CHAPTER 1

A. Principal Antitrust Statutes

1. Sherman Act § 1 (Anticompetitive Agreements)

Every contract, combination in the form of trust or otherwise, or conspiracy, in the 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 or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding 10 million if corporation or 350k if person, imprisoned up to three years.

2. Sherman Act §2 (Monopolization)

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed to be guilty of felony, same punishment as § 1.

3. Clayton Act § 3 (Conditioning of Sales)

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

4. Clayton Act § 4 (Civil Treble Damage Suits)

5. Clayton Act § 7 (Anticompetitive Mergers)

6. FTC ACT § 5 (Anticompetitive Practices)

B. Monopolization:

Aspen Skiing Co. v. Aspen Highlands Skiing Co: (Sherman Act § 2)

Aspen Skiing owned three mountains and Highlands owned a fourth mountain. For some time a 6-day all Aspen ticket was used to allow purchasers to travel between ski resorts and utilize different mountains of different days. By 1977, multi-area tickets accounted for nearly 35% of the total market. Aspen Skiing told Highland that it would only continue the pass if Highland
agreed to a reduced share of the profits from the multi-ticket, and when Highland refused, replaced 4 pass, with a three area ticket featuring only its mountains. Aspen Skiing refused to sell Highlands any lift tickets (even at retail), and refused to honor vouchers issued by Highland (even though they were guaranteed).

1. The District judge explained that the offense of monopolization under §2 of the Sherman Act has two elements (1) the possession of monopoly power in a relevant market, and (2) the willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes. (Did they use arrangements designed to further domination of market).

2. Ct held:
   a. Monopolization:
      ii. Possession of monopoly power in a relevant market
      iii. Willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means
   b. Central Message of Sherman Act is that a business entity must find new customers and higher profits through internal expansion – that is, by competing successfully rather than by arranging treaties with its competitors.
   c. While firms have a right to refuse to deal with other firms, the right is not unqualified, when the purpose is to maintain a monopoly – there is a problem, but the improper behavior has to be deliberate; Here Aspen Skiing made deliberate choice to change historical practice.
   d. Aspen Skiing had no valid reasons:
      ii. Tried to protect itself against loss from not cooperating with Highland by creating substitute product
      iii. Willing to forgo daily ticket sales by not honoring Highland’s vouchers
      iv. Monitoring argument not supported by evidence and undermined by the fact that Highland would hire auditor

3. Review
   a. What must you show for monopolization:
      (1) Market
      (2) Monopoly Power
      (3) Did they engage in exclusionary or competitive conduct?
   b. Attempts to Monopolize:
      (1) Market
      (2) Show intent to achieve monopoly power in relevant market
      (3) Dangerous probability of success

4. Notes
   c. Why didn’t Ski Co. argue that there were substitute goods available, and that they did not have monopoly power (i.e. golf, etc)
d. Finding of monopoly power is based on market share

e. They could have argued that the court drew the market too narrowly

f. The could have argued that the multi-day ticket was not an essential facility.

g. Essential facility: Something that is necessary to conduct an activity??

h. While CT agrees that Ski Co. has no obligation to compete with competitors, they cannot refuse to agree to create monopoly – this will violate the antitrust laws.

i. CT looks at Lorain Journal case: There Lorain Journal refused to deal with advertisers who did business with radio station.

   ii. There were no third parties involved in the Ski Co case

   iii. The refusal in the Lorain Journal case was conditional, refusal in Ski Co was absolute

   iv. Lorain Journal, condition was necessary to show intent

j. Ski Co. (Monopolization Context) not necessary to show specific intent, no monopolist monopolizes without knowing what they are doing

k. Big problem for Ski Co is that they did not come up with legitimate business reasons – court doesn’t buy what they are doing

l. Ellis points out that Highlands has increased its bargaining position by brining antitrust case, questions whether Highland’s demise undermines the monopolist or antitrust theory

m. How important is the pre-existing multiphase ticket, if there wasn’t one, then the essential facility argument disappears.

n. One way to look at decision, is the court is enforcing a cartel.

C. Vertical Restraints: (Rule of Reason)

*Graphic Products Distributors, Inc. v. Itek Corp.* (11th Cir. 1983): (Sherman Act §1) (vertical)

Itek Graphic Products Division manufacturers graphic equipment and supplies for the national art market. Prior to 1975 it supplied its equipment exclusively through its own sales network consisting of 22 sales or branch offices in and around major urban areas. In an effort to increase sales in areas outside these markets, Itek switched to a dual-distribution system in the period of 1975-1976 allowing for the branch or sales office direct sales activity to encompass a 50 mile radius of the sales or branch office and allowing independent contractors to sell in 30 or so other market areas designated by Itek’s Business Equipment Manufacturers Association (BEMA). Zatos, an Itek salesman, formed GPD, and received a distributorship covering 7 areas on Georgia and SC, selling 90% of its products within the assigned area and 10% in the area covered by the Atlanta branch office and to a customer within a territory of an Alabama based distributor. Itek terminated the distributorship as result, and GPD brought an antitrust case alleging conspiracy to restrain trade

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1 No evidence was presented before or after distribution system showing the extent of Itek’s sales activities outside the major urban areas or the extent to which Itek’s competitors were selling in these areas, or what the potential market share was in the outlying areas, or if and to what extent it had been exploited. “With respect to GPD’s assigned territory, the record indicates that Itek had realized only 10-13% of the potential market for platemakers, and only 1-2% of the potential market for other graphic products.
1. CT beings with the framework set forth in *Sylvania* that there is no per se rule against territorial or customer restrictions, as “an antitrust policy divorced from market considerations would lack any objective benchmarks,” and noted that the “legality of particular vertical restrictions must be judged by their competitive impact,” and noted the Rule of Reason must control as there are three ways vertical restrictions can be wielded by a manufacturer to compete interbrand:
   a. Used by new manufacturers or manufacturers entering new markets to induce competent and aggressive retailers to invest large amounts of capital and labor in the distribution of products unknown to the consumer (“market access rationale”)
   b. Used by established manufacturers to induce retailers to spend money on promotional or servicing activities necessary to market their goods efficiently – increasing sales, but free-rider problem arises (“dealer services-free-rider” rationale)
   c. Used to ensure product quality and safety, in accordance with products liability and consumer warranty law.
2. CT notes at threshold: Plaintiffs must demonstrate market power of defendant by offering a “well defined relevant market upon which the challenged anticompetitive actions would have had substantial impact.”
   a. Market power is the ability to raise the price significantly above the competition level without losing all of one’s business, market share is often substituted for market power.
   b. No problem here as far as Itek is concerned as they controlled 70-75% of the relevant market, and they designed platemakers to that only Itek supplies could be used to service, and warranty prohibitions prohibited other people from servicing
   c. Product differentiation wasn’t huge problem here, b/c sufficient evidence that Itek product was a superior product.
3. After showing market share, GPD has to show anticompetitive effect, either in intrabrand or interbrand markets. *International Harvester.* Consumers are injured by the restraint if, without obtaining more services, they are denied intrabrand choices that are sources of consumer welfare, but are benefited (withstanding the restraint) if dealer services increase. Gerhart, The “Competitive Advantages” Explanation For Intrabrand Restraints: An Antitrust Analysis, 1981 Duke LJ 417, 439.
4. Second implication of *Sylvania* even if a negative effect on consumer welfare and competition can be shown, court must look to possible procompetitive effects stemming from intrabrand competition, burden of providing antitrust effects rests on plaintiff.

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2 Here no question submitted to the jury regarding market power, but 11th Cir. Assumes court made this finding and additionally finds that there was “ample evidence to support a finding that the relevant geographic market was national.” Also, relevant product market was not submitted to jury, only theory was the relevant product market was platemakers, GPD also sold duplicators, camera processors, and microfilm equipment, Itek never challenged this characterization of the relevant product market, so 11th Cir. assumes that the relevant product market was platemakers.
a. Here, purpose of Itek was to have no competition between branch offices and distributors, so no low bidding would occur.
b. Also, Itek wanted to keep service charges higher, and GPD was underbidding branch offices for service.
c. Here problem was really that Itek acted as supplier and distributor and had other independent distributors, this is what really moved the courts, because Itek had an incentive to keep the price of the goods high for the consumers on the distribution end (sales from distributors to consumers) because they would profit at that end as well, not just from sales from supplier to distributor. If this was not the case, it would have been easier for Itek to argue that one of the positive aspects of vertical restraints was present, i.e. to induce distributors to advertise more, etc.
d. No showing that restrictions were tied to any legitimate purpose there, no evidence here that the absolute territorial restrictions, as opposed to the use of independent distributors, were important to the goal of improved service coverage.
e. Ct doesn’t buy Itek’s best efforts argument either (that purpose was sales penetration in outer markets and GPD wasn’t using best efforts to penetrate markets).

5. Notes:
   a. Ellis notes the lack of evidence presented, bad lawyering.
   b. Not infrequently local counsel tries an antitrust case, and then lawyers with antitrust experience don’t handle it until appeal, when it’s too late, and the trial record is established.
   c. Vertical vs. Horizontal
      (1) Vertical agreements are those among persons at different levels of the market structure, i.e. among a manufacturer and its distributors
      (2) Horizontal agreements are those among competitors at the same level of market structure, i.e. among manufacturers or distributors.
      (3) Vertical Restraint: Use Rule of Reason
      (4) Horizontal Restraint:
         (a) Naked or Ancillary
         (b) If Naked Restraint: just have to show agreement, per se unlawful
         (c) If Ancillary use Rule of Reason
   d. Ellis: Court doesn’t use per se here b/c good things come out of this situation, vertical restraint can stimulate intrabrand competition (don’t want free ride, good for customers, get new market)
   e. Market power:
      (1) Product differentiation: all same in Cournotia if all products are all the same
      (2) If you have an undifferentiated products, the demand curve is flat, if you have differentiated products, you can sell at higher prices without sacrificing sales.
   f. Intrabrand vs. Interbrand competition:
Intrabrand competitions is the competition among the manufacturers of the same generic product … and is the primary concern of antitrust law.

Intrabrand competition is the competition between the distributors – wholesale or retail – of the product of a particular manufacturer.

Normally manufacturer wants lowest cost for distributors, so they sell at lower prices, they sell more product, here ITEK owns distributors, they argue that they are trying to increase coverage and protect distributors, but this argument fails b/c ITEK is sitting on both sides of table (wants to avoid cream skimming by independents)

Does price fixing argument sneak in the back door (Itek owning both distributorship and manufacturer)

D. Conspiracy to Restrain Trade:

*Rothery Storage & Van Co. v. Atlas Van Lines* (DC Cir. 1986): (Sherman Act §1)(horz.)

Atlas, the 6th largest van carrier, provides a network of 490 agents and operates a national moving company and uses independent moving companies throughout the country as its agents, operating under a standard agency contract. Carrier agents used Atlas equipment, training, etc. for interstate carriage under their own authorities and paid Atlas nothing. The agents find customers and do the packing, loading, hauling, and storage, and Atlas sets the rates, dispatches shipments, chooses routes, arranges backhauls, collects revenues, establishes uniform rules for appearance, trains salespeople & drivers, purchases and finances equipment, and conducts a national advertising scheme. In 1981, the ICC repealed its requirement that carrier agents charge the same rate for agency shipments and shipments carried on their own accounts, and various agents began undercutting Atlas’ prices while still using their services, to counteract these problems Atlas announced it would terminate any contracts if an agent carried under its own authority and Atlas’ to avoid the “free rider dilemma.”

1. Rothery alleged this constituted a group boycott in order to categorize it as per se illegal, so they don’t have to prove market power, only the agreement.

2. Ct held: Challenged restraint is ancillary to the economic integration of Atlas and its agents so that the rule of per se illegality toes not apply, and the Rule of Reason is not offended as Atlas’ market share is fall to small for restraint to threaten competition.

3. Ct begins with premise that all other carriers are potential or actual competitors with Atlas, even the Board of Dir. consists of potential competitors.

4. Court notes that Atlas cannot fix rates as it does not have a large enough share of the market to constitute a monopoly, many substitutes available as far as Van lines go.
a. Court notes: The degree to which a similar product will be substituted for the product in question is said to measure the cross-elasticity of demand, while the capability of other production facilities to be converted to produce a substitute product is referred to as cross elasticity of supply.

b. Evidence of sub markets also goes to show the availability of consumers to substitute products.

c. Atlas arrangement is meant to promote efficiency – avoid free rider problem of little carriers using Atlas’ national image, undercutting Atlas’ price, and then not giving Atlas’ any money for all the services. Like Ellis’ example of the 5th Avenue stereo listeners who buy in Brooklyn warehouse.

5. Boycotts are never per se illegal, as this would destroy many common beneficial business arrangements.

a. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* (1985) (plaintiff, stationer, challenged as per se illegal its expulsion from a wholesale purchasing cooperative for violating the group’s by laws). CT held: not all concerted refusals to deal should be accorded per se treatment.

b. *Addyston Pipe & Steel Co (6th Cir. 1898)* per se illegality for naked price fixing and market dividing agreements, but ancillary agreements are okay as long as directed at economic efficiency (subordinate and collateral to a separate legitimate transaction).^3^

6. Court goes through historical analysis:

a. *Topco Assocs* (1972) Supremes held Topco supermarket’s ancillary horizontal restraint designed to make integration more efficient with clear relationship to marketing effectiveness; can’t sell Topco if another had rights there (private labeling) was per se illegal as it was horizontal. Clarified *Sealy* which had appeared to hold illegal a very similar set of restraints among mattress manufactures.

b. *Broadcast Music Inc (BMI)*: Supremes rejected literal approach to price fixing with respect to blanket licenses for copyrights and royalties because that approach does not establish whether a particular practice is of a type that is plainly anticompetitive and very likely without redeeming virtue (*BMI* read to overrule *Topco* to some extent).

c. *Sylvania* cited in *NCAA* case for proposition that “a restraint in a limited aspect of a market may actually enhance market competition.”

d. Also discusses *Pacific Stationery*, notes that ancillary restraints are essential to the efficiency of contract integration: An anticompetitive effect is to be presumed only if the plaintiff makes a “threshold showing” that the group “possesses market power or exclusive access to an element essential to effective competition.”

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^3^ Court gives law firm example, partners agree not to compete with firm, steal clients, etc. Hard to have a firm without some sort of agreement like this, but definitely more efficient and better service to clients than 500 individual lawyers. Better service at lower cost.
7. Notes:
   a. Bork construes this arrangement as a vertical restraint, and then goes into the rule of reason.
   b. Naked Restraint vs. Ancillary Restraint:
      (1) Naked restraint: Cournotia: only purpose is to decrease output and increase prices: per se illegal.
      (2) Ancillary restraint: law firm made up of partners; agree on draw, hourly rate, no partner engage outside firm: use rule of reason, this is where Bork ends up.
   c. Economists: monopoly power: any price set above the competitive level, the problem is product differentiation comes in
   d. Market power for purposes of §2: looking for significant or substantial market power – filter is market share.

E. Injury to Competition Through Mergers:

*United States v. Waste Management Inc.* (2nd Cir. 1984): (Clayton Act §7)

Waste Management (WMI) acquired EMW, who owned a subsidiary (Waste Resources), which was in the waste disposal business in 10 states and had revenues of $54 million. WMI and Waste Resources both had subsidiaries operating in the Dallas area. WMI had American Container Service (ACS) and Texas Waste Management and Waste Resources had Texas Industrial Disposal (TIDI), after the merger WMI operated TIDI as a sub of WMI.

1. CT’s holding:
   a. first disagreed with trial court finding that 48.8% of market share was per se illegal.\(^4\) Court found that easy of entry of FW competitors was so easy as to constrain prices of WMI subs.
   b. Court then addressed Market Definition and Determination of Market Share
   c. Court noted that residential customers receive service from municipal haulers, so that relevant market that WMI competes in is limited to industrial customers due to residential customers preference for non-containerized equipment
   d. Court noted that “appraisal of the impact of a proposed merger upon competition must take into account potential competition from firms not presently active in the relevant product and geographic markets. *United States v. Falstaff Brewing; FTC v. Procter & Gamble; United States v. Penn-Olin Chemical Co.*
   e. Under *General Dynamics*, “a substantial existing market share is insufficient to void a merger where that share is misleading as to actual future competitive effect.”

\(^4\) Court noted that there was “containerized” and “non-containerized” equipment (containerized – dumpster type, noncontainer – men on truck). Court also noted there were three types of customers: (i) single or multi dwelling residential customers, (ii) apartment complexes of varying size, (iii) “business” customers – stores, restaurants, etc. and (iv) “industrial” customers – construction sites, factories, etc.
f. Merger guidelines issued by Government note, “[w] here entry is so easy that existing competitors could not succeed in raising prices for any significant period of time gov. will usually not challenge a merger.”
g. Court concludes by noting that anyone can operate out of their homes to pick up trash if WMI raises prices to high (unclear how true this is if we’re talking about industrial container service), but notes that the FW drivers could compete in the Dallas market.

2. Class notes
   a. Section 7 of the Clayton Act: “effect may be to substantially lessen competition” or “tend to create a monopoly”
      (1) Doesn’t have to be, just may tend to create or may be to substantially lessen
      (2) Different from Sherman Act where there has to be an actual affect
      (3) Market is defined as any line of commerce in any section of the country
   b. Brown Shoe: First case to interpret the Clayton Act after the 1950 Amendments
   c. Congress does not treat all mergers as horizontal mergers as per se illegal b/c there are benign mergers (query: is this maybe etc. language – less of standard than Sherman a balance between dangers of horiz. mergers and benign effects)
   d. Ability to rebut market share marks more nuanced approach to section 7 (c.f. Philadelphia National Bank and 30%)

F. Special Requirements for Private Recovery


Mid-Michigan was exclusive provider of radiological services to Central Michigan Community hospital, Mid-Michigan was getting complaints about over billing, so CMCH said they were terminate agreement unless Mid-Michigan agreed (1) not to compete, (2) to submit prices to be charged, and (3) to relinquish staff privileges. When they refused their agreement was terminated and they brought suit for an antitrust violation.

1. Ct held: No standing, standing concerns the connection between the asserted wrongdoing and the claim injury to limit the class of plaintiffs to those who are in the best position to vindicate the antitrust infraction
2. From market standpoint, no reduction in radiological services to consumers, nothing has changed, just reshuffling of competition, plaintiffs have suffered no antitrust injury
3. Antitrust injury should reflect the anticompetitive effect of the defendant’s actions, underscoring fundamental tenet that “antitrust laws were enacted for the protection of competition, not competitors.
4. Notes:
a. Palsgraf analogy: Ellis: Mid-Michigan would be like the guy standing next to Ms. Palsgraf.

**REVIEW:**

<table>
<thead>
<tr>
<th>Single Firm</th>
<th>Multiple Firm</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monopoly</td>
<td>Horizontal Restraint</td>
</tr>
<tr>
<td>Attempt to Monopolize</td>
<td>Vertical Restraint</td>
</tr>
<tr>
<td></td>
<td>Conspire to Monopolize</td>
</tr>
</tbody>
</table>

Monopolization:
(1) Market; (2) Monopoly power; (3) Did they engage in exclusionary or competitive conduct.

Attempt to Monopolize:
(1) Show relevant Market; (2) Show Intent to achieve monopoly power in relevant market; (3) Dangerous probability of success

Horizontal Restraints
(1) Naked or Ancillary
If Naked – just show agreement, per se unlawful
If Ancillary- (Rule of Reason): (1) Define relevant market/market power; (2) Anticompetitive effect; (3) Procompetitive effect (balancing)

Vertical Restraint:
(1) Rule of Reason (see above)

**CHAPTER 2**

A. The Mechanics of Price Fixing Arrangements:

How price fixing works: The Uranium Cartel: Existed to manipulate world uranium prices. Ellis also showed movie on ADM and Lysine

B. Classic Early Cases:

1. *E.C. Knight Case*: Holmes stumbled over commerce clause, now no problem, commerce encompasses nearly everything.

2. *US v. Trans-Missouri Freight Ass’n* (1897): Agreement between several independent railroads regulating railroad traffic and rates, changes subject to notice and approval by association, punishable by fine (up to $100)
a. Supreme Court: Mere compliance with another statute was no defense (here Interstate Commerce Act) to the antitrust liability, unless the other statute specifically required or authorized the conduct in question
b. Reasonable rate argument is no good: Who decides what is reasonable, what is reasonable one day, might be unreasonable the next. Market decides what is reasonable.

3. **US v. Addyston Pipe & Steel Co.** (6th Cir. 1898): Firms competed in pay and free territories assigned by association. Free territories allowed competition, pay territories, each firm assigned geographic area and list of customers, bonuses paid to ass’n by customer, distributed to manufacturers based on capacity, later turned to auction system, with winning bidder predetermined (only 30% of capacity of country and limited reach)
   a. Taft: Goes back to English Common law: Contract “in partial restraint of trade” must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary, if main purpose is to restrain trade, void.
   b. Reasonable price argument fails again.

4. **US v. Trenton Potteries Co.** (1927): Manufactured 82% of toilets, maintained uniform prices, and forbade sale of seconds (flawed products- could only be sold abroad)
   a. While Appellate court held that “not every restraint of trade is unlawful,” it was overruled by Supreme Court, who reinstated district court instruction: “The law is clear that an agreement on the part of the members of a combination controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade.”
   b. Reasonableness of prices non issue
   c. Garden variety price fixing.

5. **Appalachian Coals v. US:** Defendants: 137 producers of coal in 4 states, had joint selling agency, Appalachian Coals, Inc., which was exclusive agent for sale of coal in mined Appalachian territory, sell as much as defendants mined, apportioning orders amount them if demand was not sufficient to sell all coal. Agency set price of coal, but defendants were free to use their own sales outlets, but only on terms of agency.
   a. Supreme Court reversed: No evidence for conclusion that operation of defendant’s plan would have an injurious effect on the competitive conditions of production, and network of transportation facilities at immediate command.
   b. “Extent of developed mining capacity, and the vast potential undeveloped capacity, makes it impossible to conclude that defendants thought the operation of their plan will be able to fix the price of coal in the consuming markets --- Plan did not contemplate fixing of market prices.
c. “If in actual operation it should prove to be an undue restraint upon interstate commerce, if it should appear that the plan is used to the impairment of fair competitive opportunities,” Gov can bring action later.

d. Disagreement whether this case was decided correctly under the law.

C. Doctrinal Foundations of § 1:

**Per Se Violations**

1. Horizontal Price Fixing

*United States v. Socony-Vacuum Oil* (“Madison Oil”) (1940): In 1926, crude oil was being overproduced, reducing productive capacity of oil fields, driving down the price below levels of the cost of production, once wells become abandoned, significant costs are incurred in opening them. Texas was attempting to enforce a proration law, with little success, and “hot oil” (unlawfully produced) was selling for substantially lower prices than legal oil. The oil refineries did not have any storage capacity, so they had to sell “distress” gasoline almost as soon as they made it, driving the market price down. In 1934 the Petroleum Administrative Board proposed that certain major oil companies would purchase gasoline from refiners, each was to select a “dancing partner” and would assume responsibility for purchasing its distress supply, with the hope that this would raise prices for the oil. The amount they purchased was more than they normally would, some refiners curtailed their production, and by fixing purchases of refined product in East TX, gasoline prices increased in the Mid-West.

a. Ct held:

(1) Rule of Reason does not affect price fixing arrangements, price fixing arrangements subject to per se rule.

(2) Court found this agreements purpose was to raise prices, causation present where the buying programs resulted in a price rise and market stability, which but for them would not have happened

(3) Fact that there was still competition doesn’t matter b/c competition was restricted through the removal of part of the supply, prices rose and jobbers and consumers paid more for gasoline in Mid-West than they would have but for the conspiracy. Elimination of competitive evils does not justify buying program.

(4) Prices are fixed with the meaning of *Trenton Potteries* case if the “range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices.” Stabilization is but one form of manipulation, and monopoly power is not the only power which the Sherman Act strikes down.

(5) FN 59:
(a) A person may be guilty of conspiring, although incapable of committing the objective, and conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring.

(b) It is the contract, combination or conspiracy, in restraint of trade or commerce which §1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.

(c) “the fact that the group cannot control the market prices does not necessarily mean the agreement as to prices has no utilities, effectiveness of these agreement is dependent upon many factors, economic justification, etc.

(d) They are banned b/c of their actual power to threaten the central nervous system of the economy.

(e) The existence or exertion of power to accomplish the desired objective becomes important only in cases where the offence charged is the actual monopolization of any part of trade or commerce in violation in § 2 of the Sherman Act, Section 1 is legally distinct from Section 2.

2. Boycott programs

*Fashion Originator’s Guild of America v. FTC* (1941): Dress manufactures designs were being copied by other manufacturers, and sold for lower prices in retail stores (style piracy), they didn’t have a patent for the designs. They banned together and formed the Guild (176 members), and refused to sell clothing to any retailer who purchased a pirated design, as a result 12,000 retailers designed agreements to cooperate with the boycott program. Also National Federation of Textiles Inc., a textile manufactures guild, members of Federation who are affiliated with the Guild agreed to sell product only to garment manufactures who have agreed to sell to cooperating retailers. Guild employs “shoppers” to visit retailers, make sure they are complying, elaborate trial and appellate tribunal system setup to determine if one is a copy, also audit books (of Guild members to see if they are selling to retailers), heavy fines employed.

a. Ct. Held:

(1) Guild narrows the outlets to which garment and textile manufactures can sell and the sources from which retailers can buy; subjects all retailers and manufactures who decline to comply with the Guild’s program to an organized boycott; takes away freedom of action of members – requiring them to reveal intimate details of records, combination is extra-governmental agency, proscribing rules and regulations for trade (trenches upon power of national legislature)

(2) An intent to increase prices is not an ever-present essential of conduct amounting to a violation of the policy of the Sherman and Clayton Acts; a monopoly contrary to their policies can exist even
though a combination may temporarily even permanently reduce the price of the articles manufactured or sold.

b. Notes: Why isn’t this like the *Cement Manufactures Protective Ass’n* case:
   1. Cement was ancillary restraint of trade, just sharing information, and canceling improperly sought deliveries
   2. Both cases deal with common law tort through collection action
   3. A third party was affected in the fashion case (the retailer), difference also in the appearance of extra judicial enforcement mechanism.

3. Territorial Allocation

*US v. Topco Associates (1972):* Topco (an association of 25 small & medium sized regional supermarkets) served as a purchasing agent for its members, procuring and distributing to the members more than 1,000 different food and related nonfood items, most of which are distributed under the brand name: Topco. All of Topco stock is owned by the members, and the board of directors, which controls the operation, is drawn from the members. Topco designed areas for its members operations, where they would only be able to sell Topco branded products in their exclusive area and if this restriction is violated membership can be terminated. Topco argued that the only way they can compete with national chains is to sell private label foods (giving customers choices and allowing them to buy branded foods at lower prices), and the only way to maintain their private label is to join together, and restrict free riding on sales of branded foods, and the restrictions really increase competition.

   a. Ct held:
      1. Classic example of *per se* violation of §1 is an agreement between competitors at the same level of market structure to allocate territories in order to minimize competition, restraint in this case is a horizontal one, and therefore a *per se* violation of § 1.
      2. Court compares this case to *Sealy*, which licensee the sale of mattresses and bedding, and fixed prices.
   
   b. Dissent:
      1. This is ancillary restraint designed to increase competition with national brand chains
      2. Should have analyzed under Rule of Reason like District Court did, basically going to destroy Topco and local grocers in favor of national chains
   
   c. Notes:
      1. If vertical restraint, could have been viewed under Rule of Reason, can’t view this way b/c of Board composition, but from an economic standpoint, looks vertical
      2. Initial determination is outcome determinative
Most commentators view Topco as a disaster, b/c the arrangement was pro-consumer, and procompetitive

If court had examined under Rule of Reason, would have balanced interbrand competitive effects with intrabrand competitive effects

Topco has never been overruled, cited in Rothery as good law

Palmer also cites Topco, but Topco is the last full opinion on issue of territorial allocation as per se unlawful, may have been implicitly overruled

**Rule of Reason**

1. *Board of Trade of City of Chicago v. US* (1918): In 1906, the Chicago Board of Trade adopted the “call rule”, prohibiting members from purchasing or offering to purchase, during the period between the close of the call and the opening of the session on the next business day, any wheat, corn, oats, or rye “to arrive” at a price other than the closing bid at the call. After the rule, bids had to be fixed at day’s closing bid on the call until the opening of the next session.

   a. Ct held:

      (1) The legality of an agreement or regulation cannot simply be determined by whether or not the agreement restrains trade: every agreement concerning trade, every regulation of trade, restrains, to bind is their very essence

      (2) “The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”

      ii. To determine that question courts should consider: facts peculiar to business which restraint is applied; conditions before and after the restraint; nature of the restraint and its effect, actual or probable; history of the restraints; evil believed to exists; reason for adopting particular remedy; purpose or end sought to be attained.

      (3) Here: Nature of rule, scope of rule, effect of rule, did not suggest any anticompetitive design or effect, only applies to small amount of grain, small amount of sales, no affect on market prices, or volume of grain coming to Chicago, now people know of prices, more trading available, larger number of people participating, eliminate risks of private market

   b. Notes:

      (1) Dicta very important

      (2) Rule was enacted to avoid cheating on commissions by brokers, b/c Board operated using fixed commissions, brokers were cheating, selling lower prices after hours

      (3) Maybe DOJ didn’t attack commission fixing b/c of restrictive view of Commerce clause at that time, now commerce is everything.
(4) Never any attempt to show what is bad about after hours trading
(5) Market is defined as grain coming into Chicago; only after hours here, limited market
(6) Fixed price: arrived at competitively – full information
(7) Brandeis looks at the market prices and grain coming into Chicago, and lists a laundry list of beneficial effect.

2. *Nat’l Soc’y of Professional Engineers v. U.S.* (1978): Agreement between Engineers prohibiting them from quoting a price on services until after they had been contracted to perform a project. Society of Engineers averred that this agreement was to keep the quality of Engineering projects at a satisfactory level (public interest) for if Engineers were allowed to compete in a competitive bidding process with one another, the quality of their work would suffer, endangering the public. District Court held *per se* violation.

a. Ct. Held:
   (1) Begins by drawing an analogy to the *Goldfarb v. Virginia State Bar* case, and noted that agreements between professionals *may require* that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently b/c of the professional service association is not a business.
   (2) Court then moves on to Rule of Reason analysis: *Standard Oil test*: Whether the challenged contracts or acts were unreasonably restrictive of competitive conditions.”
      ii. Unreasonableness could be based either on: (1) the nature or character of the contracts; or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. The inquiry in confined to a consideration on the competitive conditions.
   (3) “The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.” *Chicago Board of Trade v. US.*
   (4) Ban on Competitive Pricing: Rule of reason does not accept that restraint on price competition ultimately inures to the public benefit by preventing the production of inferior work and insuring ethical behavior.

b. Notes:
   (1) Public service aspect in *Goldfarb*: professions get treated differently.
   (2) *California Dental Ass’n* (p. 196): Local dental ass’n had code of ethics prohibiting discount pricing. FTC held this practice to be
illegal (FTC Act prevents unfair methods of competition, interpreted to encompass violations of the Sherman Act). Applied *per se rule*; alternatively looked at under *abbreviated* Rule of Reason. Ninth Circuit overturned Rule of Reason. Supreme Court reversed: At least plausible that information disparity between professional and patient presents a quality issue. Might have procompetitive effect. Complete rule of reason inquiry.

D. Doctrinal Reformations: § 2.04

1. Loosening of Per Se Rules: Price Fixing:

   A. *Broadcast Music v. Columbia Broadcasting Systems (BMI)* (1979): BMI & ASCAP control blanket licenses for 22,000 performers (nonexclusive), they issue licenses and distribute royalties to copyright owners in accordance with a schedule reflecting the nature and amount of the use of their music and other factors. Fees for blanket licenses are ordinarily a percentage of total revenue or a flat dollar amount, and do not directly depend on the amount or type of music used.

   a. Ct Held:

      (1) Court of Appeals approach of *per se* price-fixing is too simplistic, when two partners set the price of their goods or services they are literally “price-fixing,” but they are not *per se* in violation of the Sherman Act. *Addyston Pipe & Steel Co.*

      (2) It is only after considerable experience with certain business relationships that courts classify them as *per se* violations. See *Topco.*

      (3) The line of commerce allegedly being restrained, the performing rights to copyrighted music, exists only b/c of the copyright laws.

      (4) Court takes a *quick look*, to determine whether the “practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instated one designed to “increase economic efficiency and render markets, more rather than less efficient.

      (5) Blanket license not a naked restraint of trade, but accomplishes the integration of music sales, lowering costs (transaction costs), whole is truly greater than its products, and is to some extent *a new product* with unique characteristics.

      (6) Can also seek agreement with individual composer

   b. Dissent (Stevens)

      (1) Blanket license is discriminatory, forces consumers to purchase more than they need, and price based on percentage of revenues, reflecting ability to pay, rather than cost, quality, or quantity of product, factors normally affecting price in a competitive market.
(2) If distributions of royalties can be calculated on per-use and per-composition basis, it is difficult to see why royalties could not also be collected in the same way.

c. Notes:

(1) Where does this leave Topco: Also new product in that case, court in this case uses Topco as building block.

(2) Madison Oil is brittle, but it hasn’t gone away, most cases it still applies. BMI limits Madison Oil or is this a rediscovery of an old doctrine: Appalachian (single agent marketing for all of them), is Appalachian not simply limited to depression circumstances.

(3) Transaction costs are low with this arrangement, allows them to sell at a lower price, increasing demand.

(4) Teaching of BMI: What may be on its face-price fixing, falling within Madison Oil may be viewed under the Rule of Reason in certain circumstances:

(a) availability of single license
(b) new product (what does this do to Topco)
(c) efficiencies – reduces prices and increases output (but how do you get to these questions?)
(d) at some point/some cases – get enough of look to make BMI analysis (quick look), then go into full blown Rule of Reason Analysis
(e) On the other hand, Professional Engineers takes quick look – these arguments don’t work.

2. NCAA v. Board of Regents of the Univ. of Oklahoma (1984): The NCAA exercised control over which games could be televised, intending to reduce, the adverse effects of live television upon football game attendance, awarding rights to CBS and ABC. The agreement granted each the right to televise 14 games, amount received by team did not change with the viewing audience, number of markets in which the game is telecast, or the particular characteristic of the game or participating teams, also had appearance requirements so that it must schedule appearances for at least 82 different member institutions during each 2 year period, and no member institution may appear on TV more than 6 times (4 nationally) and no member may sale television rights outside of the plan.

a. CT held:

(1) District court concluded that this was classic cartel, and price fix was a group boycott with other potential broadcasters and threatened sanctions against members was threatened boycott, this plan placed artificial limit of televised college football. NCAA argued that plan protected gate attendance and preserved competitive balance amount football programs at various

(2) Court of appeals held this was per se price fixing
(3) Supremes: Don’t apply per se rule here, some horizontal restraints on competition here are essential if the product is to be available to all.

(4) BMI holds that joint selling arrangements may be efficient and increase sellers’ aggregate output and be procompetitive.

(5) Look at this case under Rule of Reason. Decision to look at case under rule of reason – rests on recognition that a certain degree of cooperation is necessary if the type of competition that NCCA seeks to market is to be preserved.
   
   (a) District court defined relevant market as “live college football television
   
   (b) District court also found that if member intuitions were free to sell television rights, many more games would be shown on television, and that the NCAA’s output restriction has the effect of raising the price the networks pay, price structure is unresponsive to viewer demand, and members have no choice but to adhere to these rules.

(6) NCAA argues that its television plan “can have no significant anticompetitive effect, since the record indicates that it has no market power – no ability to alter the interaction of supply and demand in the market.
   
   (a) Supreme Court rejects this argument: when there is an agreement not to compete in terms of price or output, “no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement Professional Engineers (legal reason); as factual matter, district court determined that NCAA has market power, b/c intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience.

(7) Here agreement not necessary to market product to everyone, no evidence to support theory that fan interest in televised game may adversely affect ticket sales. Home team can always refuse to sell the right to telecast its game to stations in the intermediate area.

(8) NCAA’s argument (if it be so) that ticket sales cannot compete in free market is inconsistent with policy of Sherman Act.

b. Dissent: upset not enough attention paid to market analysis: no evidence that agreement does not result in greater televised games, increasing revenues, don’t focus on price paid, focus on nature and quality of product delivered. Why not use new product argument here – creating

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5 Market power: ability to raise prices above those that would be charged in a competitive market.
new product – exclusive television rights – more valuable to networks than what individuals could market individually.

c. Notes:
   (1) What about in pari delicto (“of equal fault”) defense
   (2) Jury instruction exercise

3. *Abbott Laboratories v. Baxter International*: Baxter made an agreement with Maruishi to produce “one-step process” sevoflurane (good for anesthesia). Maruishi was marking in Japan, made another agreement with Abbott to sell drug in US, all made agreements with Baxter (patent holder) that it would not compete in exchange for royalties. Abbott expended 1 billion developing drug and marketing, and then Baxter purchased another process from Ohmeda, and intended to market “three step process”. Abbott sued Baxter for patent infringement and breach of K, Baxter alleged certain anti-trust defenses, that Abbott controlled all of the sevoflurane, and had monopoly.

   a. Ct held:
      (1) Supreme court reluctant to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious. *Federal Trade Comm’n v. Indiana Fed’n of Dentists*.
      (2) Court recognized that antitrust problem only arises with something Baxter did itself, and only to escape contractual obligations, and agreement not to compete is the only thing that antitrust argument is based on.
      (3) No evidence in record as to intent to divide up market, no case law where *per se* analysis has been applied to void a licensing agreement, no naked restraints present here, no reason why another generic producer could not compete with Abbott.
      (4) No showing of intent to raise prices, Baxter never even competition with Abbott, Abbott not trying to limit competition, only prohibit licensor from competition, generic competition possible.
      (5) Court must ask “whether an agreement promoted enterprise and productivity at the time it was adopted,” at time agreement was formed, sevoflurane not even on market, therefore licensing arrangement was procompetitive, cannot create antitrust violation by artificially narrowing the relevant market to be only Abbott and Baxter

**CHAPTER 3**

Further Issues Concerning Collusion:

*Applicability of the Sherman Act*
A. Commercial v. Non-Commercial Activities

1. *US v. Brown University* (3d. Cir. 1993): MIT and several other “overlap” institutions, met once a year to decide on the amount of need-based financial aid it would provide their students, and to compare admissions overlap and financial aid applications. Admissions is need-blind. MIT used this policy to ensure that aid packages would be comparable, and that students would choose an institution based on criteria other than financial aid, and that financial aid awards could be provided to the students with the greatest need. DOJ brought antitrust suit alleging violation of the Sherman Act by (1) agreeing to award financial aid exclusively on the basis of need; (2) agreeing to utilize a common formula to calculate need; and (3) collectively setting, with only insignificant discrepancies, each commonly admitted students’ family contribution toward the price of tuition. District court refused to apply *per se* rule given the nonprofit status and educational mission of the schools, instead used *abbreviated rule of reason*, taking only a *quick look* to determine the procompetitive effects (widening pool of applicants, increasing consumer choice, quality of education, opening doors to elite schools), and then found violation of Sherman Act (rejecting social welfare justifications as in *National Society of Prof. Engineers, and FTC v. Indiana Federation of Dentists*)

(a) Appeals Ct. held:

(1) Court first decides that disbursing charitable funds is used to obtain the benefit of prestige and influence, and is competing with other schools for exceptional students (Nonprofit organizations are not beyond purview of antitrust laws), so financial assistance is part of tuition setting, and is commercial activity

(2) Three standards:

   ii. *Per se*

   iii. *Rule of Reason*: Requires the fact finder to “weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” Plaintiff has initial burden to show adverse, anticompetitive effect, such as reduction of output, increased price, or deterioration in quality of service, and can show market power. Burden then shifts to defendant, to show procompetitive effect (can’t be solely social welfare). To rebut, plaintiff must show not reasonably unnecessary

   iv. *Quick look Rule of Reason*. Abbreviated, intermediate standard. Applies in cases where *per se* condemnation is inappropriate, but where “no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint. Competitive harm is presumed, defendant must promulgate "some competitive justification,” if no is forthcoming, practice is condemned.
If defendant offers sound procompetitive justifications, go to full-scale *rule of reason* analysis.

(3) Antitrust analysis based largely on price theory, assures us that economic behavior directed towards profit maximization. No profit maximization present here, qualified charitable organization, so use *Rule of Reason*

(4) Improvement in quality of product or service is one possible procompetitive effect, money goes to needy students, more students able to afford ivy league, District court should have used full blown *rule of reason analysis*.

2. *D.E.L.T.A. Rescue v. Humane Society of the US, Inc* (9th Cir. 1995): Delta alleged that Humane Society is direct competitor, alleged to have attempted to have CA atty. gen. take disciplinary action against DELTA to cause “providers of valuable services” to discriminate against DELTA.

   (a) Ct held:
      (1) Sherman Act expressly requires a showing of restraint “of trade or commerce” among the server States” or of monopolizing or attempting to monopolize “any part of the trade or commerce among several States.”
      (2) Solicitation of contributions is not trade or commerce
      (3) No general immunity for nonprofit activity, but has to be restraint of trade or commerce
      (4) Two philanthropists divide up market, one care for homeless on east side of town other on west side, no antitrust violation here, same with DELTA and Humane – no market here

3. Black holes:
   a. Labor Unions: typically function by contract, combination, or conspiracy, but §6 of the Clayton Act provides them with a statutory exemption, declaring that labor is “not a commodity or article of commerce” and that generally the antitrust laws would not apply against the “existence and operation” of labor unions or against unions “lawfully carrying out their legitimate objects.”
   b. Insurance: McCarran-Ferguson Act: provides that federal law not specific to the business of insurance shall not e construed to “invalidate, impair or supercede” any state regulation of the insurance industry, as long as the activity regulated by the state is part of the business of insurance” and no issue of “boycott coercion, or intimidation” arises.

B. Proving the Existence of Conspiracies:

1. *Matsushita Electric. Industry. Co. v. Zenith Radio Corp.* (1986): Defendants, 21 corporations that manufacture and sell consumer electronics controlled by Japanese parents, are alleged to have sold below the market price in order to drive
American companies out of business, while at the same time keeping prices high in Japan to make up for the low profits, and adhered to a so-called five company rule and minimum prices set by Japanese Trade Ministry.

a. Supreme Ct held:

(1) What case is not about:

ii. Cannot recover antitrust damages based solely on alleged cartelization of the Japanese market, conduct has to have an effect on American commerce (anticompetitive pricing in Japan)

iii. Cannot recover on conspiracy to charge higher prices in American market no harm to other manufactures, or other claims that actually benefit American manufacturers (five company rule, minimum prices)

(2) Summary Judgment standard: establish genuine issue of material fact as to whether defendants entered into a conspiracy that caused an injury

i. Claim has to make economic sense, if it doesn’t, have to come forward with more persuasive evidence to support the claim than otherwise would be necessary.

ii. Have to evaluate in factual context

iii. Antitrust law limits the range of permissible inferences from ambiguous evidence in §1 case, must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

(3) Predatory pricing conspiracy is by nature speculative, b/c any agreement to price below the competitive level requires the conspirators to forego profits that fee competition would offer them, must have a reasonable expectation of recovering later profits

(4) Each conspirator has strong motive to cheat, on this theory in this case, cartel would need to last at least 30 years to make money, lower court here found no likehood of success given Zenith and RCA’s market share

(5) RISK of chilling the very conduct antitrust laws are designed to protect here b/c price cutting activity to increase business is procompetitive, look at balance

i. On one hand want to encourage procompetitive conduct, on the other punish illegal conspiracies

ii. Here failed predatory pricing schemes are almost self deterring

b. Dissent: points to expert DePoodwin and contends report was erroneously excluded by district court – high prices in Japan, resulted in lower consumption of goods, more goods go to US, which depressed prices. This creates genuine factual issue
C. Conspiracy to Monopolize: §2 makes it illegal to “combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states.

1. *Virginia Vermiculite v. W.R. Grace*: VVL argued that proof of a relevant market is unnecessary to establish a conspiracy to monopolize claim, b/c §2 conspiracies primarily are concerned with concerted action and intent, which does not require delineation of the market.
   a. Elements of §2 conspiracy to monopolize claim are (1) concerted action; (2) a specific intent to achieve an unlawful monopoly; (3) commission of an overt act in furtherance of the conspiracy; and (4) antitrust injury. *See NYNEX Corp. v. Discon, Inc.*
   b. In *Alexander v. National Farmers Organization*, the Eighth Circuit held that because the essential elements of §2 conspiracy claims are concerted action and intent to monopolize – not market power – and because a plaintiff only must establish that the conspiracy affected “some appreciable part of interstate commerce,” rigorous proof of the relevant market is not required for §2 conspiracy claims. (Can aid in showing context – b/c bad intent alone does not do)
   c. Factual impossibility is not a defense to conspiracy, under Common law person could be guilty of conspiracy to commit a crime, even though it was impossible in fact to achieve the goal of the conspiracy.
   d. The reason that specific market delineation is important in §1 claims and in §2 monopolization and attempted monopolization claims, is because the fact-finder must be able to determine whether the defendants actually restrained trade, actually achieved and maintained monopoly power, or came dangerously close to achieving monopoly power. The same specific delineation of market is unnecessary to prove a §2 conspiracy, b/c its “essential elements… are concerted action and specific intent to monopolize…” and the required intent is simply intent to monopolize a product that “appreciably is a part of interstate commerce.”

2. Fifth and Eleventh Circuit do not share the view of Second, Eighth, and Tenth Circuits and do require plaintiff to defined the relevant market to establish §2 violations premised on attempt and conspiracy to monopolize.

3. Some courts distinguish between impossibility due to ineffective means and “legal or inherent impossibility” ---attack on wooden Indian cannot be assault and battery.

*Legally and Economically Ambiguous Practices*

A. Agreements to Exchange Information
1. **American Column & Lumber v. US** (1921): Members of Plan operated 5% of hardwood mills in US, producing 1/3 countries total volume. Plan required members to reports on sales, identifying purchaser, price lists, past transactions, and future production levels and views on future market predictions. S.Ct found that members used the gathered information to “suppress competition by restricting production.” Competitors do not make daily, weekly, and monthly reports, contract to submit books to discretionary audit, and stocks to discretionary inspection, submit details of business to scrutiny by expert.

2. **Maple Flooring Mfrs. Ass’n v. US** (1925): Association members produced 70% of total maple, beech, and birch flooring, association exchanged (1) average costs for sizes and grades of flooring, (2) freight rates from Cadillac Michigan to over 500 locations; (3) complete information as to the quantity and kind of flooring sold and prices received by the reporting members, and amount of stock on hand, members identity was not revealed with regard to specific information. Gov. alleged this created uniform delivery prices. Court noted: certain kinds of information had not been gathered (1) current price quotations and the names of the members’ current customers, ONLY historical information was gathered, and current and future prices were not discussed. “Dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade, prevent overproduction, public interest served by stabilization”

3. **US v. Container Corp. of America** (1969): 51 manufactures within 98 plants account of 90% of shipment of corrugated containers from plaints in SE US. Exchange of Information of specific sales to identified customers, unlike Maple Flooring and lacking controlling circumstances like in Cement Manufacturing. Defendants would request of competitors information as to most recent price charged or quoted, whenever it needed such information and whenever it was not available from another source. (reciprocal exchange expected).
   a. Market: Containers substantially identical, common to buy from two suppliers, usually same price quoted on additional orders, where a competitor was charging particular price, def. would normally quote the same price or lower price, prices stayed within normal ambit, entry within the market costs about 50-75,000. Result of exchange stabilized prices
   b. Demand: Inelastic, as buyers place orders only for immediate, short run needs
   c. Held to be illegal
   d. Fortas Concurrence Important: “Exchange of specific information among sellers as to prices charged to individual customers, pursuant to mutual arrangements, is not a *per se* violation, and absent *per se* violation must show that practice resulted in unreasonable restraint of trade, here practice adopted for the purpose of arriving at determination
of prices to be quoted to customers – inevitably suggests price fixing, here that effect supported by evidence
e. Dissent (Marshall, Harlan, Stewart): Cautions against use of per se rules in information sharing, goes into market analysis, ease of entry, excess capacity present, container industry is highly competitive and evidence shows that info was used for competition

4. *US v. United States Gypsum Co.* (1978): Gov. charged that def. had restrained trade by “telephoning or contacting one another to exchange and discuss current and future published or market prices and published or standard terms and conditions of sale and to ascertain deviations” Gypsum Manufacturers said they were checking against compliance with Robinson-Patman Act prohibiting price discrimination).
   a. S.CT: reversed guilty finding: noting that “defendant’s state of mind or intent is an element of criminal antitrust offense which must be established by evidence and inferences drawn there from and cannot be taken from the trier of fact through reliance on a legal presumption.”
   b. Court found that there was no conflict between Robinson-Patman and Sherman Act which would require the prohibitions of the Sherman Act to be tempered.

5. *The Five Smiths, Inc. v. N.F.L. Players Ass’n* (D.Minn. 1992): NFL and 28 member clubs allege exchanging price information with agents is *per se* antitrust and rule of reason violation b/c has anticompetitive effect of forcing them to pay higher salaries.
   a. Ct unconvinced: begins by examining structure of NFL – virtually entire supply of new players are apportioned among teams, with each team being assigned the exclusive rights to bargain with their draft picks, first refusal/compensation rule.
   b. Furthermore, information sharing among competitors is not within any of the categories of conduct that is so manifestly anti-competitive as to warrant *per se* condemnation, noting that some information sharing has efficient effects.
   c. Court turns to *per se* price fixing scheme –
      (1) To state claim for horizontal price fixing, plaintiffs must allege (a) the existence of an agreement, combination or conspiracy, (b) among actual competitors, (c) with the purpose or effect of “raising, depressing, fixing, pegging, or stabilizing prices, (d) in interstate commerce
      (2) Here plaintiffs allege nothing other than exchange of information, no agreements, or goals of conspiracy, no concerted action alleged
   d. Rule of Reason:
      (1) In order to state a rule of reason claim under §1 of the Sherman Act, a plaintiff must allege concerted action that is intended to harm or unreasonably restrain competition and that actually causes such injury to competition.
Plaintiff must further allege a relevant market that has been adversely affected by the challenged restraint; failure to do so is grounds for dismissal.

(3) Here plaintiffs plead no relevant market, no injury to competition alleged.

(4) S.Ct has determined that, absent some agreement between competitors to restrain price, the exchange of price and other market information is generally benign conduct that facilitates efficient economic activities. *Maple Flooring Mfr’s Ass’n*

e. Plaintiffs attempt to compare their case to *US v. Container Corp.* fails:

(1) *Container corp.* ruled that an exchange of price information among competitors, without an agreement to fix prices, was sufficient to raise antitrust concerns, only in markets where certain structural conditions existed: (a) highly concentrated market dominated by relatively few sellers; (b) fungible product; (c) competition that is primarily based on price; (d) and inelasticity of demand because buyers tend to order for their immediate short-term needs.

(2) Many football players (over 1500), not fungible (buyers consider other things than price, each player different); not short term (contracts signed for many years)

f. Court concludes by noting that players just have access to information that plaintiffs already have, and therefore makes negotiations more efficient b/c avoids misunderstanding. Cites *Gypsum* (exchange of price date many increase economic efficiency and thus have competitive effect); *BMI* (horizontal price fixing arrangement was procompetitive b/c it increased market efficiency and reduced costs).

6. *In re Petroleum Products Antitrust Litigation* (9th Cir. 1988): Major oil companies, producing crude oil, refined it into gas, and sold gas to distributors, sold to independent franchisees. Each company sold at price known as “dealer tank wagon price,” fluctuations in the cost of gasoline to franchised dealers were reflected in the changes in applicable discounts. 3 classes of evidence asserted to create genuine issue of material fact

a. Pricing Pattern Evidence: Saw tooth pattern of pricing, argument is that companies acted in concert b/c otherwise would risk losing business. Court applies *Matsushita test* – any risk of deterring good conduct. Price cycle not enough.

(1) If this is enough, company making wholly independent pricing decision would have to consider the possibility responses of competitors might make it liable for treble damages

(2) Just b/c price high – not antitrust violation, if so, all price hikes would be subject to antitrust scrutiny.

b. Price Data Dissemination Evidence: Used press releases to show withdraw dealer discount, execs testified that purpose was quickly informing competitors of price change in hope that they would follow,”
court notes - increasing likelihood that price changes detected before one competitor hung out to dry. Information also posted.

(1) Court cites Container (informal agreements to provide price information may, under appropriate market conditions, constitute circumstantial evidence of an agreement to stabilize prices.

(2) No Matsushita danger here b/c no legitimate conduct here, only purpose to facilitate price coordination.

c. Evidence of Competitor Contracts: Regularly provided one another with information concerning dealer tank wagons and discounts pre-Container (1)

(1) Court uses this evidence to show motive/intent b/c falls outside of limitations period, may equitably toll statute of limitations (district court must consider)(ordinary statute of limitations for antitrust violations is 4 years, 15 USC §15b, but acts that are concealed frequently cause the period of potential liability to be extended until the time when plaintiffs knew or could have known of the antitrust violations.

(2) Post-Container contact evidence less impressive, but sufficient for SMJ motion.

(3) Testimony of execs comes in again here.

B. Oligopolistic Interaction and Facilitating Devices

Conscious Parallelism and Tacit Agreements
1. City of Tuscaloosa v. Harcros Chemicals, Inc.: Plaintiffs were purchasers of repackaged choline, defendants distributed chlorine and sales were handled by submission of sealed bids or by negotiation of price with one or more suppliers. Chlorine industry is oligopy selling a homogenous product to an inelastic market, all defendants issued price lists for sales, most sales made at list prices, low parties to entry into market. Complaint alleged that horizontal arrangement to restrain trade existed among chlorine repackages/ distributors in Alabama to set high prices… specifically defendants violated §1 of Sherman act by exchanging price information, allocating contracts or winning bids in geographic markets, refusing to deal with plaintiffs, and submitting complementary, noncompetitive bids

a. Plaintiffs outlined 7 structural conditions facilitating conspiracy: (1) presence of oligopy makes price conspiracy easier, (2) product homogeneity simplifies a collusive price arrangement, (3) sealed bidding makes collusion more likely b/c cheater cannot hide price cuts, (4) inelastic demand for chlorine facilitates collusion, (5) static demand of purchasers of chlorine was stable and predictable, (6) high barriers to entry make conspiracy more plausible, (7) similar costs make conspiracy possible.

b. Daubert analysis comes in: (1) Whether the theory or technique can be and has been tested; (2) Whether the theory or technique has been subjected to peer review and publication; (3) The known or potential rate or error or the existence of standards; and (4) Whether the theory or
technique used has been generally accepted. Two distinct requirements – Evidence must be reliable and relevant… Significant factor is whether research was conducted specifically for litigation.

(1) Lanillotti: Concludes that defendants were using explicit price signals through bids not intended to win contracts in order to reach an agreement to bid higher prices, while honoring incumbency

(2) McClave (statistician): Cites high incumbency rates, tie bid rates, price signaling

c. Court:

(1) Proof of parallel behavior alone does not establish a *prima facie* case of a Sherman Act violation, have to have a “plus” factor, which tends to indicate the absence of independent action, also must be show that the decisions not to deal were contrary to the def’s economic self-interest so as to raise issue of business judgment.

(2) Conscious Parallelism: Tacit collusion, sometimes called oligopistic price coordination, describes the process by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their share of economic interests and their interdependent with respect to price and output decisions.

(3) Strikes down Lanzillotti’s testimony b/c he quotes a Posner and Easterbrook article that was not widely adopted, his testimony was inconsistent with antitrust law (irrelevant)(misses plus factor), his subjective interpretation doesn’t matter, and subjective judgment has no way to be tested. Also contradictory (no stable market shares shown, vary widely; low barriers to entry), ignored law of supply/demand (increase demand in chlorine market); ignored organizational structure of firms,

(4) McClave, no evidence to support his theory either, also uses conscious parallelism incorrectly

2. On appeal: *City of Tuscaloosa v. Harcros Chemicals* (11th Cir. 1998), partly reversed. Noted that plus factors can be evidence by high and rising incumbency rates (peaking at over 90% during the middle of the period).

3. Notes

a. Expert must have some stated basis for his opinions, which a court may review for sufficiency in resolving a motion for summary judgment.

b. [Ellis made many comments – Insert]

C. Facilitating Devices

1. Facilitating devices: commercial practices or institutions that a group of conspirators may employ in order to make it easier to attain or stabilize an anticompetitive arrangement of some type.
a. Information exchanges are a classic example
b. An agreed upon artificial standardization of the product will prevent potential chiselers from undercutting a price-fixing agreement by competing on “quality” dimensions of the product.
c. Base point pricing & Most favored nations clause (these can have procompetitive effects as well)

2. Base point pricing: example – Freight charges
   a. Producers can fix product prices but then cheat by charging less for transportation than it costs them
   b. A way to prevent this is to set a single freight rate for all shipping
   c. Sometimes there is credible explanation, for example: firms may independently choose to quote delivered prices, based on the same geographic shipping point, as a way of competing with the dominant firms in the industry. (Southeaster firms using base point pricing to compete with Pacific Northwest, link their price to the price in Oregon in order to stay competitive).

3. Most Favored Nation Clauses: Seller guarantees the buyer the right to have product delivered at either the contract price or the lowest price charged by the seller to any other customer during the term of the contract.
   a. Conspirators find it hard to cheat b/c if they do, they have to go back and provide the discount to prior customers
   b. Can also be used as insurance for future price changes given by the seller to the buyer

4. Conclusion: Facilitating devices have dual purposes

D. Facilitating Devices in Oligopolistic Setting

   a. Ct. of Appeals held that removing agreement might enhance competitions by removing barrier to entry by increased visibility of price. Dissent, argued that extension of free-credit is an indirect price reduction and that the elimination of such credit is a method of raising prices
   b. S.Ct. adopts dissents position, cites Sugar Institute v. US (holding unlawful an agreement to adhere to pervious announced prices and terms of sale, even though advance price announcements are perfectly lawful and even though the particular prices and terms were not themselves fixed by private agreement).
c. Ct finds it is “self evidence” that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time., thus credit terms are part of price, falls within per se rule
d. Goes though quick look any way. Market always more attractive for new entrants when competitors are able to increase price level, or curtail production, but doesn’t save from per se violation – b/c more successful an agreement was in raising prices/more vulnerable from attack it would be; further any industry wide agreement will provide more accurate understanding of price – doesn’t mean it’s legal.

E. Horizontal vs. Vertical Agreements

1. _Toys “R” Us, Inc. v. FTC._ (7th Cir. 2000): TRU sells approximately 20% of all toys in US, and that some places sales range anywhere from 35-49%. TRU offers around 11,000 ind. Toys, and is a critical outlet for toy manufacturers, buying approx. 30% of the toy companies output. 4 types of stores: Toy stores/Dept.stores (30% markup); ToysRUs (30% markup); Walmart/Kmart/Target (22%); Warehouse clubs - Costco/Pace (9%). Warehouse clubs were cutting into TRU’s profits, pricing items as much as 25-30% below TRU. TRU entered into vertical agreements with manufacturers, making them sell different toys to warehouses & no discussion on prices (10 agreements); also entered into horizontal agreements between key suppliers to boycott clubs (Mattel, Hasbro, Fisher Price, Tyco,etc) “on the condition their competitors did the same.” Strong evidence, statements, market share of the warehouse clubs fell, no free riding justification b/c manufacturers paid TRU for this
   a. Findings of Commission: Boycott was _per se_ illegal under NW Wholesalers; Boycott was illegal under _rule of reason_ b/c anticompetitive effects outweighed any possible business justification; vertical agreements violated §1, and violations amounted to a violation of §5 of the FTC ACT
   b. Ct.finds:
      (1) Substantial evidence support FTC findings
      (2) Horizontal Conspiracy: Group boycotts remain illegal _per se_ under NY stationers, no need to take extensive look at market power when: (1) the boycotting firm has cut off supply necessary for boycotted firm to compete; (2) boycotting firm possess a “dominant position in the market”, (3) boycott has no plausible justification designed for efficiency.
      (3) Two ways of proving market power:
         (a) Though direct evidence of anticompetitive effects
         (b) Proving relevant product and geographic markets and by showing that the defendant’s share exceeds whatever threshold is important for the practice in the case.
(4) Taking steps to prevent a price collapse through coordination of action among competitors has been illegal at least since Socony-Vacuum Oil Co., no more elaborate market analysis is needed.

c. Remedy:
   (1) Can’t refuse to buy toys b/c supplier sells to warehouse
   (2) Make stocking decisions independent of what warehouses buy, use internal safeguards

CHAPTER 4: Monopolization

A. Monopoly Power

1. *US v. Aluminum Co. of America* (2d. Cir. 1945): Judge Hand: Alcoa, secured several patents, and had a monopoly of the manufacture of “virgin” aluminum ingot. Alcoa had been involved in past cartel activity. Eventually, Alcoa was producing over 80% of the amount of “virgin” ingot as compared to secondary ingot (scrap composed of clippings or recycled material). Alcoa’s control
   a. Fact that Alcoa controlled such all of the virgin ingot, meant that they could limit the secondary market supply by restricting virgin ingot production, therefore secondary ingot is excluded from Alcoa’s market definition (and Alcoa’s production is included).
   b. While foreign imports keep prices in check, these imports were subject to the cost of transportation and tariffs (like Cournotia problem).
   c. Court looks to see if monopoly existed – 10% profit not extortionate, but profit on ingot not necessarily proof from business as a whole --- Not really going to look at profit though, b/c subjective
   d. Inconsistent to condemn contracts to restrain prices and not monopoly b/c monopoly is really contracts functioning perfectly
   e. Court goes to discussion of small business protection, but going to look to see if Alcoa “monopolized” the ingot market, but not going to condemn ingenuity and efficiency --- “Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat.
   f. Court looks at past deceptive practices
   g. Court infers monopolization or “intent” from increasing capacity to produce more ingot, “we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened…” – This argument sucks, contradicts (e) (h. The outcome: Nothing, industry has changed, no need for remedy

2. Economics: The “Dominant Firm” Model.
   a. Sales capabilities attributable to advantages over other firms
   b. GET INFO OFF OF CO. WEBSITE

B. Sources of the Monopoly Power: Relevant Markets
1. *US v. Grinnell Corp.* (1966): Grinnell manufactured plumbing supplies, had controlling interest in alarm companies, and offered “central station service” – hazardous detecting devices installed on the protected premises transmit system to central station, included a wide variety of features. Grinnell had purchased stock in many companies, whose officials agreed onto to engage in protective service business for 5 years to permanent

   a. Douglas: What is relevant market --- what are substitutes (teaching of *du Pont*), are service station services lumped together --- they all generally offer the same services, so move to *du Pont* – what are the substitutes, Douglas doesn’t think watchman or audible alarm are substitutes (different insurance rates), nonaccredited not same as accredited – operated on national level, national rate schedule, prices, terms, nationwide contract.

   b. Dissent: Evidence of other competition, lower prices in different areas where there is other competition, can’t define product market in form of defendant’s business, need for service is local, local personnel, only 25 mile radius for service stations, why accredited better than noncredit, gerrymandering market, economic evidenced points to larger market (customers switch from one form of protection to another).

2. *Blue Cross & Blue Shield of Wisc. v. Marshfield Clinic.*: (*7th* Cir 1995) (Posner): Marshfield clinic is 5th largest physician-owned clinic in NA, revenues exceeding $200 million, has 21 branch offices in 14 counties (don’t what percentage of physicians employed by Marshfield. Security, Marshfield’s HMO serves Marshfield’s physicians and many others, contracts are not exclusive – physicians free to work with other HMO’s (work for security only generates about 6% of these physicians income). HMO is only a method of pricing medical services, patient pays fixed annual fee for all service needs, and HMO provides services with physician (thought to encourage preventative care), to control costs contracts with physicians for compensation, rather than reimbursing percentage of fee – must line up enough physician.. Plaintiffs argue that Security has too many physicians tied up.

   a. Here plaintiffs loose on substitutes. “[I]ndividuals regard HMO’s as competitive not only with each other but also with the various types of fee-for-service provider, including “preferred provider” plans under which insurer offers more generous reimbursement if the insured patronized physicians who have contracts with insured.

      (1) This is supply substitution, the willingness of producers to switch from one product to another, or of new producers to come from outside the geographic area to begin producing the same product that is allegedly being monopolized.6

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6 Notes caution to be careful about the degree of substitutability and note that consumer preferences may change over time – butter v. margarine example, sometimes conditions on the supply side change and the relieve costs of product for the two products offered, and change consumer preferences. Chart on p. 342.
b. Court also blasts HMO’s for skimping on service, keep you healthy incentive, but let you die quick if you get sick (then attempts to distance from opinion)
c. Court notes sometimes people don’t use HMO even when its price are lower than fee-for-service providers
d. They argued in another case that these preferred-provider plan were part of same market with HMO in another case, physicians can easily switch from one to the other.
e. Plaintiffs, since they can’t show that requisite number of physicians are taken, try to narrowly define market with “Diagnostic Related Groups” – small practice areas --- Court doesn’t buy – most physicians can perform more than one procedure.
f. Not going to infer monopoly due to higher prices – when you have a heterogeneous product or service, such as full range of medical care – difference may result in a higher quality of service more costly to provide --- NOT going to infer monopoly from high rate of return.
g. If it is monopolist at all it is natural monopolist – firm has no competitors simply b/c the market is too small to support a single firm.
h. Clinic looses on collusion argument, b/c they didn’t make any sort of “free riding justification” for division of markets

3. Notes:
   a. Court’s very hesitant to assign specific percentage enough for §2 violation, no broad rules really, just different cases to compare with.

4. American Key Corp. v. Cole National Corp. (11th Cir. 1985): American Key rented mall space and tried to get out of eviction action with anti-trust defense alleging (alleging eviction was part of conspiracy to monopolize key replacement in the mall), tried to limit market to the mall. Court held that market included free standing hardware stores, noting, “antitrust laws do not protect a right of a party to do business in any formulate that he chooses but rather protects competition between suppliers of similar goods and services in a variety of formats.”
   a. Relevant market is the “area of effective competition” in which competitors generally are willing to competitive for the consumer, not the market are of a single company.
   b. Expert opinion and other affidavits excluded on Daubert grounds

C. Exclusionary Conduct:

1. Background:
   a. Winning the competitive game is not necessarily an antitrust offense even when it involves utterly destroying one’s competitors and driving them from the market, must be honest competition though
   b. Businesses may adopt different policies some are exclusionary, some are ordinary, and some are ambiguous
(1) Exclusionary: returns or benefits that a firm receives, usually only in the further, from an enhanced exercise of market power due to a diminution of competition that the policy causes
(2) Ordinary: returns are returns that any firm would receive from the policy, regardless of present or future market structures
(3) Ambiguous: returns are those that in theory must in either r of the former categories, but are in practice very difficult to classify

c. Keep in mind Matshusita

2. Exclusionary Contracts: United States v. United Shoe Machinery Corp. (D. Mass 1953). (Wyzanski, Dist. Judge): United Shoe challenged with monopolizing the shoe machinery industry, market defined in terms of what United Shoe offers, United leased all of its shoe machinery; 10 year lease had four clauses including full capacity clause and termination clause, with renewal for 5 years. Full capacity clause not violated unless use a competitors machine (can perform work by hand though), don’t have to pay termination fee unless going to use competitor’s machine, discrimination in termination terms if use competitors machine (as deterrent). United also provided research services with equipment lease, varying amounts of service given depending upon needs, but everyone pays same. No evidence of monopoly profit (only 10%); ability to price discriminate by lowering rates
a. Ct. discusses benefits of leasing system: constants access to customers through service agreements, improve machines, improves research, gives United Shoe an advantage over competitors; easier for entry shoe manufacture to come in (lowers barriers of entry)(costs are same), everyone likes system
b. Detriments: 10 years long time, hard for competitors to enter (raise barriers for suppliers)
c. United can’t show market power due to research
d. No evidence that patents ever used anticompetitively, just that shoe manufacturers patented everything, competitors can invent around them
e. No evidence of monopoly power in supply fields b/c other competitors willing to supply, but they do supply over 80% of supplies b/c of regular contact w/ manufacturers
f. Court’s conclusion of fact on anticompetitive conduct: Leases raise barrier to entry by competitor, deter competitor machine and full capacity clause, tying service to leases had effect that no independent servicement, pricing discrimination for different customers depending upon threat of competition.
g. Background on §2: Three approaches:
   (1) Enterprise has monopolized in violation of §2 if it has acquired or maintained a power to exclude others as a result of using an unreasonable “restraint of trade” in violation of §1 of the Sherman Act (Aluminum)
(2) A violation of §2 not necessary to show violation of §1, violation of §2 occurs when enterprise has (a) power to exclude competitions, (b) has exercised it or has the purpose to exercise it, even though not technical restraint of trade. *Griffith*

(3) Monopolize when does business even if there is no showing of an exclusionary practice, but may escape liability if prove that monopoly due solely to superior skill, products, natural advantages, economic of technological efficiency, low margins of profit maintained permanently, within the limits of the law (including patents or franchises). Hand approach.

h. CT says it would adopt the first approach, but doesn’t need to because conduct satisfies both second and third approach (therefore the first approach) as (1) defendant has and exercises, such overwhelming strength in the shoe machinery market that it controls that market, (2) this strength excludes some potential, and limits some actual, competition, and (3) this strength is not attributable solely to defendant’s ability, economies of scale, natural advantages, and adaptation to inevitable economic laws.

i. 75% percent of she machinery market served, 90% of market tied up in long term leases, exclude competitors, capacity to attract new inventions, no substitutes here, most of ties to market result of leasing, unnatural barriers, exclude competition, and restrict free market, supplies are a separate market; control of supply business stems from control over machinery business and is therefore unlawful.

j. Remedy: “Principal objects of the decrees are to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market, not going to make Shoe divide into three companies, can’t really be cut into three, just required to segregate charges for machines from repairs, and allow people to buy machines

4. Essential Facilities: *Florida Fuels, Inc v. Krueoder Oil*: Belcher had storage tank facilities on Fisher Island in Miami, blending fuel on Island then barging the fuel across the channel to cruise ships, limited land on port for tanks, no new land avail, Port Everglades, has piping system; Florida fuels competed with Belcher by purchasing oil in Freeport Jamaica, then shipping it to South Florida, using special barges to blend the fuel as it was pumped into the vessel. Florida fuels never formally proposed to lease or purchase land from Belchar, just suggested it, which was denied b/c of lack of capacity, Port Everglades, more tank space, but only Belcher’s pipeline – never proposed here either. FF prepared study saying it was not feasible to build tanks, etc. at port everglades, claimed that tanks and pipeline were essential facilities.

a. A refusal to deal where a competitor is denied reasonable access to an essential facility is anticompetitive behavior sufficient to support a § 2 claim. *MCI (7th Cir)*
b. Essential facilities doctrine devices from Terminal RR case, S.C. determined that RR terminal in St. Louis was essential for competitors to compete

c. Four elements necessary: (1) Control of essential facility by monopolist; (2) a competitor’s inability, practically or reasonably, to duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

d. Control by monopolist: (power to control prices or exclude competition), consider factors including control over price, market share greater than 70-80%, high barriers to entry, have to define geographic and product market, and then compute market share, Belcher is monopolist

e. Practicality of duplicating facility: must be economically unfeasible to recreate and must present sever handicap on market entry, not enough evidence submitted on this element, no evidence that they can’t compete, have competed and gained market share, Matsushita standard, failed to meet

f. Whether valid reason for refusing to deal: affirmative defense, examined with care, evidence shows tanks were shared with others

g. Sometimes history of dealing will complicate, as in Aspen Skiing, but here no history of dealing

D. Predatory Conduct:

1. Predatory Pricing: AA Poultry Farms, Inc. v. Rose Acre Farms, Inc (7th Cir. 1989), Easterbrook: Rose Acre farms is a vertically integrated egg producer and processor. Competitors who were not integrated alleged that Rose was pricing eggs below the cost of production. Rose produced 1% of national production, mostly in Midwest, but had broken into NE by selling eggs at low prices, undercutting industry standard. Prices had two components – ordinary deliveries and specials. Competitors argued that more specials argued further away (discriminatory)

a. Robinson Patman Act makes it unlawful to “discriminate in price between different purchasers of commodities of like grade and quality, unless certain exclusions and defenses apply, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly.

b. How to tell predatory pricing:

   a. First: Prices exceed costs? This is difficult, as sometimes new businesses lose money for years, and then make profit, how do you measure costs? Include capital costs? Research costs? Advertising? What is the right benchmark? Short run, long run

   b. Second: Focus on intent, sometimes courts use to resolve ambiguity, this is not useful though b/c want firms to intend to be competitive, almost all evidence shows self interest, Areeda and Hovenkamp

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7 Unintegrated firms packed and shipped eggs they purchased from farmers called producers and bought only the grades and sizes they needed, whereas integrated firms have the chickens laying the eggs on the belts and going into cartons.
suggest intent be removed from predatory pricing b/c brings economic questions to forefront.

c. Third: Look at the back end, see if you can recoup profits later with low prices now and high prices later

c. Contemporary cases favor third approach: Much easier than the other to – Only if market structure makes recoupment, does court have to look at price vs. cost, and if can’t recoup costs – don’t care about intent.

d. *Matshushita:* Sacrificing profits today for profits tomorrow, if the attempt fails, benefits consumers

e. Here: No way Rose Acre could have recouped costs, other firms entering the market, market structure unconcentrated, no market power (Market defined as set of sellers to which a set of buyers can turn for supplies at existing or slightly higher prices).

2. *Brooke Group Ltd. V. Brown & Williamson Tobacco* (US 1993): Kennedy: Liggett pioneered a market segment for generic cigarettes, representing 97% of the market, and 4% of domestic cigarette sales (1% before Liggett); 6 firms make up cigarette market (Phillip Morris and RJ Reynolds have 28 & 48% of the market respectively), B&W had 12%, generic cigarettes saved Ligett b/c their market share had gone to 2% (generic 30% cheaper then regular), promoted wholesale through rebates, generic took away sales from regular (hit B&W hard), wholesalers usually only carried one, B&W came in beat Ligetts price by offering big rebates, Ligett claimed predatory pricing, Jury verdict for Ligett, District Court set aside, 4th Circuit affirmed

   a. Robinson Patman Act: condemns price discrimination, but only to the extent that it threatens competition, several defenses based on different costs, changing conditions, or good faith to meet price of competitor

   b. Since *Utah Pie*, clear that primary line competitive injury under Robinson-Patman Act is the same as predatory pricing under §2 of Sherman, both need to show: (1) prices complained of are below an appropriate measure of rivals costs; (2) have to show that competitor had a reasonable prospect or under §2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. (w/out recoupment – just benefits consumers, which is what we’re concerned with)

   c. If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would injury competition in the market (must demonstrate cause a raise in prices)

   d. Determining whether recoupment of predatory losses requires estimate of cost of predation, and structure of market, if market circumstances of deficiencies in proof would bar a reasonable jury form finding that the scheme alleged would likely result in sustained surpacompetitive pricing, no case.

   e. Ligett alleges tacit collusion to raise prices, conscious parallelism – process by which firms in a concentrated market might in effect share monopoly power, setting their prices at profit-maximizing,
surpacompetitive level by recognizes their shared economic interests and their interdependent with respect to price and output decisions

(1) CT says this is least likely means, very had to coordinate in oligopy, must bear losses and share all profits, but court stops short of creating per se rule of nonliability for predatory price discrimination when recoupment is alleged to take place through supracompetitive oligopy pricing.

(2) Theory: B&W enters generic market, uses discriminatory pricing, Ligett raised pries to avoid losses, close price gap between generics and branded, making generics less desirable, slow growth in generic – benefit branded

f. No evidence showing B&W could recovered losses, no inference sustainable (Matshshita); Ligett shows list prices increased, but evidence that consumers didn’t pay list prices.

g. No evidence that restriction in output (necessary for supracompetitive pricing). Output increased, price difference between branded and generics increased when included subgeneric cigarettes, price increases are just as consistent with growing product demand, evidence suggests market increased when B&W entered, also tacit coordination undermined by market fluxuations – enter new generic competitor

h. Supreme Court less interested in the accounting-type issues surrounding predatory pricing than the lower courts (who disagree on which costs are relevant).

i. Lower Courts have embraced S.Ct’s theory on recoupment for the most part, but be prepared to work through both accounting and recoupment issues.

3. Theories of Predatory Behavior:

a. Court’s increasingly skeptical view of predatory pricing allegations mirrors economists’ own belief that, for the most part, the simple sort of predatory pricing alleged in the preceding two cases makes little economic sense: Losses immediate, recovery uncertain, recoupment impossible when no barriers to entry

b. Sometimes argument works though, for instance if make significant investment in heavily fixed expungement, and low marginal costs, could undercut prices to discourage new entrants, rivals would understand and not enter

c. Also, could increase competitors costs, usually these cases have not fared well

d. Injured competitors must still demonstrate separately an injury to competition, thus allegations of raising rivals costs leave plaintiff-rivals vulnerable to defendant defenses that competition has not been effected

E. Attempted Monopolization:

1. Abcor Corp. v. AM International, Inc (4th Cir. 1990): AMI manufactures printing equipment and Abcor provides repair and service for AMI machines, most machines
services in house by company, a small number by Abcor and AMI respectively, 1987 AMI thought about purchasing Abcor, but decided to try to compete for larger market share instead

a. Plaintiff seeking to establish attempted monopolization under §2 of the Sherman Act must show three things: (i) the defendant formed a specific intent to monopolize the market, (ii) the defendant engaged in anticompetitive or predatory conduct designed to further than intent, and (iii) a dangerous probability of success.

b. Here:

(1) Specific Intent: Desire to increase market share and sporadic activity, not specific intent – no basis to infer specific intent;

(2) Anticompetitive Activity: Price cuts not predatory, just response to competition – they enhanced competition; Selective denial of parts okay b/c AMI eliminated Abcor’s free ride (needs to bear its own inventory costs), hired employees had motivations to leave,

(3) Antitrust Injury: Sherman act designed to protect competition, not competitors, failed to show a link between profits declining and anticompetitive conduct (more aggressive competition could have caused this)

(4) Dangerous probability of Success: Court doesn’t reach this issue, but AMI argued that in the 4th Circuit 25% could never do it.

c. Courts should be circumspect in converting ordinary business torts into violations of antitrust laws.

2. Notes:

a. Defendant’s market share often used to measure whether a defendant is dangerously probable to monopolize.

b. Almost all courts seem to subsume the intent requirement under the other factors required to make out a §2 offense, particularly a showing of anticompetitive acts – pattern of such conduct typically suffices to demonstrate intent

F. Price Squeezes:

1. Town of Concord v. Boston Edison Co. (1st Cir. 1990): Many public utilities participate in power pools, enhancing customer demands, and as a result often end up distributing electricity generated by a different, interconnected company, most going interstate. Edison is a fully integrated investor owned utility (as opposed to municipal or national) and transmits power to 52 cities and towns, each one having one distribution system. In 39 towns, Edison owns the distribution system, in the remaining ones the towns own them, Concord and Wellesley are two examples. Edison’s rates are regulated by the Federal Energy Regulatory Commission, with whom Edison filed a series of rate increases. Wellesley and Concord challenged them but lost, then challenged as antitrust b/c no corresponding retail increases. Question here: Whether a pricing practice known

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8 Integrated utilities operate at all three levels of the electric power industry: (1) they produce (generate) electricity, (2) transmit electricity from generators to local distributors, and (3) they distribute electricity at the local level.
as a price squeeze violates the antitrust laws when it takes place in a fully regulated industry?

a. Price squeeze: Firm has to operate at two levels of an industry, and competitors at one level also have to be customers. Price squeeze occurs when the integrated firms price at the first level is too high, or its price at the second level is too low, for the independent to cover its costs and stay in business.

b. Price squeeze violates Sherman Act §2 when (1) the firm conducting the squeeze has monopoly power at the first industry level, (2) its price at this level is “higher than a fair price” and (3) its price at the second level is so low that its competitors cannot match the price and still make a “living profit”

c. Ct assumes monopoly power, but notes that regulatory price squeezes do not ordinarily implicate antitrust laws; regulation and antitrust typically aim at similar goals, economic regulators seek to achieve them directly by controlling through rules and regulations & antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about

d. Price Squeeze Liability in an Unregulated Industry:

(1) Burden:

a. When monopolist obtains maximum monopoly profit at two levels – raises entry barriers, b/c firm essentially have to enter both levels at once (price)

b. Existence of competitors at a second “level,” irrespective of their effects upon price, provides an added incentive for the monopolist to develop better products and more efficient ways to produce the product, second level independent firm can grow and challenge the primary level (non-price)

(2) Benefits:

a. Primary level monopolist might carry out its second-level activities more efficiently than its independent competitors

b. Price squeeze at “second-level” firm will benefit consumers whenever the “second level” firm is itself a monopolist

e. It is not easy for courts to administer Judge Hand’s price squeeze test, how does a judge determine a fair price; court also notes costs and benefits are closely balanced, therefore careful in applying price squeeze rules with different economic consequences – i.e. regulated market.

f. Price squeeze in regulated industry:

1) Regulation significantly diminishes the likelihood of major antitrust harm – diminishes the likelihood of entry barrier, b/c regulators control prices directly, should regulator decide new entry is warranted – has power to prevent price squeeze

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9 IF for example, ingot costs $40, the fabricating process costs $35, and the profit-maximizing price for sheet is $100, an ingot monopolist will charge $65 for the ingot, hoping that competition at the fabricating level will keep the total price at $100. IF a different, independent monopolist dominates the fabricating level, however, that independent monopolist buying ingot at $65 will mark up the price by more than $35, because he wants to earn monopoly profits as well. The result will be a market price of more than $100, resulting in smaller monopoly profits overall (for the final price is far too high), but greater profits for the second monopolist if he sold sheet for only $100. Under these circumstances, entry by the ingot monopolist into the sheet-fabrication level – even by means of a price squeeze – will help the consumer by limiting the final price of sheet to $100.
2) Regulators set prices that reflect costs (other cases finding price squeeze involved finding of wholesale prices exceeding resale prices).
3) Holding is limited b/c “normally” language, door still open for cases involving exceptional circumstances.
4) Also, reasoning only apples when monopolist is regulated at both industry levels.

g. Other problem here: No monopoly power shown, no showing that Edison used control of electricity to disadvantage others, no evidence that this is too high a rate, other companies bought from different suppliers, Edison’s production accounted for less than 12%, no where near 70%-90% that Hand found in Alcoa, plaintiffs point to study showing monopoly power at generation level:
1) only reason that it was infeasible for town to build b/c Edison’s rates based on equipment they bought at lower rates
2) record does not show that tariff prevents customer’s ability to buy from others
3) no showing that Edison would not sell firm-requirement electricity at a price that did not reflect current costs, no evidence that Edison’s rates were significantly lower than the rates of others, nor that lower rates reflected lower costs, only economic rent, not monopoly profit

h. Opinion offers Appendix A to explain “single monopoly profit” argument: basically showing that the monopoly profit is going to be the same so long as the profit maximizing price is the same, no matter whether a mfg. controls one level, or two levels, see pg. 430, with graph. (Don’t really understand b/c seems at two levels, would lower cost b/c of efficiency).

G. The Microsoft Litigation: Monopolization (DC Cir. 2001)
1. §2 of the Sherman Act makes it unlawful for a firm to “monopolize.” The offense of monopolization has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”

ANTICOMPETITIVE CONDUCT
2. District Court held that Microsoft violated §2 engaging in a variety of exclusionary acts (not including predatory pricing): (1) the way in which it integrated IE into Windows; (2) its various dealings with OEM, IAP, ICP, ISV, and Apple Computer; (3) its efforts to contain and to subvert Java technologies; (4) its course of conduct as a whole
3. To violate §2 must have an “anticompetitive effect,” must harm the competitive process, harm to one or more competitors will not suffice, if establish prima facie case – monopolist must offer a “procompetitive justification” for its conduct, if procompetitive justification stands unrebutted, plaintiff must show that harm outweighs benefits, focus is on the effect of the conduct, not the intent behind it.
4. MS wanted to protect its hold in the operating system and prevent competitors from building large browser base, and moving into the operating system market, court looks to see if anticompetitive effect:
a. Second browser w/out removing first confuses people, increases support costs
b. Microsoft prohibited OEM’s from altering boot sequence, has internet sign up sequence

c. Additional desktop restrictions decreased rival’s hare of usage

d. Copyright argument is frivolous (can’t alter desktop), all are anticompetitive.

5. Integration of IE and Windows:

a. Increase product testing for OEM’s on installing 2nd browser, used up valuable disk space

b. If delete IE messes up machine (contradiction in testimony)

c. Court says judicial deference to product innovation, but commingling deters OEM’s for installing rival browsers, reducing rival’s usage share and developer’s interest in rivals’ API’s, MS provides no justification for excluding, and for integrating, says that need to integrate for help access

6. Agreements with Internet Access Providers: (free of charge, bounty for IAP using IE)

a. No recoupment argument made by PL, just preserving monopoly, no liability at district court level

b. Cites Tampa Electric, exclusive K no violate Clayton Act unless probable effect is to “foreclose competition in a substantial share of the line of commerce affected.” Identifying market share foreclosed important, Plaintiff must define relevant market and amount foreclosed.

c. Here don’t reach 40% necessary for §1

d. MS argues that no liability under § 1 = no liability under §2, no so, b/c §2 different than §1, ensuring that IAP’s used IE help keep usage of Navigator below critical level necessary for Navigator or any other rival to pose a real threat to MS

e. No procompetitive justification

7. Dealings with Internet Content, Independent Software and Apple

a. Had effect of preserving monopoly

b. No projustification offered

c. Smoking gun email with regard to forcing MAC to use IE (or else lose Office)

d. Had effect of reducing competition, no procompetitive effect

8. Java

a. Tried to get rid of sun Micro Systems Java with incompatible MS Java

b. No anticompetitive effect for developing Java

c. First Wave agreement, conditioned receipt of Window’s technical information upon ISV’s agreement to promote MS Java exclusively

d. No competitive justification

e. Deceived Java Developers by getting them to develop stuff that would only work with MS Java

f. Told Intel to back off or no Intel with windows – quid pro quo

9. Course of Conduct: Reversed b/c no evidence of General Course of Conduct

a. No case that says they have to directly show causation, they can infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes
b. Question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant’s constituted monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time MS engaged in the anticompetitive conduct at issue

ATTEMPTED MONOPOLIZATION:

10. To establish a §2 claim for attempted monopolization: a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports.*

a. To establish a dangerous probability of success: plaintiffs must as a threshold matter show that the browser market can be monopolized, i.e. that a hypothetical monopolist in the market could enjoy monopoly power

b. This requires plaintiffs to define the relevant market and demonstrate that substantial barriers to entry protect that market

c. Here: No examination of substitute, no market shown, b/c no market shown, cannot show barriers to entry

d. Tried to show network effects were barriers to entry (in time competitors could launch effort to compete, it could have erected barrier by adding property extensions to browser market) using existing networks

e. No soap though

REMEDY

11. Vacated b/c (1) no evidentiary hearing, (2) no adequate reasons for decree, and (3) court has revised the scope of liability (i.e. attempted monopolization) therefore, impossible to determine to what extent that should effect remedy

CHAPTER 5: VERTICAL RESTRAINTS

A. Introduction

1. Many firms find it advantageous to “contract out” part of the production and sales process to third parties.
2. In order to extract the full gains from this contracting-out, such firms frequently condition their contractual relationships in ways designed to regulate the conduct of the other party.

3. Are these vertical restraints anticompetitive?

4. Mighty Mfg. Example: had exclusivity clause, price agreement, market distributorship, the point is that contracts can be designed in such a way as to hurt competition.

5. Why have vertical distributorships:
   a. Sometimes problems for self-serving behavior of a downstream seller may create difficulties for the upstream supplier of the product.
   b. Independent distributorships may have lower costs, may be able to reduce cost of product, so more of the product can be sold at a lower cost.
   c. The higher profits have to be shared by the independent distributorships.
   d. Lower costs can be passed onto consumer.
   e. Sometimes manufacturer is located at some distance from the places where products are in demand, distributors can take products into the field and demonstrate them, product demonstrations are costly – have to be careful about dealerships free riding.

6. Local Beauty Supply Inc. v. Lamaur: Other distributors complained Local was subjobbing—selling at low prices to discounters who then resell to consumers so they could avoid the additional cost of advertising and promotion, and “free ride” off of other full service distributors, normally they were limited to customers who they could sell to, Local brought antitrust actions and lost.

**Competitive Threats vs. Competitive Opportunities:**

B. Dr. Miles Medical Co. v. John D. Park & Sons: Mfg. sought to maintain fixed prices at wholesale by appoint agents who would not sell below certain prices by contract, with a set commission and set customers, Miles asserted that entitled to protect secret formula and was able to control prices on sales of his products.

   1. CT: Patents have constitutional protection based on public considerations, no general statutory grant to protect formula, right to protect formula is not right to violate antitrust laws.
   2. CT examines price fixing under Rule of Reason, basically says that vertical restraints such as this one pose the same risks as horizontal restraints, no procompetitive effects, and “are injurious to the public interest and void”
   3. Holmes (dissent): These wholesalers are agents of the manufacturer, unconvinced that agreement has anticompetitive effects, right to set prices shouldn’t turn on amount of items sold, talks about the possibility of substitutes.

C. Agency vs. Reselling in Price-Setting Contracts:

   1. *Dr. Miles* left open the question of whether the contract-based distinction made any antitrust difference (the Court held that both contracts, even those purposing to be agency agreements, were in fact sales contracts ---- “the so called ‘retail
agents’ are not agents at all, either of the complainant or its consignees, merely contemplated purchasers or retail dealers

2. *US v. General Electric:* S.Ct. resolved the Agency issue, Court held that the manufacturer did not violate the antitrust laws “by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer.”

3. *Simpson v. Union Oil:* Court noted that consignment contract just as illegal as those in *Dr. Miles* b/c “to allow Union Oil to achieve price-fixing in this vast distribution system through this ‘consignment’ device would be to make legality for antitrust purposes turn on clever draftsmanship.” Dissent (Stewart): noted that majority overruled *General Electric.*

4. Lower courts still use *GE*

5. Jury instructions (484) note that what parties call the arrangement does not control look at who controlled product/had title, who had responsibility to do selling, who bore expenses.

D. Vertical Contracts v. Unilateral Action

1. *Colgate* (1919 S.Ct): Whether unilateral conduct – specifying resale prices and refusing to deal with any one who failed to maintain them – might still violate §1 of the Sherman Act? S.Ct held that “In the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.” --- *Colgate Doctrine*

2. Courts have narrowed the *Colgate doctrine* of the years, remains the veritable flagship of the *mothball fleet* of antitrust opinions – opinions like *Appalachian Coals* whose days at sea one seemed over forever, but suddenly have come out again

3. Notion of agreement between manufacturers has become quite complicated.

E. *Albrecht v. Herald Co* (S.Ct 1968): When Globe-Democrat used another delivery person and then terminated route of independent carrier who raised prices to customers over the suggested retail price, carrier brought §1 suit; even though this involved maximum price setting

1. S.Ct. held it unlawful, as maximum prices may be fixed to low for dealer to furnish services and conveniences, and may hurt distribution channels by helping specifically advantaged dealers who would otherwise be subject to price competition, can be used to disguise minimum price fixing (by having the actual price always the maximum price)

2. Harlan (dissent) said maximum price fixing is different from minimum, drive prices toward a level, and firm was not contracting to raise prices, b/c not contracting to hire outside accountants, etc. to perform tasks

3. After case, many newspapers began to distribute their own papers
F. *Paschall v. Kansas City Star* (8th Cir 1984): Star set wholesale prices, retail set by contract carriers, Star had some control, set price as percentage of retail price, reserved right to sell directly if contract carrier not providing proper service, 1977 Star was acquired by Capital Cities, who announced it would replace carriers with its own agents, and set uniform prices, independent carriers could apply as delivery agents, and promised they would earn about same income

1. 8th Cir: 2 basic elements to Sherman Act §2 violation: (1) possession of monopoly power in a relevant market and (2) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Grinnell*
2. Neither vertical integration nor unilateral refusal to deal is *per se* illegal. *Columbia Steel; Russell Stover Candies*
3. Both actions are judged under §1 Rule of Reason standard… hence the central issue is whether the combination of Star Co’s vertical integration and refusal to deal has resulted in any unreasonable anticompetitive effects in the market
4. Here: Record shows that Star Co’s rates were lower than rates charged by independent carriers, large portion of its revenue comes from advertising, must competitive with many other media, and advertising revenues are dependent on circulation --- Star has greater incentive than contract carriers to keep retail prices as low as possible,
5. No showing that procompetitive effects of lower prices and greater distribution (optimum monopoly pricing --- charging ‘optimum monopoly price’\(^{10}\))
6. Dissent raises small business protection concerns noted in *Brown Shoe*

G. *State Oil v. Kahn* (US 1997): Agreement that service station would obtain gas supply from Stat Oil at a price equal to a suggested retail price set by State Oil, less a margin of 3.25¢ per gallon, they could charge whatever they wanted, but anything over retail went to State Oil, when they broke lease agreement they brought anti-trust action. 7th Cir. (Posner) characterized *Albrecht* as unsound and inconsistent with later decisions, felt constrained to follow.

1. In *ARCO*, the Sct. Acknowledged that vertical maximum price-fixing “may have procompetitive interbrand effects,” and pointed out that, in the wake of *GTE Sylvania*, “the procompetitive potential of a vertical maximum price restraint is more evident .. than it was when *Albrecht* was decided b/c exclusive territorial arrangements and other non-price restricts were unlawful *per se* in 1968
2. Court begins this decision by noting *Matsushita* highlights the notion that condemnation of practices resulting in lower prices to consumers is “especially costly” b/c “cutting prices in order to increase business is good for competition, therefore hard to condemn vertically imposed maximum prices as *per se*
3. Court also notes that *Albrecht* has actually had the opposite effect, and just caused vertical integration, and that its intellectual underpinnings are unsound

\(^{10}\) Court noted if monopolist charged more than this price, its profits would decline b/c lost revenues from the reduced number of sales would more than offset the added revenues from the higher price. IF the monopolist charged less, the added revenue from increased sales would not compensate ffo the reduced revenues per sale that the added marginal costs in producing that quality.
4. While maximum prices can be used to disguise minimum prices, this behavior can be ferreted out under Rule of Reason.

5. Court ends by directly overruling *Albrecht*, noting that vertical maximum price-fixing restraints should be evaluated under the Rule of Reason.

**Accommodating Efficiencies: Relaxed Rule for Non-price Restraints**

H. *Continental TV v. GTE Sylvania Inc.* (US 1977): GTE sold TVs to independent or company owned distributors who resold them to retainers, GTE phased out distributors and began to sell directly to smaller group of franchised retailers (to decrease # of competition retailers), and limited the number of franchises granted for any given area, each franchisee must sell Sylvania products only from the locations franchised (not constitute exclusive territory & GTE retained authority on increase number of retailers). When GTE gave additional franchise to retailer close to Continental, resulting in fallout and antitrust action. Lower court used *Schwinn* to say *per se* analysis applied, 9th Cir. said *Schwinn* was distinguishable

1. *Schwinn* involved title passing for bicycles and mfg. setting restricting sale to only franchised retailers, S.Ct. says different result if no title passed (retain title, domination, and risk, functions of dealer indistinguishable from agent or salesman), but was unable to see difference between this case and *Schwinn*, fact that one restriction was addressed to territory and the other to customers is irrelevant to functional antitrust analysis

2. Court reconsiders *Schwinn*, noting scholarly criticism, begins “*per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.” But while *per se* rules provide guidance to the business community and minimize burden on litigants and judicial system for Rule of Reason trials – this does not justify the creation of *per se* rules.

3. Court in *Schwinn* did not distinguish among challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand harm.

4. Vertical restrictions reduce interbrand competition by limiting the number of sellers, but the ability of retailers to exploit resulting market may be limited by substitutes and they promote interbrand competition by allowing the manufacturer to achieve efficiencies in distribution, they can induce competent and aggressive retailers to make investment in capital and labor, engage in promotional activities, provide service or repair facilities, eliminate free rider effect

5. Whether title has passed is unrelated to economic impact (watershed moment), CT concludes that they are going to look more at economic realities than whether this is a sale or nonsale transaction

6. Substantial scholarly authority for proposition that vertical restrictions have great economic value, CT overrules *Schwinn*.

7. White (dissent) would distinguish *Schwinn* on the fact that case did not involve territorial restrictions, had little market share, and enjoyed no consumer preference (*Schwinn* was Cadillac of bikes). Authors are critical
I. *US v. Visa* (SDNY 2001): Suggest that horizontal/vertical distinction may not matter much under general Rule of Reason. Visa/MC joint ventures, owned by thousands of members (mostly banks) that issue cards, member may sit on boards of dir, but not of both, can issue both cards, but not AMEX or Dis, gov. attacked not allowing board of dir for both and restriction on issuing Amex & Visa.

1. Ct.: Members compete horizontally among themselves to issue cards, but cooperate vertically in establishing financing and managing the two associations,
2. Court found dual governance provision did not effect brand promotion or network and product information, and there was (to the contrary) significant evidence of vigorous competition between Visa/MC
3. On not issuing other cards, b/c high barriers to entry, product market
4. Case noted for judge’s failure to properly analyze antitrust issues, doesn’t cite any exclusive dealing cases (pro & anticompetitive effects), just applies single standard

J. *St. Martin v. KFC* (WDKY 1996): KFC decided not to allow St. Martin to compete in the “company market” of Las Vegas and franchise agreement did not let him operates any other brands, St. Martin alleged that KFC violated § 1 of the Sherman Act by: (1) excluding franchisees in KFC company markets throughout the country (company town policy); and (2) prohibiting franchisees from acquiring any interest in fast food outlets other than KFC outlets (non-KFC clause)

1. Majority of circuits, including the 6th Cir., have held that companies that operate at two levels of the market, such as a company that is represented at the mfg. level and at the distributorship level, are characterized as “dual distributorships” and are considered vertical, and analyzed under the Rule of Reason standard.
2. 6th Cir. has defined “dual distributorship” as “a business structure in which one party operates a branch of dealership on the same market level as one or more of its customers. *Davis-Watkins Co. v. Service Merchandise.*
3. “Departure from the Rule of Reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing. *Sylvania.* Whether KFC actions have an effect on interbrand vs. intrabrand competition is significant, here interbrand competition was not impeded, rather it created an “efficient market distribution system” and maintained control over the quality of the product.
4. The restrictions could potentially increase interbrand competition and should be considered vertical in nature.
5. ST. Martin must allege: (1) that the antitrust defendant contracted, combined, or conspired; (2) that the combination or conspiracy produced adverse anticompetitive effects; (3) within relevant product and geographical markets; (4) that the objects of and conduct pursuant to that contract or conspiracy were illegal; (5) that the plaintiff was injured as proximate result of the conspiracy
6. It is inappropriate to consider intrabrand restraints as “agreements” to conspire and mfgs. Are permitted to unilaterally impose appropriate restraints w/out giving rise to antitrust injury.
7. KFC’s company town policy and non-KFC clause were unilaterally formulated and implemented by KFC, and b/c they were unilateral, St. Martins fail to show that there was a conspiracy or the first prong of the Rule of Reason Test.

Applying the Rules: Per Se vs. Rule of Reason:

K. Price Agreements: Monsanto v. Spray-Rite Service Corp. (US 1984): Monsanto mfgs chemicals incl. herbicides, had 15% corn herb market, 3% soybean herb market, corn herb market leader had 70%, other soybean competitors each had 30-40%, Spray-Rite was discount wholesale distributor, bought large qualities, sold at low margin – bought Monsanto products. 1967 Monsanto imposed new conditions w/ one year terms – wanted distributors to seek out new business (solicit sales, did they have good salespeople, could they exploit market), 1968 refused to renew Spray-Rite’s K (16% of its sales were Monsanto, 90% herb prods). Lower court noted numerous competitor complaints about Spray-Rite’s price-cutting activity. Issue: Whether a price-cutting plaintiff can survive a summary judgment or directed verdict motion by showing that mfg. terminated the distributorship “in response to or following complaints by other distributors?”

1. “A manufacturer generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.
2. Under Colgate, the mfg. can announce its resale price in advance and refuse to deal with those who fail to comply
3. If proven, resale price maintenance was per se illegal under Dr. Miles, while non-price restrictions were judged under the Rule of Reason, per GTE Sylvania.
4. Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about “in response to” complaints, could deter or penalize perfectly legitimate conduct. Monsanto
5. Complaints are common about price cutters, arise in the normal course of business, and distributors are an important information source for the mfgs to ensure an efficient distribution system. The antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the mfg and others “had a conscious commitment to a common scheme designed to achieve an unlawful objective.”
6. Correct standard: there must be evidence that tends to exclude the possibility of independent action by the mfg. and distributor, direct or circumstantial evidence that reasonably tends to prove that the mfg and others had a conscious commitment to a common scheme designed to achieve an unlawful objective
7. There was direct evidence in the form of mgr. testimony here, and contact between Monsanto and Spray right here showing price-fixing conspiracy (questionable, but case is important for standard…. Dr. Miles is alive and well)

L. Business Electronics v. Sharp Electronics (US 1988): BE was exclusive retailer in Houston for Sharp, second retailer came in and was doing better, BE was free-riding off of other’s promotional and sales efforts, Other guy complained and Sharp terminated
BE’s dealership, BE brought antitrust action alleging *per se* illegality under §1. SCT

**HELD:**

1. There is a presumption in favor of the Rule of Reason standard; that departure from that standard must be justified by demonstrable economic effect; such as the facilitation of cartelization, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view toward protecting the doctrine of *Sylvania*.

2. A vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels

3. Court affirms 5th Circuit holding that to render illegal *per se* a vertical agreement between a manufacturer and a dealer to terminate a second dealer, the first dealer “must expressly or impliedly agree to set its prices at some level, though not a specific one.”

4. Plaintiffs can almost always make the price agreement, arguing that real motivation for terminating agreement was price fixing, mfgs. will be forced to forego legitimate conduct (*Monsanto*), not going to look at word price, b/c “vertical nonprice restraints only accomplish the benefits identified in *Sylvania* b/c they reduce intrabrand price competition to the point where the dealer’s profit margin permits provision of the desired services.

### Chapter 6: Tying and Exclusive Dealing:

*Traditional Cases*

**A. Background**

1. The rules prohibiting so-called tying arrangements have long been among the most controversial of antitrust principles. At times tie-ins have been condemned as per se illegal in rhetoric typically reserved for such "hard core" offenses as horizontal price-fixing see, e.g., *Northern Pacific Ry*; *Fortner I*

2. However, at a relatively early time antitrust scholars argued persuasively that tie-ins often served important pro-competitive functions. See, e.g. Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L.J. 19 (1957)

3. With the reorientation of non-price vertical restraint law brought about by the Supreme Court's decision in *Sylvania, Inc.* many predicted that the per se tying rule would soon be abolished.

4. In fact, the Vertical Restraints Guidelines of the Department of Justice take almost an indifferent attitude towards the risks posed by tie-ins: "Tying arrangements generally do not have a significant anticompetitive potential." Id., §5.1.

5. Many predicted that the end of the per se rule was at hand when the Supreme Court granted certiorari in *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2 (1984). However, like Mark Twain's death, reports of the impending demise of the per se tying rules proved to be exaggerated, though only barely (and only slightly).
B. *International Salt* (US 1947): International Salts had patents for two machines for utilization of salt products, to use the machines you had to buy salt from International Salt.\(^\text{11}\)

1. Not only is price-fixing unreasonably *per se*, but it is also unreasonable *per se* to foreclose competitors from any substantial market. *Fashion Originators*
2. Even though Intl. Salt allowed lessee to buy any salt of equal grade offered by competitor at lower price, this does not avoid the stifling effect of the agreement on competition, b/c Intl. Salt had at all times priority on the business at equal prices
3. Ct also doesn’t buy argument that salt of certain grade needed for machines, b/c not pleaded or argued that machine allergic to salt of equal quality
4. Court seems to assume the existence of market power due to the patents

C. *IBM* (US 1946): IBM found liable for tying punch cards to leasing of tabulating machines, an early form of data-processing equipment. CT rejected quality control argument b/c the use of standards and specifications for cards to be used in the machines was deemed to be practical. IBM overcharged for the cards for metering.

1. Different from lease of photocopying machines for a fixed periodic sum plus per-copy charge determined by a mechanical meter – b/c don’t have to buy paper
2. Different from common practice in franchising whereby the franchisee pays a percentage of gross sales in exchange for rights given b/c no additional product purchase required.

D. *Siegel v. Chicken Delight, Inc.* (9\(^{th}\) Cir. 1971): Chicken Delight required that franchisees purchase certain essential cooking equipment, dry-mix food items, and trademark bearing packaging exclusively from Chicken Delight as a condition of obtaining Chicken Delight trademark license, did not charge franchisees fees or royalties

1. In order to establish unlawful tying arrangement: (1) scheme in question involves two distinct items and provides that one (the tying product) may not be obtained unless the other (the tied product) is purchased; (2) the tying product possess sufficient economic power appreciably to restrain competition in the tied product market; (3) that a “not insubstantial” amount of commerce is affected by the arrangement
2. The hallmark of a tire-in is that it denies competitor s free access to the tied product market, not b/c the party imposing the arrangement has a superior product in that market, b/c the power or leverage exerted by the tying product ----- the forced purchase of the second, tied product, is a price extracted for the purchase of the dominant, tying product (by shutting competitors out of the tied product – tying arrangements hardly serve any useful purpose)
3. In determining whether an aggregation of separable items should be regarded as one or more items for tie-in purposes in the normal cases of sales o product, must look to function of aggregation – are they normally sold together, is there any cost savings achieved?

\(^{11}\) One machines, the Lixator dissolves salt rock into a brine used in various industrial processes. The other, the Saltomat, injects salt into canned products during the canning process.
4. Where one of the products sold as part of aggregation – is a trademark of franchise license, new questions are injected --- must consider function of trademarks --- trademarks represent product quality, trademark simply reflects the goodwill and quality standards of the enterprise, sale of franchise in no way requires the forced sale of component articles

5. Have to show market power under per se theory --- here circular argument – you have market power for purposes of finding tie in power if you can require users to buy tied product, thus giving you market power

6. Court presumes (later O’Conner casts doubt on this) that sufficient economic power is present where tying product is patented or copyrighted

7. Chicken delight urges purpose was quality control and for collecting revenue – court says that alternative methods exist for collecting revenue – no authority for justifying tying arrangement on this ground, second argument fails (quality control) b/c they can just specify types of products to be used (unless they cannot practically be supplied)

E. “Not insubstantial” Tying under Clayton § 3:
1. “For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, the relevant figure is the total volume of sales tied by the sales policy under challenge.” Fornter I
2. Whether the amount of commerce affected is “no insubstantial” is not measure by percentage of the market, but by dollar amounts, this is undercut later by Tampa Electric.

F. Jefferson Parish Hospital (US 1984): Hospital contracted with Roux & Assoc. to provide anesthesia service – impacted two segments consumers of medical services and providers of medical services, b/c any consumer has to use Roux and no anesthesiologist except Roux can practice there. District ct. regarded Orleans Parish and Jeff. Parish as market, 5th Cir. though Jeff. Parish was market, question of whether contract gave rise to per se violation.
1. Sct. begins: “It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangement pose an unacceptable risk of stifling competition and therefore are unreasonable “per se,” ... but every refusal to sell two products separately cannot be said to restrain competition (12 food stores in market refuse to sell sugar w/out flower – hardly restrain competition)
2. Essential characteristic of an invalid tying agreement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. (Ct. call this forcing). Have to have market power to “force”
3. When seller’s power is just used to maximize its return in the tying product market, where presumably it enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised.
4. Per se condemnation w/out inquiry into actual market conditions is only appropriate if forcing is probable and there must be a substantial potential for impact on competition in order to justify per se condemnation, if only a single purchaser were forced – no big deal

5. Patent presume market power (578), also strict rules apply when market share is high, or offer unique product. See Northern Pac. R. Co. (RR’s control over vast tracks of western real-estate gave the RR a unique kind of bargaining power that enabled it to tie the sales of land to exclusive long term commitments that fenced out competition)

6. Initial inquiry: focus on whether there are two separate product markets, and to do this, must focus on character of the demand for the two items ---- Have to have two separate product markets linked.

7. For per se liability: (1) Need 2 product markets, (2) must be forcing one to purchase the other, (3) must have substantial impact on competition (if not – can be no anticompetitive effect)

8. Here court does not really go into whether anesthesiological services could be offered separately, says “Unquestionably, the …”, assumes that there are two product markets, then court looks to see if there is forcing, examines market power using Jefferson parish, says that market includes Orleans Parish, so there is no forcing, therefore no violation --- discounts market imperfections argument (indifference to price will not make them take service they do not once)

9. Goes into Rule of Reason: no showing of adverse effects on competition

10. Court really has to add this two separate product markets in, otherwise, looks like vertical agreement, which would be analyzed under Rule of Reason…. Interesting, b/c now with focus on anticompetitive effects as well – hardly going to be very many anticompetitive effects in market like Chicken Delight with vigorous competition.

G. Jefferson Parish (continued) O’Connor’s Concurrence: Would analyze tying agreements under the Rule of Reason

1. O’Conner says: using per se in tying is same as going though Rule of Reason costs, w/out the benefits of examining procompetitive effects

2. Misconception to assume that just b/c patent, high market share, or unique product, that competitors are not able to offer suffice to demonstrate market power, is also possible that in these situations seller will have no market power --- a patent holder who has no market power if there are close substitutes, a higher market share indicates market power only if the market is properly defined to include all reasonable substitutes

3. O’Conner would add in examination of procompetitive effects, look at economic benefits – and condemn tie in arrangements only when its anticompetitive impact outweighs its contribution to efficiency, otherwise, use majority test

4. Criticizes for majority failure to look to see if they are really separate product markets – anesthesiological services are distinct from other services – who goes to the hospital just for anesthesia services, few patients would undergo surgery w/out anesthesia
5. Rule of Reason: Tie-in improves patient care and permits more efficient hospital operation – ensures 24-hour anesthesia logical coverage, aids in standardization of procedure and efficient use of equipment, facilitates flexible scheduling of operations, and permits hospitals more efficiently to monitor the quality of anesthesia services, patients who are seriously ill couldn’t’ properly evaluate anesthesia services

H. Town Sound and Custom Tops, Inc. v. Chrysler (3rd Cir. 1992): Group of auto sound dealers sued Chrysler for conditioning the sale of their cars on the purchase of Chrysler-supplied stereo (until 1970’s could purchase w/out sound, now have to pay for it regardless). Parties stipulated to other two elements, debated element was the not insubstantial amount of commerce be affected. Dst. Ct held that Chrysler lacked market power and therefore no per se liability

1. Where (1) a defendant seller ties two distinct products; (2) the seller possess market power in the tying product market; and (3) a substantial amount of interstate commerce is affected, the defendant’s tying practices are automatically illegal w/out further proof of anticompetitive effect

2. Don’t want tying to raise barriers to entry to the tied product b/c new entrants would have to sell both tied and tying products, use of tied product can force consumers to buy tied products, and second monopoly could impede innovation in the tied product market by reducing competitive pressure in that market, tying can also hide other activities (price discrimination, hiding inflating price)

3. To determine existence of market power – must first determine relevant tying product market, here: not going to accept plaintiff’s product market definition of all new Chrysler cars.

4. Trademark is not itself persuasive evidence of economic power, b/c trademark, unlike a patent, protects only the name or the symbol not the product itself--- look at other competitors in the market providing substitutes --- significant cross-elasticity of demand here

5. Rule of Reason: Don’t need to make showing of tying market power that is necessary for “per se” claim, only need to show anticompetitive effect, several courts disagree with this court: 6th Cir, 7th Cir (598), but Court here does not agree, goes with causation instead, says that if you prove lack of market power then there has to be another cause for the anticompetitive effect not tying.

6. Court agrees with Professor Areeda that standards for illegality of tying arrangement under the Sherman and Clayton Acts have coalesced so dismisses Clayton Act claim as well.

I. Eastman Kodak v. Image Tech Serv. (US 1992) Kodak manufactures and sells photocopiers and micrographic equipment, and also sells service and replacement parts for its equipment. Plaintiffs were independent service organization servicing Kodak equipment. Kodak provided 80-90% of the service for its machines though annual service contracts or on per-call basis. Some years after ISO’s started doing business, Kodak began selling its replacement parts only to buyers of its equipment who used
Kodak service or repaired their own machines. 9th Cir. reversed dist. ct. b/c allegations concerned tying between parts and service (not as dist. ct. had interpreted between copiers and “aftermarket sales” Whether a defendant’s lack of market power in the primary equipment market precluded – as a matter of law – the possibility of market power in derivative “aftermarket.”

1. SCT. upheld 9th Cir: Blackmun wrote there was tying if Kodak sold two distinct products and if it tied the sale of them, to be considered two distinct products there must be sufficient demand to provide on without the other – evidence from “truncated” discovery suggests sold separately in the past, some service does not require parts, then moved on to whether Kodak had market power.

2. Market power was defined as an ability “to force a purchaser to do something that he would not do in a competitive market” Jefferson Parish, or the “ability of a single seller to raise prices and restrict output. Fortner, that ability typically inferred from possession of a predominant share of the market.

3. Kodak argued that competition in equipment market would prevent it from raising prices in the service and parts market above comparative levels

4. Court didn’t buy this, b/c once invested in machines, not easy to change just b/c increase in service costs, also different monopoly prices can be charged – a middle optimum price – a higher price on service could compensate for lower equipment sales, also Kodak’s theory not supported by record; also information switching costs – consumer may not have access to total costs of switching – if high switching costs – purchasers were locked in

5. No Matsushita risk of deterring legitimate behavior

6. Dissent: Had Kodak tied from the beginning no problem b/c no monopoly power in equipment market

7. Post Kodak, courts scrutinizing alleged sources of market power have distinguished between (a) buyer willingness to contract into a situation whose consequences were rapidly foreseeable vs. (b) buyers being “forced” later to adapt to changes in the buyer-seller relationship they arguably would not have foreseen until they were locked in.

J. Microsoft – Tying: DC circuit reversed the tying portion of the district court opinion – MS’s arrangement was “unlike any the Supreme Court has considered,” … In no previous case “was the tied good physically and technologically integrated with the tying good” nr was it ever contended that tying “improved the value of the tying product to users and to makers of complementary goods

1. There are four elements to a per se tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product form it; and (4) the tying arrangement forecloses a substantial volume of commerce. Kodak; Jeff Parish

2. Jeff Parish demand test: “no tying arrangement can exist unless there is a sufficient demand for tied apart from tying.” This test is a poor proxy for net efficiency from newly integrated products, b/c at the moment of integration, risk
tying argument, this is troubling for court, as soon as integrate new market (separate) for tied product
3. Fearing that per se liability might student innovation, and noting that it did not “have enough empirical evidence regarding the effect on MS’s practice on the amount of consumer surplus created or consumer choice foreclosed by the integration of consumer surplus created or consumer choice foreclosed by the integration of added functionality into platform software to exercise sensible judgment.” (prior cases involved bundling hardware with software)– Remanded so Gov. could make Rule of Reason case
4. Bundling might capitalize on economies of scope: shared library files saving drive space, no redundant routines save memory – Here consumer demand test tries to screen off false positives under per se analysis – determining whether a tying arrangement may be welfare-enhancing and unsuited to per se analysis.
5. To make out case: would involve inquiry into the actual effect of MS’s conduct in the tied good market, requiring a careful definition of the tied good market and a showing of barriers to entry other than the tying arrangement itself
6. Court have to weigh procompetitive and anticompetitive justifications
7. Basis for §2 claims different from tying practices – court would have to determine that MS indeed price-bundled – was MS charge for Window’s and IE higher than charge for Window’s alone
8. In determining whether pro or anticompetitive --- Would OS vendors w/out market power also sell their software bundled with a browser, the natural inference is that sale of the items as bundle serves consumer demand more than unbundled software

**Exclusive Dealing**

K. Standard Oil Co (US 1949): Standard Oil entered into exclusive supply contracts with various service stations, some owned independently some owned by Standard. Standard is the largest seller of gasoline in the “Western Area,” selling 23% of total taxable gas with about 6-7 percent to independent and the same amount to company owned service stations, 16% of the retail outlets in the Western Area have entered into exclusive K’s with Standard, binding the dealer to purchase all of requirements (some petroleum only, some additional stuff)

1. Tying contracts are different from requirements contracts, as tying agreements hardly serve any purpose beyond suppression of competition, and the justification most often used – protection of good will of manufacturer fails b/c manufacturer can make require certain specifications be adhered to; whereas requirements contracts may assure supply, afford protection against a rise in prices, enable long-term planning on the basis of known costs, obviate the expense and risk of storage in quantity. From seller’s perspective – reduce selling expenses, gain entrance when there is entrenched competition
2. Court goes though Rule of Reason analysis, but says that statute doesn’t call for this, and going though analysis would “stultify the force of Congress’ declaration that requirements contracts are to be prohibited whatever their effect ‘may be’ to substantially less competition.
3. Court concludes: Qualifying clause of §3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected.

**Recent Approach to Exclusive Dealing:**

L. *Tampa Electr. v. Nashville Coal* (US 1961): Tampa Electric contracted with Nashville Coal for total requirements contract, price set at $6.40 w/ escalation clause for 20 years and 225,000 tons of coal per year, Nashville wanted out of K, court reasoned that contract was exclusive b/c called for total requirements, looked at tonnage for 20 years

1. Clark: Exclusive-dealing arrangement does not violate antitrust laws unless court believes that its probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected

2. First: line of commerce must be determined on basis of fact peculiar to case; Second: area of effective competition in the known line of commerce must be chartered by a careful selection of the market area in which the seller operates and which the purchaser can practically turn for supplies; Third: the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market (opportunities for other traders to enter into or mean in the market must be significantly limited)

3. To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total value, probable and immediate future effects, mere showing that a contract itself involves a substantial number of dollars is ordinarily of little consequence

4. Here: market it much broader than lower courts found, look at West Virginia, KY, TN, Ohio, IL --- basically, where producers of coal effectively compete

5. Amount of $ involved is significant, but doesn’t pas significant effect, look at total market value and volume, its insignificant

6. Court also acknowledges *Matshshita* Type 1 errors

7. When you can’t meet §3, you can’t meet §1 of the Sherman Act b/c §3 has lower standard.

**M. Roland Machinery Co. v. Dresser Industries** (*7th* Cir. 1985)(Posner): Roland entered into an exclusive distributorship with Dresser to distribute International Harvester, which could be terminated on 90 days notice (no exclusive dealing clause). Roland signed agreement with Komatsu to sell their equipment, and Dresser gave notice to terminate, Roland brought antitrust action.

1. Judge granting TRO and Injunction committed errors of law and fact, Factual Error was finding that Roland would go out of business (only 10% of revenues derived from sales of new equipment, renting old equipment would not be affected), however, parts business will be substantially affected, Error in Law when failed to consider the possible impact on competition of the provision of the injunction that freezes Dresser’s market share until the end of the lawsuit --- Posner not willing to assume that Komatsu equipment sales will be low as the first
year, federal judge in no position to supervise dealership (maintain same level of aggressive sales w/ regard to Dresser and same market share)

2. Having lost on irreparable harm, Roland also can’t show that it is more likely than not to win

3. In order to win §3 claim, Roland must show there was an agreement (not necessarily explicit) between it and Dresser, that it not carry a line of construction equipment competitive w/ Dresser’s and that the agreement was likely to have a substantial though not necessarily an immediate anticompetitive effect.

4. Nothing in dealership agreement hints at exclusive dealing – fact that Roland applied for Komatsu dealership is evidence that Roland itself did not think it had made an implied commitment to exclusive dealing, an agreement requires a meeting of the minds and there was no evidence that Roland ever thought itself bound to carry only the Dresser line

5. If Roland announced a policy unilaterally, this would be permitted under Colgate, while there is some evidence of surveillance by Dresser which could be illegal under some circumstances, no evidence that it was used to intimidate here. Evidence does not support an inference here. “Dresser’s preference for exclusive dealers, its efforts to find out whether its dealers were exclusive dealers, and its terminating Roland when it found out that Roland no longer was its exclusive dealer do not support an inference of an agreement to exclusive dealing

6. Exclusive Dealing agreements will be judged under the Rule of Reason (no deference here) and thus condemned only if found to restrain trade unreasonably

7. Exclusion of one or even several competitors for a short time is not ipso facto unreasonable, exclusion of competitors only cause of antitrust concern if it impairs health of competitive process.

8. Plaintiff must show (1) that agreement is likely to keep at least one significant competitor of the defendant from doing business in relevant market (if there is no exclusion how can agreement harm competition); (2) must prove that the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition; in other words an anticompetitive effect.

9. Here: Cannot show these two things – Komatsu is the second largest manufacturer in the world – fact that it entered the market underlies first element; also no showing of anticompetitive effect. Court is looking at nationwide market here for keeping Komatsu out.

10. Exclusive Dealing contracts terminable in less than a year are presumptively lawful under §3.

11. Procompetitive effects: plausible that dealer pushes brand more, prevent free-ride on national advertising – switch price to lower price substitute which he got higher margin, maybe exclusive dealer promotes line more effectively

12. Dissent: Talks about surveillance, not unilateral conduct, smaller market definition, Roland can’t survive w/out Dresser

N. Parikh v. Franklin Medical Center (D.Mass.1996): Parikh filed action to enforce his exclusive right to practice anesthesiology at Franklin Medical center (162 bed acute care
community hospital in Greenfield MA, the only one in Franklin county). FMC entered into the agreement to lure Parkh to the hospital, after fallout over staffers, hospital sought to terminate agreement on antitrust grounds.

1. Primary inquiry for exclusive dealing is whether an exclusive arrangement “ties up” a substantial amount of supply or outlet capacity and unreasonably hampers competitors from accessing the foreclosed market.

2. Court takes “quick look” for “direct evidence of competitive harm”/anticompetitive effects eliminating need for Rule of Reason, just passes over this briefly

3. Rule of Reason

4. Three factors relevant to the foreclosure analysis: (1) extent of foreclosure in the relevant market, (2) the duration of the exclusivity, (3) the incentives to remain in exclusive status

5. Market definition: Relevant product market and then relevant geographic market (geographic area in which the defendant faces competition to which consumers can practically turn or alternative sources of the product)

6. No analysis from one expert about ability to increase prices w/out losing customers to alternative suppliers, or cross-elasticity of demand or barriers to entry. Absent such evidence is not possible to infer whether a service area constitutes a geographic market for antitrust purposes

7. Use Elzinga-Hogarty Test: generally defines the relevant geographic market to be the area from which few patients leave, and to which few patients enter to purchase goods or services, when measured at the 75/75 level, the test describes an area in which 75% of the resident consumers purchase goods or services from resident suppliers and 75% of the resident suppliers sell goods or services to resident consumers. Cannot apply test mechanically b/c can overstate geographic market, also test does not address elasticity of demand and barriers to entry here – expanded to Cape Cod –absurd

8. Given term of K (potentially unlimited), and scope of market – here: showed substantial foreclosure

9. Anticompetitive effects: sometimes exclusive contracts promote efficiencies – assured availability of anesthesia services, lower costs through standardized procedures, improved supervision of staff, better working relationships with staff and physicians… here K duration and no leverage for assuring quality performance are problems, no guaranty that procompetitive advantages

10. Tying claim: Most circuits require an alleged offender to have an economic interest in the tied product (only the Second circuit has questioned this)(if they don’t have this, then they lose their distinction and become just like vertical agreements. No evidence showing that FMC ever acquired direct economic interest in Dr. Paikh’s anesthesia services (no splitting fees with, pay commission to, or confer direct economic benefit to hospital)

**Chapter 7: Mergers and Acquisitions:**

*Classic Merger Cases:*
A. *US v. Von's Grocery* (US 1966): Von’s Grocery ranked third in the LA Area and Shopping Bag ranked 6th, together their sales totaled 7.5% of the market, both companies had grown rapidly in the years preceding the merger, merger created 2nd largest grocery chain in LA, during growth of these two chains, mom and pop stores declined

1. Clayton Act as small business protection act, 1950 Celler-Kefauver Act was designed to prevent economic concentration by keeping a large number of small competitors, prohibited merger that substantially lessen competition
2. Court has to make a prediction of impact upon competitive conditions in the future
3. Dissent (Stewart & Harlan) are outraged b/c Court makes no efforts to appraise the competitive effects of this acquisition in terms of the contemporary economy of the retail food industry in the LA area, simply finds number of small businesses has decreased, this *per se* rule sucks
4. Focus of act was mergers which substantially lessened competition, here structure of LA grocery market remains unthreatened, affiliated cooperatives have developed to cope with population explosion, automobile keeps possible driving to stores

B. *Brown Shoe* (US 1962): Merger between Brown Shoe and GR Kinney created post merger market share of just over 5% in most cities in a few as high as 57%, relevant market was cities with populations over 10k. SCt upheld District court’s injunction of the merger:

1. Market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market – this industry was fragmented, inventories, can set fashion trends, history of concentration in the industry

C. *Philadelphia National Bank* (US 1963): post merger bank would be the largest in the city, and it and the second largest bank would have almost 60% of the assets, deposits, and loans.

1. A merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects

D. *FTC v. Procter & Gamble Co.* (US 1967): P&G acquired the assets of Clorox Chemical in a “product-extension merger”. Clorox was the leading mfg. in the heavily concentrated household liquid bleach industry (relevant line of commerce). It is a distinctive product w/ no close substitutes, relevant geographical market is nation and a serious of regional markets, not feasible to ship product more than 300 miles from mfg., Clorox is the only firm selling nationally, w/ 48.8% of the national sales, w/ market share steadily increasing (nearest rival was Purex – 15.7%)(4 firms account for 80%, other 20% spread out over 200 smaller firms). B/c all liquid bleach is identical, advertising and promotion are important. P&G produces many household products (not bleach), wanted produce bleach, and thought b/c of advertising economies of scale it would be a good expansion. FTC found that P&G was a potential entrant into the industry, and w/ huge
advertising advantage would discourage competition, and b/c P&G so powerful, Chlorox would be given between shelf space, and might under price and subsidize with other revenue to drive people out of market

1. §7 of the Clayton Act intended to arrest the anticompetitive effects of market power in their incipiency--- core question is whether a merger may substantially lessen competition, requires prediction on competition… All mergers are within the reach of §7, since the products of the acquired company are complementary to those of the acquiring company and may be produced with similar facilities marketed though the same channels and in the same manner, and advertised by the same media – FTC termed “product extension merger”

2. Liquid bleach industry already oligopolistic, P&G would become price leader and oligopy would become more rigid- barriers (P&G’s huge advertising budget) to entry would be raised, advertising is best weapon in bleach industry, could easily divert any new threat, P&G was most likely entrant

E. Potential Competition Doctrine: Focus on enhanced future competition that might occur if the merger is disallowed

1. Even perceived potential competition works (whether given financial capabilities and condition in market – would it be reasonable to consider it a potential entrant into the market) Potential competitors can exert a downward influence on price as long as they stand in the wings

2. Tough demands on finder of fact – must address standard merger issues like market definition, and then ask whether the market is currently an oligopy, if the market is already competitive, there is no improvement to be had by forcing the new entrant to come in de novo – then whether there are barriers to entry to other firms ----- then if whether firm would have entered de novo or though a merger with a firm of less power but for challenged transaction, and if not an actual potential competitor – was the firm perceived as one

3. Lower courts don’t like doing all of this, cases few and far between

F. Staples: FTC sought to enjoin merger between Staples and Office Depot, market defined as sale of consumable office supplies through office superstore, b/c found that office superstores didn’t really compete with Wal-Mart and other discount stores, but were able to price independently of these firms, and found that prices only varied when another office superstore was competing, repeatedly referred to nonoffice superstore markets a noncompetitive, then goes on to HHI index, which is high, high barriers to entry, cannot rebut the presumption that merger will lessen competition

G. General Dynamics Corp (US 1974): Gov challenged stock acquisition by Gen. Dynamics predecessor (who produced building materials, and coal from deep shaft mine) who began to acquire stock of UECC, which operated only strip or open pit mines in IL or KY

1. Coal competes with other sources of energy such as oil, natural gas, nuclear energy, and geothermal power (c.f. Tampa Electric), which created a cross-elasticity of demand amount those various fuels
2. Coal reserves were so low that its potential for future competition with other coal producers was far weaker than gov’s aggregate production statistic indicated.
3. Coal’s share of energy consumption has fallen dramatically, evidence of past production does not necessarily provide a clear view of future.
4. Production for spot sales limited by long term requirements contracts.
5. Failing company defense.
6. Partial acquisitions may be treated for antitrust purposes as equivalent to total acquisitions.

**MERGER GUIDELINES:**

**Flowchart of Merger Guidelines Analysis**

- Determine Product Market
- Determine Geographic Market
- Determine Market “Participants”
- Classify Market By HHI Index
- Apply HHI Filter Tests

**Market Definition**
**Concentration**
**Adverse Effects of Merger**
**Entry**
**Efficiencies**
**Failing Firms and Divisions**

**Modern Merger Cases:**

H. *Hospital Corp of America v. FTC* (7th Cir. 1986) (Posner): HCA acquired several hospitals, making it the second largest provider of hospital services in a highly concentrated market, it owned or managed 5/11 hospitals in Chattanooga area, ALJ concludes acquisitions violated §7 b/c of probable anticompetitive effect, HCA appealed to 7th Cir (for unexplained reasons!)

1. Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight.
2. Posner notes that FTC only relief on Phil. Nat. Bank, which took an explicitly
economic approach and not Brown Shoe, Von Grocery, Aluminum which seem to
establish the illegality of any nontrivial acquisition (Posner sniping), Posner notes
that current focus is on economics of merger, and ultimate issue is whether the
challenged acquisition is likely to facilitate collusion.
3. Posner then goes though Rule of Reason Analysis and compares procompetitive
and anticompetitive effects:
4. Anticompetitive:
   a. Reduce number of competing hospitals (mgr. set prices, board defers),
      fewer competitors in the market, easier it is to coordinate pricing, four
      largest firms control virtually entire market
   b. Tennessee’s certificate-of-need law forces hospitals to give public
      notice, well in advance, of any plans to add capacity, making it harder
      for members of a hospital cartel to cheat
   c. No substitutes, people not going to drive 2 hours for emergency care,
      doctors recommend hospital
   d. Inelastic demand, doctors recommend hospitals, bills paid largely by
      insurance companies or federal government. Less elastic the demand for
      a good or service is, the greater are the profits that providers can make
      by raising the price – a low elasticity of demand means that raising
      prices will cause a relatively slight fall in demand with the result that
      total revenues will rise sharply (if it was .2, w/in that area every 1%
      increase in price will result in 2/10 of 1% decrease in quantity
      demanded, 10 % increase in price, 2% reduction, almost 8% increase in
      total revenue
   e. Tradition of cooperation for hospitals (well documented), prone to
      collusion, management contracts illustrate too
   f. Hospitals under great pressure from gov. and insurance companies to cut
      costs, they could present united front, easier to stick together
5. Procompetitive:
   a. Hospital services are complex and heterogeneous, more difficult when
      heterogeneous and services are customized for individual patients;
      Posner: other markets complex and heterogeneous
   b. Sellers are heterogeneous b/c of differences in services provided and
      differences in corporate character, public ally owned subject to different
      pressures (political), different tax structures; Posner: speculative, didn’t
      make argument that services may not be substituted (open heart surgery
      for broken leg)
   c. Hospital industry undergoing rapid technological change
   d. Payors for services are large and knowledgeable, Posner: bigger buyer –
      easier to cheat b/c bigger windfall, insurers can’t tell patients they are
      not going to pay b/c prices are too high, they can collude tacitly
   e. FTC investigation began by complaint from competitor (who thought
      that acquisition would lead to lower prices). Posner: just view of one
      firm.