F2d 370 (7thCir. 1986): A firm with monopoly does not violate section 2 if, by its own volition, it provides its competitors with proprietary information about the market, then revokes additional access to the information in order to save its own business.

ITS v. Kodak – 125 F.3d 1195 (9thCir. 1997): A firm cannot use its legal monopoly in one market to gain monopoly power in another market, if the legal monopoly does not protect all of the products it attempts to tie; legal protection of intellectual property dissolves when that position is exploited.

Refusal to provide access to legally copyrighted or patented products is not a violation of section 2 unless, 1) the patent/copyright is obtained through knowing and willful fraud, or 2) the patent-holder brings a wrongful patent infringement suit against the firm attempting to obtain access to the information that is actually a sham to disguise an unlawful act and is intended to deter the party from obtaining the proprietary information. The suit must be 1) objectively baseless, and 2) subjectively motivated by desire to commit an anticompetitive act.
Xerox Corp. – 203 F.3d 1322 (FedCir. 2000): Refusal to sell patented copyrighted products is not a section 2 violation if refusal is not an exploitation of protection, but leveraging sale of nonpatented parts and services with patented parts is.

**In order to prove “attempt”, the plaintiff must show the defendant had 1) specific intent to 2) commit an anticompetitive act to create a monopoly (lower standard of conduct than with monopoly), and 3) there was a dangerous probability that the anticompetitive act would have the effect of creating a monopoly. Market definition is considered at the time of the act.**

US v. Empire Gas – 537 F.2d 296 (8thCir. 1976): Dangerous probability of success must exist to prove attempted monopolization in violation of section 1, even if the party had the specific intent to allocate the market geographically, enter into price collusion agreements, and used specific language that indicated intent.

US v. American Airlines – 743 F.2d 1114 (5thCir. 1984): A solicitation of a monopoly without the existence of an actual agreement may constitute a section 2 “attempt to monopolize” violation. The government need not allege or prove an agreement to monopolize in order to establish an attempted joint monopolization under section 2; such a rule acts to deter monopolies at proposal rather than actual formation (otherwise, no deterrent to offering to collude).

**Sherman Act Section 1: Every person who shall make any contact or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.**

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**Price Fixing is a per se illegal violation of section 1, and does not take into consideration market power.**

US v. Trenton Potteries – 273 US 392 (1927): A combination to fix and maintain uniform prices by a group controlling 82% of the market is illegal per se.

Appalachian Coals v. US – 288 US 344 (1933): A combination that controls less than 60% of the market, restricts output in a manner which has the potential to control prices is judged by the rule of reason to determine the existence of a section 1 violation.

Swift: Agreement to 1) refrain from bidding against each other, and 2) fix prices at which they would sell to dealers constitutes a conspiracy in violation of Section 1.

**Nash Rule: Only such constraints and combinations are within the act as, by reason or intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.**

US v. Socony-Vacuum Oil – 310 US 150 (1940): Firms that combine to flood the market with excess product in an attempt to control market prices and quantities are in violation of section 1, as such conduct is per se illegal.
National Society of Engineers v. US – 435 US 679 (1978): A professional canon that prohibits competitive bidding by its members can be judged under the rule of reason to determine whether it is a section 1 price fixing violation.

BMI: Not price fixing because it was non-exclusive, it provided other avenues by which to obtain access to music, and it created a “new” product through the bundling.

Maricopa County: per se price fixing, as any fluctuation in a component of price is price fixing.

Superior Court Trial Lawyers: By reducing output to force a price increase, not necessarily price fixing, considered market power in rule of reason analysis.

US v. Topco Association – 405 US 596 (1972): A co-op of small supermarkets acted as a buying/selling group, and created exclusive territory agreements in violation of section 1 because such agreements restrict output and are therefore horizontal sales agreements.

When information sharing among competitors results in similar pricing schemes, the court can imply price fixing, which is per se illegal under section 1.

US v. Container Corp. – 393 US 333 (1969): Price sharing that results in similar pricing schemes constitutes price fixing and is therefore per se illegal.


BRG of Georgia: Immediate price increase from market division is per se horizontal restraint of trade in price fixing and market division.

Goldfarb v. Virginia Bar – 421 US 773 (1975): A fee schedule that set recommended minimum prices and established a price floor is price fixing and is therefore a per se violation of section 1 (horizontal minimum price restraint).

US v. C&S Bank – 422 US 86 (1975): Branches or wholly-owned subsidiaries cannot enter into price fixing schemes (conspiracies or combinations in violation of Section 1) even though they may share information regarding rates/fees and encouraged its subsidiaries to establish their own schedules.

Standardization of processes and contracts often leads to cost savings, but standardization that excludes is anticompetitive and can lead to “boycott” or “price fixing” designation; making the relevant product more homogeneous allows standardization agreements to facilitate cartelization, interdependence – leads to higher prices.

Product standardization can be analyzed under three circumstances: 1) If the program or agreement is a cover or a facilitating device for a cartel, it is price fixing and is per se illegal; 2) If it, given its particulars and the structural circumstances, leads to interdependent, supracompetitive pricing, or 3) if the program so significantly eliminates competition in product variety by reducing competitors’ freedom to determine size, share or composition of the product as to seriously reduce consumer options so that it hurts competition, it is judged by the rule of reason.

Cal Dental v. FTC: Standard fee agreement indicated price fixing, and is per se illegal.

Full Rule of Reason: 1) Plaintiff must prove actual adverse effect on market as whole, then 2) defendant must try to establish pro-competitive defense; finally 3) plaintiff can rebut with same effect through less-restrictive means.

The KEY to Antitrust: Market Definition
**Horizontal restraints of trade are per se illegal, and include horizontal boycotts. To characterize as per se, the plaintiff must present a threshold case that the challenged activity falls into a category likely to have predominately anticompetitive effects.**

**Per Se standard for boycotts:** In these cases the boycott often cut off access to a supply, facility or market necessary to enable the boycotted firm to compete, frequently the boycotting firms possessed a dominant position in the relevant market, and the boycott cannot be justified by plausible arguments that it was designed to enhance overall efficiency (Pacific Stationers).

Pacific Stationers – 472 US 284 (1985): the per se approach has been applied in cases that generally involved joint efforts by a firm or firms to disadvantage competitors by “either directly or denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.”

Eastern States Lumber v. US – 234 US 600 (1914): Horizontal restraint of trade (boycott) by retailers of wholesalers who sold consumers caused injury to the public and is per se illegal.

Paramount Famous Lasky v. US – 282 US 30 (1930): An agreement that restrains trade between producers and distributors (boycott) unduly suppresses competition and is therefore illegal under the rule of reason, when it drives out members of the distribution channel.

**Vertical restraints of trade, including vertical boycotts, are judged under the rule of reason.**

FOGA v. US – 312 US 457 (1941): A vertical combination between manufacturers and raw materials suppliers is a violation of section 1 and the rule of reason is applied, controlled the distribution channel.

Klor’s v. Broadway-Hale – 359 US 207 (1959): An implied horizontal agreement between manufacturers that is “manipulated” by a retailer in order to boycott the retailer’s competitor’s is a horizontal restraint of trade and is per se illegal under section 1.

NW Wholesale Stationers v. Pacific – 472 US 284 (1985): A refusal to deal if a cooperative agency expels a member without providing procedural justification should be judged under the rule of reason.

FTC v. Indiana Fed. of Dentists – 476 US 447 (1986): An insureds’ refusal to submit x-rays to insurers in conjunction with policy is an unreasonable refusal to deal in violation of section 1, rule of reason applied.

**Noerr Doctrine: Efforts by individuals or groups to petition the government are protected by the antitrust immunity doctrine. Under this doctrine, such activities are not illegal, even if they are undertaken for anticompetitive purposes. Must be a direct government petition, and must be undertaken without other criminal acts. The Pennington Doctrine creates the sham exception of Noerr when conduct is 1) objectively baseless, and 2) it has an anticompetitive purpose.**

Parker v. Brown: states are immune from antitrust liability; potential to lose immunity if conduct is wrongful under other laws in judicial/administrative proceedings (not legislative).

Allied Tube: Noerr Doctrine does not apply because the actual conspiracy is in violation of section 1.

NOW Boycott: Immune from antitrust because of constitutional freedoms, impossibility of individual liability, attempt to influence political action.

Terminal Railroad: Policy that discriminates against short-haul railroads is violation of section 1.
Associated Press: Horizontal restraint of trade, but not essential facility.

Paddock Press: Put self into stream of competition to remedy lost bids.

To evaluate a joint venture, consider 1) whether the venture anticompetitive in essence, 2) whether it contains unreasonably anticompetitive covenants or restrictions, 3) whether it must it grant access to competitors who want to join, and 4) what re the market power implications are.

The court can use circumstantial evidence to determine or imply the existence of conspiracy, but such evidence must make economic sense. Parallel pricing alone does not show an agreement; must have something else.

Interstate Circuit v. US – 306 US 208 (1939): The court can imply that an agreement exists, despite an explicit writing, if the circumstances indicate the parties colluded; awareness of other’s conduct is implicit in order to make the combination effective.

FTC v. Cement Institute – 333 US 683 (1948): An agreement to fix prices across an industry by means of a set pricing system (multiple basing system) is a restraint of trade in violation of section 1; evidence such as price sharing, exact prices to 6 decimal places, threats.

Theatre Enterprises, Inc. v. Paramount Film Distributors – 346 US 537 (1954): Similar motives for excluding competition may signal a concerted effort to collude in violation of section 1, but not necessarily indicative of collusion.

Matsushita v. Zenith – 475 US 574 (1986): A defendant is not in violation of section 1 if the alleged conspiracy does not injure competition and the prices were not predatory or monopolistic, but competitive; use reasonableness standard to determine if conduct is consistent with motive of colluding and driving out competition; must make economic sense with arguments to grant summary judgment.

Kodak v. US – 504 US 451 (1992): Unreasonable to assume that Kodak had Kodak-brand aftermarket power, considering it had no interbrand market power.

Atlas Van Lines: the boycott was judged under the rule of reason; Ancillary restraint present, legal; Market power not present, legal.

DuPont v. FTC – 729 F.2d 128 (2dCir. 1984): The mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an essential product does not violate the antitrust laws, unless: 1) Evidence of anticompetitive intent or purpose by producer, or 2) absence of independent, legitimate business reason… where logical nexus between conduct and effect and substantial lessening of competition.

In re Kellogg Co – 99 FTC 8 (1982): No antitrust violation when there is no evidence of the existence of anticompetitive conduct that would violate section 1.

JTC Petroleum: Must show causation, direct injury and antitrust injury to win a civil antitrust suit.

Retail Price Maintenance (both maximum and minimum) is per se illegal if the controlling firm takes one step beyond a unilateral request to adhere to pricing scheme (with one warning) and uniform application of penalty policy when a partner breaches.

Dr. Miles v. JD Park: RPM is per se illegal because it lessens competition and causes injury to competition; the seller cannot control the price of its own products; RPM contracts are unenforceable and cannot be used as evidence in an equity claim.
**Parker Doctrine:** RPM is immune under state law if: 1) The challenged restraint is one clearly articulated and affirmatively expressed as state policy AND 2) The policy must be “actively supervised” by the state itself.

Consignment agreements create a loophole to a certain extent, but must be clear consignment agreement where the retailer is merely an agent who sells the goods of the manufacturer, and remits the entire revenue, less a commission.

Simpson v. Union Oil Co. – 377 US 13 (1964): Consignment agreement is illegal if the cosignor retains title, but cosignee incurs full risk of loss or damages, or uses coercive tactics to induce participation.

US v. Colgate – 250 US 300 (1919): No section 1 violation for refusing to deal with “agreeing” firms, as long as no penalties are proven and the agreement is applied to everyone.

Copperweld: Subsidiaries of same parent company cannot conspire under section 1.

US v. Parke, Davis – 362 US 29 (1960): RPM to maintain wholesale and retail prices is a per se section 1 violation when there is evidence of coercion and discriminatory application of policy.

**Colgate/PD Rule:** There is no combination when a manufacturer simply states a resale price and announces that he will not deal with those who depart from it; there is a combination when the manufacturer goes one inch further.

Monsanto v. Spray-Rite – 465 US 752 (1984): Refusal to continue distributorship was an unlawful maintenance of RPM and a per se violation of section 1 when “something more” includes inducing distributors not to deal with retailers unless they conform to the pricing policy, but insufficient grounds for directed verdict. Standard for directed verdict in section 1 violation: 1) Evidence of complaints against non-agreeing party, AND, 2) evidence that tends to exclude the possibility that the manufacturer and non-terminated parties were acting independently.

Business Electronics v. Sharp Electronics – 485 US 717 (~1980): In order to prove a vertical minimum price fixing agreement in violation of section 1, the agreement between parties, whether expressed or implied, must indicate a specific price.

**Non-price restraints are judged by the rule of reason to prevent vertical integration (erroneous to assume that one party can influence another as effectively as multiple parties, acting independently, can influence that other).**

Nynex v. Discon – 119 SCt. 493 (1998): Per se rule does not apply to boycotts, but rule of reason should apply to measure harm to the competitive process.

Pace Electronics v. Canon – 213 F.3d 119 (3dCir. 2000): Termination of wholesaler contract for refusal to comply with vertical minimum price fixing agreement is per se illegal; therefore, no need to prove anticompetitive injury.

Kahn v. State Oil – 118 SCt. 275 (1997): Vertical maximum price fixing agreement is judged by the rule of reason to determine a violation of section 1.


Continental TV v. GTE Sylvannia – 433 US 36 (1977): Overrules Schwinn rule, that draws an arbitrary line between sales agreements (per se) and consignment agreements (rule of reason); vertical non-price...
restraints are judged by the rule of reason unless conduct is so unreasonable as to warrant a per se application; makes a strong consideration of market power.

**Northern Pacific Railroad Per Se Standard:** Conduct must be manifestly anticompetitive; because of their pernicious effect on competition and lack of any redeeming virtue, [per se actions] are presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use (no market power consideration).

To evaluate the legality of an exclusive selling agreement under the rule of reason, balance tips to defendant if plaintiff fails to show that the defendant has significant market power; a firm without market power is a price taker and cannot afford to increase prices without losing customers.

Valley Liquors v. Renfield – 678 F.2d 742 (7thCir. 1982): Seller without market power who terminates distributor from exclusive selling is not in violation of section 1.

**Exclusive Selling Standards:** 1) Termination was not justified by good business reasons of manufacturer, or 2) agreement caused lessening of intrabrand competition not outweighed by benefits to interbrand competition, or 3) only if the agreement and termination increased the market power of the manufacturer.

**Section 3 of the Clayton Act:** Unlawful to lease or make a sale for goods (not services) on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Market share of 15% - 25% is usually sufficient to trigger section 3.

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<td><strong>PER SE</strong></td>
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<td>Tying</td>
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Standard Fashion v. Magrane-Houston – 258 US 346 (1922): Section 3 violation occurs in existence of exclusive dealing contract when the firm has 40% market share and there is a covenant restricting patterns sold on premises and pricing of those patterns.

Standard Oil v. US – 337 US 293 (1949): Exclusive supply contracts with independent dealers is a per se violation of section 3, despite the fact that it is common practice (anomaly)

Tampa Electric v. Nashville Coals – 365 US 320 (1961): Applied rule of reason to determine that a 20-year requirements contract for the production and distribution of electricity without market power to substantially lessen competition is not in violation of section 3

**Modified Per Se Test:** 1) Product line must be determined (market definition must be established as the area where both the seller sells and the buyer buys); 2) Market share must be calculated based on the definition to determine whether competition was foreclosed by the contract; and 3) Weigh probable effect of contract on relevant area of effective competition, considering relative strength of parties, proportionate volume of commerce involved in relation to total volume of commerce in relevant market area, and probable immediate, future effects which pre-emption of that share of market might have on effective competition therein. If these factors are met, then per se illegal, otherwise, judge under the rule of reason.

The KEY to Antitrust: **Market Definition**
The KEY to Antitrust: Market Definition

Toys R Us v. FTC – 221 F.3d 928 (7th Cir. 2000): An agreement facilitated by a retailer coercing wholesalers and manufacturers to boycott another group of retailers is a horizontal restraint of trade with a vertical leg that is per se illegal; vertical leg is independently evaluated under rule of reason (similar to Klors, Northwest Stationers, International Salt).

Using over 30% market power over a desired product (tying product) to coerce the purchase of a less-desirable product (tied product) or entire product line (full-line forcing) is illegal and is judged using the modified per se test. The uniqueness of the product is based on consumer perception. The market definition can be limited by where the plaintiff is likely to look for substitute goods.

Jefferson Parish v. Hyde – 466 US 2 (1984): There is no (modified) per se section 1 violation when, although two distinct products exist, and products are not unique, could not truly use market power in hospital services to leverage anesthesiological services, with market share of 30%.

Chicken Delight v. Siegel – 448 F.2d 43 (9th Cir. 1971): Per se violation when two distinct products exist, the franchisor used its power over the trademark to leverage sales of suppliers, offered uniqueness via its trademark, creating market power and there were substantial anticompetitive effects.

“Viable” defenses for tying arrangements: Quality control – but depends on whether less-restrictive alternatives are available; New business justification – but if you can’t start without them, how will you survive? Integral component justification - Where the challenged aggregation is an essential ingredient of the franchised system’s formula for success, there is but a single product and no tie-in exists as a matter of law.

Principe v. McDonalds – 631 F.2d 303 (4th Cir. 1980): No tying violation when terms of contract (lease requirement) are not restrictive because they constitute one product, and the tying firm cannot use trademark to leverage goodwill.

Kodak v. ITS – 504 US 451 (1992): Summary judgment for the plaintiffs is denied, and there is no per se violation of section 1 when copier parts and services are two distinct markets. Need to measure market power to determine the existence of tying.

MIT: by jointly deciding the amount of need for each students, the Overlap Group effectively decreased the amount of aid each student would receive, which translated into each family paying a larger percentage of family contribution – price increases! Looked like price fixing, but full rule of reason analysis was appropriate.

Section 7 of the Clayton Act: No person shall acquire the whole or any part of the stock of another engaged in any line of commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition MAY be substantially to lessen competition, or to tend to create a monopoly.

PNB: 30% market share after merger – threat if market share increases by 33%; Private benefit and social benefit are not always the same; CR (concentration ratio)-2 – market power in context of two biggest firms; CR-4 – four largest firms: merger is in violation of section 7 if: A) Combined post-merger CR-4 is greater than 75% AND B) Combined share of two firms merging was greater than 8%.

Von’s (1966): Warren court wanted to protect small business. Divestiture was remedy, but lack of specificity allowed chain to sell of failing stores for cash, and then rebuild stores in more profitable areas

Alcoa: Measured cross-elasticity of supply and demand; narrow market definition made conduct illegal; rejected merger.
Continental Can: Government attacked firms that were big in the industry.

A potential defense to a merger is that the company is failing: 1) the firm must be failing (unable to reorganize under Chapter 11), and 2) there must only be one prospective buyer in the market (without assistance, the assets would drop out of the relevant market) (Citizen Publishing).

Citizen Publishing: Attempted to use failing business defense to justify the merger. The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires the failing company or brings it under dominion is the only available purchaser. If another person or group could be interested, a unit in the competitive system would be preserved and not lost to monopoly power.

The relevant market is defined by more than sales figures.

General Dynamics: Relevant market is not necessarily determined by sales figures; must also consider factors such as available reserves (no reserves, no viability in the future). In Phillips/Conoco, the court compared production (short-term), refining capacity (mid-term) and reserves (long-term) to determine future of the firm.

Herfendal Index: The sum of the squared market shares of each potential competitor.

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<tr>
<th>HHI &lt; 1000 - irrelevant</th>
<th>1000 &lt; HHI &lt; 1800 – questionable</th>
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<td>• Change in HHI over 100 potentially raises significant competitive concerns</td>
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Hospital Merger case: “management” is sufficient to imply ownership for purposes of market share.

Handout on Mergers: merger-specific efficiencies are only achievable via the particular merger. FTC and P&G case says it is difficult to support an efficiency argument. Handout on mergers factors: 1) Changing market conditions; 2) Financial condition of firms in the relevant market; 3) Special factors affecting foreign firms; 4) Ease of Entry; 5) Nature of the product and terms of sale; 6) Information about specific transactions and buyer characteristics; 7) Ability of small or fringe sellers to increase sales; 8) Conduct of firms in the market; 9) Market performance; and 10) Efficiencies.

Heinz: The HHI indicates that the merger should be rejected; parties argued over whether they were competitors; once the market is defined, cannot be redefined for other part of the analysis.

Staples: Easy to see why merger was rejected because of HHI.

AOL Time Warner: The merger was a conglomerate and horizontal and vertical. The foreclosure was in the broadband market and in the distribution of ITV and other ISPs. The court implied the market definition and HHI. As a remedy, the court proposed opening the distribution to a broader group of competitors, but for a five-year period, to allow firms to adapt to changes in competition. The harm to competition is the impact on technology.

The KEY to Antitrust: Market Definition