

# **Principles of Antitrust Law**

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# **PRINCIPLES OF ANTITRUST LAW**

**Jeff Miles**

## **I. INTRODUCTION AND BACKGROUND.**

### **A. Scope of the Outline.**

1. This outline discusses the legal principles applied in interpreting and understanding Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, antitrust exemptions, private antitrust damage actions, and the antitrust enforcers.

2. Important antitrust subjects it does not discuss include international antitrust, antitrust and intellectual property, and the Robinson-Patman Act.

### **B. Purpose of the Antitrust Laws.**

1. To protect and promote competition as the primary method by which this country allocates scarce resources to maximize the welfare of consumers.

a. “Antitrust law is the study of competition. It is a body of law that seeks to assure competitive markets through the interaction of sellers and buyers in the dynamic process of exchange. . . . [T]he promotion of competition through restraints on monopoly and cartel behavior clearly emerges as the first principle of antitrust.”<sup>1</sup>

b. “[C]ompetition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy.”<sup>2</sup>

c. The antitrust laws “rest[] on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while . . . providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the [antitrust laws] is competition.”<sup>3</sup>

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<sup>1</sup> E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and its Economic Implications* 1, 4-5 (6<sup>th</sup> ed. 2014).

<sup>2</sup> *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 372 (1963).

<sup>3</sup> *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); see also *Cal. v. Safeway, Inc.*, 615 F.3d 1171, 1174 (9th Cir. 2010) (“Our antitrust regime is the embodiment of Congress’s judgment that, with rare and specific exceptions, free competition for customers . . . protects the public by increasing efficiency and output, lowering prices, and improving the quality of the products and services available.”), *aff’d in part, rev’d in part, and remanded on other grounds en banc*, 651 F.3d 1118 (9th Cir. 2011).

- d. The antitrust laws are the “Magna Carta of free enterprise.”<sup>4</sup>
- e. The antitrust laws are a “charter of freedom.”<sup>5</sup>
- f. “In enacting the Sherman Act . . . Congress mandated competition as the lodestar by which all must be guided in ordering their business affairs.”<sup>6</sup>
- g. “Federal antitrust law is a central safeguard for the Nation’s free market structure.”<sup>7</sup>

## 2. But what is “competition?”

- a. See 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1901 at 202-03 (2d ed. 2005):

To the noneconomist layperson or lawyer, “competition” often refers to *rivalry*, and the most obvious manifestations are the number of players in any market and the lack of cooperation among them.

By contrast, an economist uses the term “competition” in a more technical fashion to refer to a situation where all prices are driven to marginal cost and every firm in the market is a price taker rather than a price maker—that is, no one has discretion to charge a higher price.

[Under the economist’s definition] market output—assuming it can be determined—is a good measure of the amount of competition. Thus, for the economist a market can be said to become increasingly competitive when its output increases—with output measured by the number of units sold or in some cases the quality of the units.

[Why is this a better definition than merely “rivalry?”] Consider a ten-firm market in which three firms enter a production joint venture that reduces their cost. In the lay sense the venture can be said to reduce “competition” because it reduces or eliminates one avenue of rivalry among the three firms. But in a more economic sense it can be said to *increase* competition because the impact of the cost-reducing venture is to increase total market output.

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<sup>4</sup> *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

<sup>5</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

<sup>6</sup> *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 406 (1978).

<sup>7</sup> *N.C. State Bd. of Dental Examiners v. FTC*, \_\_\_ U.S. \_\_\_, \_\_\_, 135 S.Ct. 1101, 1109 (2015).



[But how to measure output?] The relevant output consists of not merely the naked product itself, but all information, amenities, and other features that a firm produces.

3. The Supreme Court has emphasized that the antitrust laws are a “‘*consumer welfare* prescription,’”<sup>8</sup> promoting, for consumers, low prices, high output, high quality, efficiency in production and distribution, innovation, and choice for consumers.<sup>9</sup>

4. Different philosophies on antitrust’s goals: Populist philosophy (“big is bad—period”) vs. economics philosophy (the “Chicago school”—maximization of allocative and productive efficiencies).<sup>10</sup>

a. From the 1940s to the mid-1970s, the populist philosophy prevailed.

b. From the mid-1970s to the present, Chicago philosophy prevailed.

c. At present, the pendulum may be swinging back, given the Obama administration’s promise to “reinvigorate” antitrust enforcement.

5. Crucially important, “[t]he antitrust laws . . . were enacted for the protection of *competition*, not *competitors*.”<sup>11</sup>

a. This extremely important antitrust principle means that unless the challenged conduct adversely affects market-wide competition (and thus consumers), it raises no antitrust problem, even if it destroys an individual competitor.<sup>12</sup> “The consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price or quality.”<sup>13</sup>

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<sup>8</sup> *Reiter v. Sonotone Corp.*, 422 U.S. 330, 343 (1979) (emphasis added); see also *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 308 (3d Cir. 2007) (“The primary goal of antitrust law is to maximize consumer welfare by promoting competition among firms.”).

<sup>9</sup> *Cal. v. Safeway, Inc.*, 651 F.3d 1118, 1132 (9<sup>th</sup> Cir. 2011) (“The touchstone [of the antitrust laws] is consumer good.”).

<sup>10</sup> For discussions of the different antitrust philosophies and schools of thought, compare Robert Lande, *The Rise and (Coming) Fall of Efficiency as the Rule of Antitrust*, 33 Antitrust Bull. 429 (1988) (liberal view) with Robert Bork, *The Antitrust Paradox: A Policy at War with Itself*, 90-106 (1978) (conservative view).

<sup>11</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis in original; internal quotation marks omitted).

<sup>12</sup> *E.g., Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 122 (1<sup>st</sup> Cir. 2011) (“It is axiomatic that antitrust laws are concerned with protecting against impairments to a market’s competitiveness and not impairments to any one market actor.”).

<sup>13</sup> *Prods. Liability Ins. Agency v. Crum & Foster Ins. Cos.*, 682 F.2d 660, 664 (7<sup>th</sup> Cir. 1982); see also *Marucci Sports, L.L.C. v. NCAA*, 751 F.3d 368, 377 (5<sup>th</sup> Cir. 2014) (“A restraint should not be deemed unlawful, even if it

b. The antitrust laws do not prohibit unfair competition, aggressive competition, hostility toward competitors, or unethical conduct unless it rises to the point of substantially adversely affecting market-wide competition.<sup>14</sup>

6. The purpose of the antitrust laws is not to protect small business.<sup>15</sup>

7. The ultimate task in most antitrust analyses is to assess the actual or likely effect of particular conduct on competition, which usually requires identifying and then comparing the conduct's anticompetitive and procompetitive effects. Only if the former outweighs the latter does the conduct violate the antitrust laws. "Anticompetitive effects include increased prices, reduced output, and reduced quality."<sup>16</sup>

8. The antitrust laws protect consumers by prohibiting conduct by which sellers (and buyers) obtain or maintain *market power*, unless they obtain that power by means that benefit, rather than harm, consumers, such as providing higher quality, lower prices, or enhancing the efficiency by which goods and services are produced or distributed—i.e., "competition in the merits."

9. Antitrust is not just a "big firm"-type practice of law limited to representing Fortune 500 corporations: "Knowledge of antitrust is relevant whether we work on Wall Street or Main Street."<sup>17</sup>

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eliminates a competitor from the market, so long as sufficient competitors remain to ensure that competitive prices, quality, and service persist.").

<sup>14</sup> See, e.g., *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (noting that the antitrust laws "do not create a federal law of unfair competition or 'purport to afford remedies for all torts'" and that "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws"); *Jetway Aviation, LLC v. Bd. of County Comm'rs*, 754 F.3d 824, 835 (10<sup>th</sup> Cir. 2014) ("the Sherman Act is not concerned with overly aggressive business practices, or even conduct otherwise illegal, so long as it does not unfairly harm competition."); *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr.*, 582 F.3d 1216, 1226 (10<sup>th</sup> Cir. 2009) ("[I]t is the 'protection of competition or prevention of monopoly[]' which is plainly the concern of the Sherman Act,' not the vindication of general 'notions of fair dealing,' which are the subject of many other laws at both the federal and state level."). Cf. Milton Friedman, *Fair v. Free*, NEWSWEEK, Jul. 4, 1977: "Businessmen who sing the glories of free enterprise and then demand 'fair' competition are the enemies, not friends, of free markets. To them, 'fair' competition is a euphemism for a price-fixing agreement."

<sup>15</sup> *Jebaco, Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 320 (5<sup>th</sup> Cir. 2009).

<sup>16</sup> *Duty Free Americas, Inc. v. Estee Lauder Cos.*, 797 F.3d 1248 (11<sup>th</sup> Cir. 2015) (noting that anticompetitive effects include, but are not limited to, reductions in output, increases in price, and deterioration in quality); *W. Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 100 (3<sup>d</sup> Cir. 2010); see also *Sterling Merch.*, 656 F.3d at 121 ("Injury to competition 'is usually measured by a *reduction in output* and an *increase in prices* in the relevant market.'") (emphasis in original).

<sup>17</sup> E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and its Economic Implications* 2 (6<sup>th</sup> ed. 2014).

### C. Types of Antitrust Problems.

1. In beginning any antitrust analysis, it's helpful to understand, most basically, that the problem underlying almost every type of action raising antitrust concern is *collusion* or *exclusion* or both:

a. "Collusion" signifies conduct resulting from joint or concerted action—or agreement—among two or more separate entities (e.g., competitor price-fixing agreements), where the direct targets of the conduct are usually customers of the colluding parties.

b. "Exclusion" or "exclusionary conduct" results where unilateral action by a single entity (or concerted action among separate entities) excludes its competitors from the market or substantially hampers their ability to compete against the firm implementing the conduct. The direct targets of the action are the firm's competitors, but the ultimate adverse competitive effect is on consumers deprived of competition.

### D. Role of Economics.

1. To a large extent, antitrust law is applied microeconomic and industrial-organization economic theory.

a. "Today the union of antitrust and economics is so complete that one cannot study antitrust seriously without at least minimal exposure to economics."<sup>18</sup>

b. "Antitrust law, policy, and practice are the product of a long and fruitful interdisciplinary collaboration between law and economics. . . . Antitrust law, more than most legal fields, looks like an outpost of economics. Competition policy decision-makers today rely extensively on economic concepts, reasoning, and evidence. Economic terms like elasticity of demand, marginal cost, and oligopoly behavior have become part of the language of antitrust."<sup>19</sup>

2. Professional economist experts are necessary for almost every antitrust case and frequently even in antitrust counseling.

3. Complicated econometric analysis is playing a larger and larger role in antitrust analysis and litigation.<sup>20</sup>

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<sup>18</sup> Herbert Hovenkamp, *Federal Antitrust Policy* v (Preface) (5th ed. 2016).

<sup>19</sup> Jonathan B. Baker & Timothy F. Bresnahan, "Economic Evidence in Antitrust: Defining Markets and Measuring Market Power," in *Handbook of Antitrust Economics* 1 (P. Buccirossi ed. 2008).

<sup>20</sup> See generally ABA Section of Antitrust Law, *Econometrics: Legal, Practical, and Technical Issues* xv (2005) ("A basic understanding of econometric principles has now become almost essential to the serious antitrust practitioner."); see also *Animal Science Prods., Inc. v. China Nat'l Metals & Mineral Imp. & Exp. Corp.*, 702 F. Supp. 2d 320, 353 (D.N.J. 2010) (explaining that through "regression analysis . . . , it may be possible . . . to estimate the relationship between the price of [the product allegedly affected by collusive activities] and the various market forces that influence prices, including demand and supply variables") (internal quotation marks and citation omitted)

### **E. What Makes Practicing Antitrust Difficult (but Fun, Interesting, and Challenging)?**

1. Antitrust law integrates legal and economic principles.
2. Antitrust law is dynamic, not static.
3. Antitrust analysis tends to be predictive and speculative—not certain.
4. Antitrust’s determinative variables are often difficult, if not impossible, to measure empirically and balance.
5. Antitrust analysis is usually very fact-specific.
6. Every antitrust principle has nuances, corollaries, exceptions, and exceptions to the exceptions.
7. Because little in antitrust is black or white, experience, judgment, and business-risk assessment are crucial.
8. As in other areas of law, clients always want to know how they *can* attain their business objectives, not why they can’t.

### **F. Motions Practice is Extremely Important in Antitrust Practice**

1. Very few antitrust cases actually go to trial. Why?
  - a. “Bet the company” cases.
  - b. Mandatory treble damages.
  - c. Mandatory plaintiff’s attorneys fees.
  - d. Time consuming cases that divert employee time and effort.
  - e. Lay juries mean results are crapshoot.
  - f. “Antitrust cases are notoriously costly.”<sup>21</sup>

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(excellent discussion of regression analysis in antitrust cases); *Evanston Nw. Healthcare Corp.*, 2007-2 Trade Cas. (CCH) ¶ 75,814 at 108,567-74 (FTC 2007) (excellent example of regression analysis as evidence that a hospital merger resulted in anticompetitive price increases).

<sup>21</sup> *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 317 (7<sup>th</sup> Cir. 2012).

2. Thus, the vast majority of antitrust cases are dismissed pursuant to Rules 12(b)(6) or 56, or settled.

### **G. The Antitrust Statutes—A Brief Overview.**

1. The good news—very few statutes.

2. The bad news—The statutes are very broad, general, and ambiguous, and the specifics are in the multitude of decisions from 1890 to the present:

a. “As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape.”<sup>22</sup>

b. “From the beginning, the Court has treated the Sherman Act as a common-law statute. . . . Just as the common law adapts to modern understanding and greater experience, so too do the Sherman Act’s prohibitions on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions.”<sup>23</sup>

3. The antitrust statutes:

a. Section 1 of the Sherman Act<sup>24</sup>—Prohibits *agreements* that *unreasonably restrain competition*; enacted in 1890.

(1) Civil and criminal statute.

(2) Criminal penalties:

(a) Individuals—Incarceration not exceeding 10 years, and fines not exceeding \$1 million per violation.

(b) Corporations—Fines not exceeding \$100 million per violation.

(3) Civil: Mandatory treble damages and attorneys’ fees for successful plaintiffs.

b. Section 2 of the Sherman Act<sup>25</sup>—Prohibits (1) *monopolization*, (2) *attempted monopolization*, and (3) *conspiracies to monopolize*.

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<sup>22</sup> *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933).

<sup>23</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

<sup>24</sup> 15 U.S.C. §1.

<sup>25</sup> *Id.* § 2.

(1) Civil and criminal statute; same criminal sanctions as above, but rarely enforced by criminal prosecution.

c. Section 3 of the Clayton Act<sup>26</sup>—Prohibits certain tying and exclusive-dealing agreements—largely redundant with Section 1 of the Sherman Act—purely a civil statute.

d. Section 7 of the Clayton Act<sup>27</sup>—Prohibits *mergers* and all other forms of *acquisitions* that may substantially lessen competition; purely a civil statute enacted in 1914.

e. Robinson-Patman Act<sup>28</sup>—Prohibits the granting or receiving of certain price discriminations that may injure or destroy competition; civil remedies and one rarely enforced criminal provision.

f. Section 5(a) of the Federal Trade Commission Act<sup>29</sup>—Prohibits “unfair methods of competition”; civil enforcement only—largely redundant with the other antitrust laws—but, technically, not an antitrust statute.

(1) Section 5 prohibits the same conduct as other antitrust laws, plus incipient restraints on competition, and other conduct that the Federal Trade Commission determines violates the “spirit” of the antitrust laws.<sup>30</sup>

(2) Enforced only by the Federal Trade Commission (“FTC”); no private right of action.

(3) Civil injunctive relief only.

g. The various state antitrust laws.

(1) Civil and criminal sanctions, depending on the state.

(2) Every state except Pennsylvania has state antitrust laws.

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<sup>26</sup> *Id.* § 14.

<sup>27</sup> *Id.* § 18.

<sup>28</sup> *Id.* §§ 13(a)-(f).

<sup>29</sup> *Id.* § 45(a).

<sup>30</sup> *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (2d Cir. 2011) (“Because ‘[t]he FTC Act’s prohibition of unfair competition . . . overlaps the scope of § 1 of the Sherman Act . . .,’ we rely upon Sherman Act jurisprudence in determining whether the challenged policies violated Section 5 of the FTC Act.”) (quoting *Cal. Dental Ass’n v. FTC*, 526 U.S.756, 762 n.3 (1999)); *Rambus, Inc.*, 2006-2 Trade Cas. (CCH) ¶ 75,364 (FTC 2006) (Leibowitz, Comm’r, concurring) (extended discussion of § 5’s scope), *remanded on other grounds*, 522 F.3d 456 (D.C. Cir. 2008).

(3) Enforced primarily by state attorneys general.

(4) Usually are similar or almost identical to the federal antitrust laws, and courts rely on federal antitrust decisions for guidance and interpretation.

## **H. The Enforcers.**

### **1. Antitrust Division, U.S. Department of Justice.**

a. Part of the executive branch; headed by an assistant attorney general appointed by the President.

b. Enforces Sherman §§ 1 and 2, and Clayton § 7.

c. Broad pre-complaint investigatory discovery powers—civil investigatory demands.

d. Prosecutes civilly and criminally in federal court.

### **2. Federal Trade Commission.**

a. Enforces FTC Act § 5, Clayton Act § 7, and (never these days) the Robinson-Patman Act.

(1) Independent regulatory administrative agency, governed by five commissioners appointed by the president, no more than three of whom may be of the same political party.

(2) Civil enforcement actions only.

(3) Broad pre-complaint investigatory discovery powers—subpoenas and civil investigative demands.

(3) Prosecutions tried before FTC administrative law judges with appeals to the full Commission, and then to federal circuit courts of appeals.

(4) May sue in federal court for preliminary injunctions.

(5) Issues cease and desist orders, violation of which may result in civil penalties.

b. Three operating bureaus—(1) Bureau of Competition (antitrust), (2) Bureau of Consumer Protection (consumer protection), and (3) Bureau of Economics (supports the competition and consumer protection bureaus with research, advice, and testimony).

### 3. State Attorney Generals.

- a. Civil and criminal prosecution under state antitrust laws in state court.<sup>31</sup>
- b. *Parens patriae* actions under federal antitrust law in federal court for damages to the state's consumers.<sup>32</sup>
- c. Civil damage actions under state or federal antitrust law for damages suffered by the state and its subdivisions.
- d. Frequently participate in joint investigations with the Antitrust Division and FTC.

### 4. Private Parties.

- a. Civil damage actions in federal court under federal antitrust laws, or in federal (given diversity jurisdiction) or state court for violation of state antitrust laws.
- b. Very few antitrust cases are brought in state courts.
- c. Treble damages and attorneys' fees are mandatory for successful plaintiffs in federal cases.

## II. THRESHOLD ANTITRUST CONCEPTS.

### A. Interstate Commerce.

1. The antitrust laws were enacted under Congress's constitutional power to regulate interstate commerce. Each federal antitrust statute, by its own terms, requires that the challenged conduct or parties affect interstate commerce to some extent. Additionally, absent the requisite effect on interstate commerce, a court lacks subject-matter jurisdiction. The scope of the coverage of the antitrust laws has expanded as the scope of Congress's power under the Commerce Clause has expanded through the years.

- a. The plaintiff must allege and prove either that defendants' conduct was *in* interstate commerce or substantially *affected* interstate commerce.<sup>33</sup>

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<sup>31</sup> For extended discussions of state antitrust laws, see ABA Section of Antitrust Law, *State Antitrust Enforcement Handbook* (2d ed. 2008); 1-3 ABA Section of Antitrust Law, *State Antitrust Practice & Statutes* (5<sup>th</sup> ed. 2014).

<sup>32</sup> Section 4C of the Clayton Act, 15 U.S.C. § 4c. See generally *La. v. Allstate Ins. Co.*, 536 F.3d 418 (5<sup>th</sup> Cir. 2008).

<sup>33</sup> E.g., *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976); *Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n*, 658 F.3d 500 (5<sup>th</sup> Cir. 2011).



b. The standard for sufficiently alleging and proving the interstate-commerce element, although confusing, is very lenient.<sup>34</sup>

c. Very few antitrust cases today are dismissed for lack of effect on interstate commerce. Still, “**some** allegations regarding a defendant[’s] interstate dealings are required.”<sup>35</sup>

## B. Market Power.

1. The concept of *market power* is probably the single most important antitrust concept because “at its core, antitrust policy is aimed at preventing firms from obtaining, maintaining, or utilizing market power,”<sup>36</sup> unless that power was obtained by competition on the merits.

a. *Seller* market power—The ability of a seller (or group of sellers acting jointly) to *profitably raise price* above the competitive level by a small but significant amount (for example, 5 or 10%) for a significant period of time by *decreasing output*. The price increase will be profitable if the firm (or firms) obtains more revenues from the price increase than it loses from the loss of sales resulting from the price increase, holding costs constant. If the firm loses (or would lose) so many sales as a result of the price increase that it is unprofitable, the firm lacks market power.<sup>37</sup>

(1) More simply, market power is “the ability to raise prices above those that would exist in a competitive market,”<sup>38</sup> or “the ability of a firm or group of firms . . . to *profitably charge prices above the competitive level for a sustained period of time.*”<sup>39</sup>

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<sup>34</sup> See generally *Summit Health v. Pinhas*, 500 U.S. 322 (1991); see also *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

<sup>35</sup> *Villare v. Beebe Med. Ctr.*, 630 F. Supp. 2d 418, 425 (D. Del. 2009) (bold in original); see also *Poling v. K. Hovnanian Enters., Inc.*, 32 Fed. App’x 32 (3d Cir. 2002) (Table) (opinion reprinted at 2002-1 Trade Cas. (CCH) ¶ 73,683) (dismissing complaint where case involved one real-estate transaction that could have no significant effect on interstate commerce); *Wahi v. Charleston Area Med. Ctr.*, 2004-2 Trade Cas. (CCH) ¶ 74,611 (S.D.W. Va. 2004) (dismissing case where the complaint did not even mention interstate commerce).

<sup>36</sup> ABA Section of Antitrust Law, *Market Power Handbook* ix (2d ed. 2012).

<sup>37</sup> For excellent explanations and discussions, see William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 937 (1981) (“‘market power’ refers to the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded”); Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 Antitrust L.J. 363, 367-84 (1998).

<sup>38</sup> *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 74 (3d Cir. 2010); see also *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 277 (6th Cir. 2014) (“Market power is defined as the ability to charge a supracompetitive price—a price above a firm’s marginal cost.”).

<sup>39</sup> ABA Section of Antitrust Law, *Market Power Handbook*, *supra*, at 1-2 (emphasis in original); see also *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1007 (7th Cir. 2012) (noting that market power is “the power to raise

(a) Market price is a function of the supply and demand for a product or service. To exercise market power by increasing price, a seller, or group of sellers acting jointly, must, all else equal, decrease supply or output.

(b) Market power results in misallocation of resources (a less-than-optimal amount of output), and resources are not used where they are most highly valued by consumers (known as “allocative efficiency”). The level of output is less than in a competitive market, so society is worse off.

(c) Seller market power also “unfairly” transfers wealth from purchasers to sellers. Some call the exercise of unlawfully obtained market power by raising prices “white-collar theft” by sellers from purchasers.

b. *Buyer* market power (i.e., *monopsony* power): The ability of a buyer (or group of buyers acting jointly) to reduce the price they pay for a good or service (often an input) below the competitive price by a significant amount for a significant period of time by *decreasing the amount of the product or service they buy*.<sup>40</sup>

(1) Monopsony power also results in misallocation of resources (e.g., too little input purchased results in less-than-optimal output produced), and resources are not allocated to uses that consumers value most highly.

(2) Monopsony power “unfairly” transfers wealth from sellers to buyers.

c. In law, “monopoly power . . . [is] a high degree of market power.”<sup>41</sup> Although as a technical matter, a monopoly is a market with only one seller, economists typically use the terms “market power” and “monopoly power” interchangeably.

d. Most firms have *some* degree of market power (i.e., their price exceeds their marginal cost) simply because their products and services are *differentiated* to some degree in the minds of some consumers from the products and services of their competitors. A firm has some market power unless its products and those of its competitors’ are *perfect* substitutes (i.e., homogeneous or undifferentiated). The antitrust laws cannot and do not trouble themselves over trivial degrees of market power.<sup>42</sup>

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price above the competitive level without losing so much business to other sellers that the price would quickly fall back to the competitive level”).

<sup>40</sup> See generally Roger D. Blair & Jeffrey L. Harrison, *Monopsony in Law and Economics* (2010); *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1118 (5th Cir. 2008) (“In a monopsony, the buyers have market power to decrease market demand for a product and thereby lower prices.”). “By reducing its demand for a product, a monopsonist can force suppliers to sell to it at a lower price than would prevail in a competitive market.” Herbert Hovenkamp, *Federal Antitrust Policy* § 1.2b at 18 (5<sup>th</sup> ed. 2016).

<sup>41</sup> Landes & Posner, *supra*, 81 Harv. L. Rev. at 937.

<sup>42</sup> See generally *Market Power Handbook*, *supra*, at 3-5.

2. In general, a firm's (or group of firms') degree of market power depends on:

a. First, the firm's market share, after defining the relevant market.<sup>43</sup>

(1) No magic market share, by itself, proves market power, because other factors affect the degree of a firm's market power. Many courts, however, suggest that 30% is a minimum threshold requirement.<sup>44</sup>

(2) A firm's market share is merely the percentage of the relevant market that it controls—the firm's sales divided by total sales by the firm and its competitors. Market share can be measured based on percentage of sales revenue dollars, percentage of physical units produced or sold, or percentage of physical capacity.

(a) For example, hospital inpatient market shares can be calculated in terms of revenues, admissions, patient days, discharges, licensed beds, or staffed beds.<sup>45</sup>

b. Second, the number of alternatives available to consumers—*Elasticity of demand*. Degree of market power also depends on price elasticity of demand for the product in question. This measures the sensitivity of sales to changes in price. Specifically it is the percentage change in the quantity demanded of the firm's product resulting from a given percentage change in the firm's price. If, for example, a firm's 1% price increase results in a 5% decrease in its sales, demand for the firm's product is price elastic. The firm likely lacks market power because its price increase is likely to be unprofitable given the resulting proportionally large loss of business. If price elasticity of demand is sufficiently high, even a firm with a dominant market share lacks market power.

c. Third, the increase in output by others, if any, resulting from the price increase—*Elasticity of supply*. Finally, degree of market power depends on price elasticity of supply for the product. Depending on the level of entry barriers affecting the ability of new firms to enter the market and expansion barriers affecting the ability of firms already in the market to expand their output ("market incumbents"), the seller's price increase may or may not be profitable, depending on the level of increased output from new entrants and incumbent firms. Price elasticity of supply measures the percentage change in output for a given percentage change in price. The seller lacks market power if its price increase will induce new entry or incumbent expansion of output to the extent that the amount of new output is equal to or exceeds the seller's decrease in output necessary for it to increase price.

3. Thus, the larger the number of alternative suppliers available to buyers (both incumbent firms and those that would become suppliers in response to a seller's price increase),

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<sup>43</sup> For a helpful explanation why, see Hovenkamp, *Federal Antitrust Policy*, *supra*, § 3.1b at 109-10.

<sup>44</sup> *E.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 68 (1st Cir. 2004) (suggesting a 40% share is necessary).

<sup>45</sup> *FTC v. OSF Healthcare Sys.*, 852 F. Supp.2d 1069 (N.D. Ill. 2012) (calculating inpatient shares based on both patient days and patient admissions).

the more elastic are demand and supply for the seller's product, and the less market power a seller with a given market share has. A buyer can have *monopsony* power only when *sellers* have very limited actual or potential alternative sources of purchases to which they can turn to sell if the buyer attempts to exercise buyer market power by lowering the price it will pay by restricting the level of its purchases.

4. As this suggests, there is no magic or certain market share that proves market power because a firm's market power (or lack thereof) depends on other factors as well, particularly the availability of reasonably interchangeable products, the level of any entry barriers (i.e., market characteristics that deter or prevent potential new competitors from entering the market), and the level of expansion barriers (i.e., market characteristics that prevent market incumbents from increasing their output)—in general, whether consumers could turn to other suppliers to avoid the price increase (demand elasticity) and whether other suppliers would increase output to drive price back to the competitive level (supply elasticity).

5. A firm's merely having market power (market power "per se") violates no antitrust law. Rather, a violation may result when a firm engages in conduct by which it obtains, maintains, or increases its market power by excluding its actual and potential competitors from the market, or when competitors merge or collude, resulting in their obtaining market power.

6. Proving market power—In most antitrust cases, the plaintiff must prove that, as a result of the challenged conduct, the defendant will obtain or maintain substantial market power. The plaintiff can prove market power by either *direct evidence* or *circumstantial evidence*.<sup>46</sup>

a. Direct evidence of market power—Proof of *actual detrimental effects on competition*, such as actual supracompetitive prices or sub-competitive output, quality, or innovation.<sup>47</sup>

b. Circumstantial evidence of market power—"To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that incumbent competitors lack the capacity to increase their output in the short run."<sup>48</sup> Market power and adverse effect on competition can be inferred from this evidence.

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<sup>46</sup> E.g., *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1071 (10<sup>th</sup> Cir. 2013); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7<sup>th</sup> Cir. 2000); *Coastal Fuels v. Caribbean Petroleum Corp.*, 79 F.3d 182 (1<sup>st</sup> Cir. 1996).

<sup>47</sup> See *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 509 (2d Cir. 2004) ("If plaintiff can demonstrate an actual adverse effect on competition, such as reduced output . . . , there is no need to show market power in addition."); *Minn. Ass'n of Nurse Anesthetists v. Unity Hosp.*, 208 F.3d 655, 661 (8<sup>th</sup> Cir. 2000).

<sup>48</sup> E.g., *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9<sup>th</sup> Cir. 1995).

### C. Relevant Market.

1. To compute market shares, the *relevant market* in which competition is affected by the challenged conduct must first be defined—market shares in what market? The products or services and geographic area affected by the alleged violation constitute the “relevant market” in which to assess the challenged conduct’s effect on competition.<sup>49</sup>

2. The “relevant market consists of a “relevant product market” and a “relevant geographic market.”

3. The relevant market must usually be defined before market power, and thus the conduct’s effect on competition, can be assessed.<sup>50</sup>

4. The purpose for defining the relevant market is to identify significant competitors of the firm in question—i.e., firms that can constrain its ability to exercise market power.<sup>51</sup>

5. If the antitrust issue focuses on *seller* market power, the relevant market includes the alternative sources of supply to which the seller’s customers can turn if it attempts to exercise market power by raising prices<sup>52</sup>--i.e., firms, if any, whose presence would prevent the firm in question from profitably raising its price.

6. If the case focuses on *buyer* market power (monopsony power), the relevant market includes the alternative buyers available to sellers if the buyer in question attempts to exercise monopsony power by reducing the price it pays sellers by restricting its purchases.<sup>53</sup>

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<sup>49</sup> For very helpful discussions, see ABA Section of Antitrust Law, *Market Definition in Antitrust Cases* (2012); Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 Antitrust L.J. 129 (2007).

<sup>50</sup> See, e.g., *McWane, Inc. v. FTC*, 783 F.3d 814, 828 (11<sup>th</sup> Cir. 2015) (“Defining the market is a necessary step in any analysis of market power.”); *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 613 (8<sup>th</sup> Cir. 2011) (“Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition.”); *Geneva Pharms., supra*, 386 F.3d at 496 (“Evaluating market power begins with defining the relevant market.”); *SMS Sys. Main. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 16 (1<sup>st</sup> Cir. 1999) (“The purpose for defining a relevant market is to assist in determining whether a firm has market power.”).

<sup>51</sup> See, e.g., *Geneva Pharms., supra*, 386 F.3d at 496 (“The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm’s ability to raise prices or restrict output.”).

<sup>52</sup> E.g., *Se. Mo. Hosp., supra*, 642 F.3d at 613 (“Determining the limits of a relevant . . . market requires identifying the choices available to consumers.”); *Doctor’s Hosp. v. Se. Med. Alliance*, 123 F.3d 301, 311 (5<sup>th</sup> Cir. 1997) (“To define a market is to identify producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant’s products or services.”).

<sup>53</sup> See, e.g., *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2<sup>d</sup> Cir. 2001) (Sotomayor, J.) (explaining that “in such a case, ‘the market is not the market of competing sellers but of competing buyers. This market is comprised of buyers who are seen by sellers as being reasonably good substitutes.’”); *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111 (5<sup>th</sup> Cir. 2008) (same).

7. Under the “hypothetical monopolist” methodology for defining relevant markets applied by the FTC and Antitrust Division and increasingly by the courts, a relevant market is a product or a group of products and a geographic area in which the product is produced or sold such that a hypothetical profit-maximizing firm that was the only present and future producer or seller of those products in that area—a “hypothetical monopolist”—likely would impose at least a small but significant and nontransitory increase in price, holding the terms of sale of all other products constant.<sup>54</sup> This methodology for defining relevant markets is frequently referred to as the “small but significant and non-transitory price increase,” or “SSNIP,” methodology.<sup>55</sup>

8. Thus, in defining a relevant market, the task is to identify those firms that could constrain the ability of the firm or firms in question from exercising market power by raising price—the alternative sellers to which consumers could turn to avoid the exercise of market power or “all sellers who have the actual or potential ability to deprive each other of significant levels of business.”<sup>56</sup> To identify these firms, and thus to delineate the “relevant market,” the “relevant product market” and “relevant geographic” must be delineated:

a. *Relevant product market*—Generally speaking, the “outer boundaries” of the relevant product market includes all the firms selling, from the perspective of consumers, “reasonably interchangeable” products or services with significant *price cross-elasticity of demand* among them—i.e., good substitutes in the eyes of consumers.<sup>57</sup>

(1) To be in the same relevant product market, “products do not need to be fungible, . . . but must be sufficiently interchangeable that a potential price increase in one product would be defeated by the threat of a sufficient number of customers switching to the alternate product.”<sup>58</sup>

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<sup>54</sup> See U.S. Dep’t of Justice & Federal Trade Comm’n, *Horizontal Merger Guidelines* § 4.11 (2010) (“*Merger Guidelines*”); *ProMedica Health Sys.*, 2012 WL 1155392 (FTC Mar. 18, 2012), *petition for review denied*, 749 F.3d 559 (6<sup>th</sup> Cir. 2014).

<sup>55</sup> See generally Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 Antitrust L.J. 253 (2003).

<sup>56</sup> *Theme Promotions, Inc. v. News Am. Mktg. Fsi*, 539 F.3d 1046, 1053 (9<sup>th</sup> Cir. 2008).

<sup>57</sup> See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (“The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross elasticity of demand between the product itself and substitutes for it.”); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481-82 (1992) (explaining that the relevant product market is determined by product choices available to consumers and that it includes products having reasonable interchangeability in the eyes of consumers); *Duty Free Americas, Inc. v. Estee Lauder Cos.*, 797 F.3d 1248 (11<sup>th</sup> Cir. 2015) (noting that courts pay “particular attention” to cross-elasticity of demand); *Se. Mo. Hosp., supra*, 642 F.3d at 617 (“A relevant [product] market is made up of products that consumers view as reasonable substitutes.”); *PSKS, Inc. v. Leegin Creative Leather Prods.*, 615 F.3d 412, 417 (5<sup>th</sup> Cir. 2010) (“A proposed product market must include ‘all commodities reasonably interchangeable by consumers for the same purposes.’”); *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 596 (8<sup>th</sup> Cir. 2009) (“A court’s determination of the limits of a relevant product market requires inquiry into the choices available to consumers.”).

<sup>58</sup> *Malaney v. UAL Corp.*, 434 Fed. App’x 620 (9<sup>th</sup> Cir. 2011) (per curiam mem. opinion).

(2) Price cross-elasticity of demand (frequently referred to as “demand substitutability”) measures the degree of substitutability between two products when the price of one changes—the percentage change in quantity demanded of one product resulting from a percentage change in the price of another.<sup>59</sup>

(3) Under this methodology, if cross-elasticity of demand is high (i.e., an increase in the price of one product would result in a greater than proportional change in the quantity demanded of another), the products are substitutes and are in the same relevant product market.<sup>60</sup>

(4) Even products that are reasonably interchangeable in use may lack significant cross-elasticity of demand and thus not be in the same relevant product market. For example, a brand-name drug may be so much more expensive than a generic of equal efficacy that if the price of the generic were significantly increased, consumers would not switch to the brand-name drug to the extent necessary to render the generic’s price increase unprofitable because the generic remains significantly less expensive. Similarly, many purchasers may trust a brand-name drug while not trusting generics drugs, and thus be unwilling to switch from brand-name drugs to their generic versions notwithstanding the generics’ lower prices and equal efficacy.<sup>61</sup>

(a) Very important warning: In defining relevant markets, the agencies, and increasingly the courts, do not include *all* reasonable substitutes, or all substitutes exhibiting

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<sup>59</sup> See generally *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1120 (10<sup>th</sup> Cir. 2014) (“For example, if the demand for margarine increases 200% when the price of butter increases 100%, the cross-elasticity of demand between margarine and butter is 2. A high cross-elasticity of demand indicates that products are substitutes; a low cross-elasticity of demand indicates that the products are not substitutes and, as a result, do not compete in the same market. . . . A relevant product market excludes products with a low or zero cross-elasticity of demand.”); *Theme Promotions*, *supra*, 539 F.3d at 1054. For a more technical explanation, see Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* 34-35 (6th ed. 2005).

<sup>60</sup> *E.g.*, *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1337 n.13 (11th Cir. 2010) (“A high cross-elasticity of demand (that is, consumers demanding proportionately greater quantities of Product X in response to a relatively minor price increase in Product Y) indicates that the two products are close substitutes for each other . . . . [A] high cross-elasticity of demand indicates that the two products in question are reasonably interchangeable substitutes for each other and hence are part of the same market.”); *cf. Theme Promotions*, 539 F.3d at 1054 (“When demand for the commodity of one producer shows no relation to the price for the commodity of another producer, it supports the claim that the two commodities are not in the same relevant market.”); *FTC v. Sysco Corp.*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 3958568 at \*11 (D.D.C. June 23, 2015) (“In an increase in the price for product A causes a substantial number of customers to switch to product B, the products compete in the same market.”); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 120 (D.D.C. 2004) (“If a slight decrease in the price of product A causes a considerable number of customers of product B to switch to A, that would indicate that a cross-elasticity of demand exists between A and B and that they compete in the same product market.”).

<sup>61</sup> See *Geneva Pharms.*, *supra*; see also *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242 (8th Cir. 1988) (holding that sugar and high-fructose corn syrup were not in the same product market, although one was substitutable in use for the other; the price of HFCS was so much lower than the price of sugar that if the price of HFCS were increased a small but significant amount, few of its consumers would switch to the still much more expensive sugar).

some cross-elasticity of demand, to which purchasers would switch, but only those that, by themselves, would constrain the firm in question from raising price.<sup>62</sup> This is known as the “smallest market principle.”<sup>63</sup>

(b) Thus, even assuming that widgets and gidgets are “good substitutes,” if a firm’s price increase of widgets would be profitable, the two would be in separate relevant product markets because it would show that too few widget customers would switch to gidgets to render the price increase unprofitable.

b. Relevant geographic market—The relevant geographic market includes the seller (or sellers) in question and also the more-distant firms to which its customers would turn to purchase if the closer firms attempted to exercise market power by raising price—i.e., the area in which the sellers in question operate and those areas to which their customers can practicably turn to obtain the relevant product or service.<sup>64</sup> In other words, if a seller attempts to exercise market power, to what other locations (or sellers in other locations) would customers turn to purchase the relevant product?

(1) As one source explains, “while product market definition focuses on substitution possibilities among goods, geographic market definition focuses on substitution possibilities with respect to the location of suppliers of such goods.”<sup>65</sup>

(2) The relevant product market must be defined before the relevant geographic market can be defined; every relevant product market has its own relevant geographic market.

(3) Often, the first step in defining the relevant geographic market is to identify those customers whose alternative sources of supply should be identified.<sup>66</sup>

(4) The second step: Crucially important, the relevant geographic market includes not only the geographic area in which the sellers in question currently operate or from

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<sup>62</sup> *Merger Guidelines* §§ 4, 4.1.1; *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011).

<sup>63</sup> *E.g.*, *FTC v. Sysco Corp.*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 3958568 at \*12 (D.D.C. 2015) (“market definition is guided by the ‘narrowest market’ principle. . . . ‘The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn’”).

<sup>64</sup> *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *It’s My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676 (4<sup>th</sup> Cir. 2016) (the “inquiry focuses on the area within which [buyers] can find alternative [sellers] if any one [seller] were to increase its prices”); *Duty Free Americas, Inc. v. Estee Lauder Cos.*, 797 F.3d 1248 (11<sup>th</sup> Cir. 2015) (“The court considers whether outside sellers are precluded from entering the market . . . and whether consumers cannot realistically turn outside the geographic area.”); *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 212 (3d Cir. 2005) (explaining that the relevant geographic market “is that area in which a potential buyer may rationally look for the goods or services he or she seeks”).

<sup>65</sup> ABA Section on Antitrust Law, *Market Definition in Antitrust* 4 (2012).

<sup>66</sup> *E.g.*, *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591 (8<sup>th</sup> Cir. 2009); *Surgical Ctr. v. Hosp. Servs. Dist.*, 2001-1 Trade Cas. (CCH) ¶ 73,215 (E.D. La. 2001), *aff’d*, 309 F.3d 836 (5<sup>th</sup> Cir. 2002).



which they draw a large majority of their customers (their “service areas”), but the geographical areas to which their customers would turn if the sellers attempted to raise price.<sup>67</sup>

(5) Importantly, a firm’s “service area” (i.e., the entire area in which it sells or from which it draws a given percentage of all its customers) is typically *not* a relevant geographic market.<sup>68</sup> The relevant geographic market may be larger, smaller, or identical to a firm’s service area.

(6) And only by coincidence will political boundaries, such as a county or state, constitute a relevant geographic market.<sup>69</sup>

c. The role of supply substitution in market definition.

(1) Thus far, this market-definition discussion has focused on “demand substitution”—i.e., consumers switching to alternative sellers to circumvent a price increase. But many courts also examine “supply substitution” and include in the relevant product market firms that, although not currently producing the relevant product, would quickly do so in response to a price increase by a firm or firms already in the relevant market.<sup>70</sup>

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<sup>67</sup> See, e.g., *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 441 (4th Cir. 2011) (“The relevant geographic market inquiry focuses on that geographic area within which the defendant’s customers who are affected by the challenged practice can practicably turn to alternative suppliers if the defendant were to raise prices or restrict its output.”); *Surgical Ctr. v. Hospital Serv. Dist.*, 309 F.3d 836, 840 (5th Cir. 2002) (“Absent a showing of where people could practicably go for inpatient [hospital] services, [plaintiff] failed to meet its burden of presenting sufficient evidence to define the relevant geographic market”); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999) (explaining that “the FTC must present evidence on the critical question of where consumers . . . could practicably turn for alternative services should the merger be consummated and prices become anticompetitive”).

<sup>68</sup> See, e.g., *Little Rock Cardiology Clinic, supra*, 591 F.3d at 600 (noting that “we do not mean to endorse the idea that a firm’s trade area is equivalent to a relevant geographic market. There is voluminous case law cautioning against such a holding.”); *U.S. Horticultural Supply v. Scotts Co.*, 367 Fed. App’x 305, 311 (3d Cir. 2010) (explaining that “the geographic market is not comprised of the area in which the seller attempts to sell its product, but, rather, where [customers] would look to buy such a product”). See generally Herbert Hovenkamp, *Federal Antitrust Policy* § 3.6d at 130-31 (4th ed. 2011) (explaining the difference between a service area and a relevant geographic market).

<sup>69</sup> See *United States v. Conn. Nat’l Bank*, 418 U.S. 656 (1974); *Discon, Inc. v. NYNEX Corp.*, 86 F. Supp. 2d 154, 162 (W.D.N.Y. 2000) (“The Supreme Court has expressly held that political boundaries, such as state and municipal boundaries, cannot be used artificially to circumscribe a relevant market, because relevant markets are defined in terms of economic realities not political divisions.”).

<sup>70</sup> See, e.g., *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); *Gulf States Reorg. Group v. Nucor Corp.*, 721 F.3d 1281 (11<sup>th</sup> Cir. 2013); *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 499 (2d Cir. 2004); *Blue Cross & Blue Shield v. Marshfield Clinic*, 65 F.3d 1406, 1410 (7th Cir. 1995) (“[T]he definition of a market depends on substitutability on the supply side as well as on the demand side. Even if two products are completely different . . ., if they are made by the same producers, an increase in the price of one . . . will induce producers to shift production from the other product to this one.”); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1436 (9<sup>th</sup> Cir. 1995) (“[D]efining a market based on demand considerations alone is erroneous. A reasonable market definition must also be based on ‘supply elasticity.’”).

(2) Major factors affecting the degree of supply substitutability are entry barriers, i.e., are market characteristics that prevent or impede new firms from entering the market; and expansion barriers, which prevent or impede firms currently producing the relevant product from expanding their output: “For antitrust purposes, a barrier to entry is some factor in a market that permits firms already in the market to earn monopoly profits, while deterring outsiders from coming in. More formally, entry barriers measure ‘the extent to which, in the long run, established firms can elevate their selling prices above the minimal costs of production and distribution’ without inducing potential entrants to enter the industry.”<sup>71</sup> Entry barriers can include capital costs, economies of scale, governmental regulatory barriers, uniquely trained or talented employees, reputation, exclusive access to necessary inputs, exclusive contracts, and even vigorous competition. The primary expansion barrier is lack of excess capacity, preventing incumbent firms from increasing output.

(3) As in the case of defining the relevant product market, the “hypothetical-monopolist smallest-market principle” applies. Thus, the analyst assumes a monopolist of the relevant product and asks whether a small but significant price increase would be profitable or whether sufficient customers would divert to more distant sellers that the price increase would be unprofitable. If the latter, the next best geographic substitute is added and the question become whether a price increase by them jointly would be profitable. If so, they are the area they serve is the relevant geographic market and they are the only seller in that market. If the price increase would not be profitable because of sufficient diversion, the process continues.

#### **D. Market Concentration.**

1. *Market concentration* is a measure of the number of firms in a relevant market and their relative market shares.<sup>72</sup> The fewer the number of firms in a relevant market and the greater the variation in their market shares, the higher the level of market concentration.

2. What’s the problem with market concentration? Why is it relevant in antitrust analysis? A basic tenet of economics and antitrust theory predicts, all else being equal, a direct relationship between the level of market concentration and market power and thus market prices.<sup>73</sup>

3. The more concentrated a market is, the more likely that firms in the market will explicitly collude or behave as an oligopoly—i.e., their pricing decisions will be interdependent rather than independent (so-called “tacit collusion”)—and thus they, *as a group*, may exercise

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<sup>71</sup> Herbert Hovenkamp, *Federal Antitrust Policy* § 1.6 at 48 (5th ed. 2016).

<sup>72</sup> See Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* 358 (6th ed. 2005) (“When only a few firms account for most of the sales in a market, we say that the market is highly *concentrated*.”) (emphasis in original).

<sup>73</sup> *Id.* (“What matters, of course, is not just the total number of firms, but the number of ‘major players’—firms with significant market share. For example, if only two large firms account for 90 percent of sales in a market, with another 20 firms accounting for the remaining 10 percent, the two large firms might have considerable monopoly power.”).

market power without entering any actual agreement that might violate the antitrust laws.<sup>74</sup> The greater the level of market concentration, the easier formal or informal collusion among firms becomes.<sup>75</sup>

#### 4. Methods for measuring market concentration:

a. *The Herfindahl-Hirschman Index* (“HHI”)—The HHI is the preferred method for measuring and then assessing market concentration.<sup>76</sup> To compute the HHI, (i) calculate the market share of each firm in the relevant market, (ii) square each market share, and (iii) sum the squares. This generates a number between almost zero (an infinite number of firms in the market) and 10,000 (one firm—a true monopoly).

(1) Assume, for example, a relevant market with five firms with the following shares: A=20%, B=15%, C=35%, D=10%, and E=20%. The HHI would be  $400+225+1225+100+400=2,350$ . The HHI takes into account not only the number of firms in the relevant market but also (by squaring their market shares) their relative market shares. As the number of firms in the market decreases or the market-share disparity among them increases, the HHI increases.

(2) What does an HHI level of 2,350 mean? The U.S. Department of Justice and FTC *Horizontal Merger Guidelines* provide some insight.<sup>77</sup> According to the *Guidelines*, a market is “unconcentrated” if the HHI is below 1,500 (roughly between 6 and 7 equal-size firms), “moderately concentrated” if it is between 1,500 and 2,500, and “highly concentrated” if it is above 2,500 (a market with 4 equal-size firms). Thus, the market above (HHI=2,350) would be “moderately concentrated” under the *Guidelines*, but close to the highly concentrated level.

b. *Four-firm concentration ratio*—A concentration ratio is simply the sum of the market shares of a given number of the largest firms in the market. The most useful concentration ratio is the four-firm concentration ratio (CR4), which measures the aggregate market share of the four largest firms in the relevant market. In general, a market is deemed unconcentrated if the CR4 is less than 50%, moderately concentrated if it is between 50% and 70%, and highly concentrated if it is greater than 70%.

### E. Efficiencies.

1. Efficiencies from conduct can lessen or offset the conduct’s potential market-power price-increasing effects. In conducting antitrust assessments, an important task is often

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<sup>74</sup> See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715-16 (D.C. Cir. 2001) (explaining that antitrust “law ‘rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels’”).

<sup>75</sup> See Richard A. Posner, *Antitrust Law* 63-64 (2d ed. 2001).

<sup>76</sup> See *Merger Guidelines* § 5.3.

<sup>77</sup> *Id.*

balancing the conduct's procompetitive efficiency effects against its anticompetitive market-power effects.

2. Conduct that increases market power also often generates “productive efficiencies,” typically by increasing a firm's economies of scale or scope. Mergers between competitors, for example, can have both market-power and efficiency effects.

3. Efficiencies—the technical definition: “Productive efficiency is most simply understood as a ratio of a firm's output to its inputs. A firm that produces a product valued at \$100 and requires inputs valued at \$80 is more efficient than a firm that produces a product valued at \$100 but requires inputs valued at \$90.”<sup>78</sup>

4. Efficiencies—the practical definition: Any effect benefitting consumers—e.g., higher output or quality, lower cost, wider choice, greater access, increased innovation, etc.

5. What role do efficiencies play in antitrust analysis? As a technical matter, to the extent efficiencies reduce a firm's marginal cost (and thus its profit-maximizing price), they may offset the market-power effect of particular conduct, resulting in no price increase or even a lower price.<sup>79</sup>

6. But in the real world, thank goodness, very few antitrust cases reach the stage of having to balance market-power and efficiency effects. Indeed, it is usually impossible to balance (or even measure) and compare them empirically. As one antitrust commentator has explained, “We sometimes hear the deceptively simple proposition that all the court needs to do is to balance efficiency effects against anticompetitive effects and see which way the scale tips. But courts are not capable of measuring either efficiency or power with anything approaching scientific accuracy. Most such judicial measurements are simply hunches based on several presumptions about the nature and effects of certain practices.”<sup>80</sup>

7. Different in concept from productive efficiency is “allocative efficiency.” Allocative efficiency results when, based on consumer preferences, all resources are allocated to their highest, best, and most-valued use so that societal or total welfare or “utility” is maximized—i.e., resources are allocated such that they best meet the needs and desires of consumers by maximizing output. The term in economics is “Pareto optimal”—i.e., a state of resource allocation such that no reallocation of resources will make consumers or society as a whole better off.<sup>81</sup> Market power detracts from allocative efficiency because it results in a reduction of output, which decreases societal wealth. Competitive markets maximize allocative efficiency.

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<sup>78</sup> Herbert Hovenkamp, *Federal Antitrust Policy* § 2.3c at 100 (5th ed. 2016). Efficiency generation can be viewed as getting “more bang for the buck.”

<sup>79</sup> See Oliver Williamson, *Economies as an Antitrust Defense: The Welfare Trade-Offs*, 58 Am. Econ. Rev. 18 (1968).

<sup>80</sup> *Federal Antitrust Policy*, *supra*, § 5.6b at 339-40.

<sup>81</sup> See generally *id.* § 2.3c at 83.

### **III. PRIVATE ACTIONS FOR DAMAGES UNDER THE ANTITRUST LAWS.**

**A. Background**—The overwhelming percentage of antitrust cases are brought by private plaintiffs injured by alleged antitrust violations, not by the government.

**B. Text of the Statute**—Section 4(a) of the Clayton Act<sup>82</sup> authorizes private parties to recover triple damages for antitrust violations by providing that “any [1] *person* who shall be [2] *injured* in his [3] *business or property* [4] *by reason of* [5] *anything forbidden in the antitrust laws* may sue therefore . . . and shall recover [6] *three-fold* the *damages* by him sustained, and [7] the *cost of suit*, including [8] a *reasonable attorney’s fee*.” (Emphasis added.)

1. Although Section 4(a) seems simple and all-encompassing such that anyone injured by a violation can recover damages, courts have significantly limited its scope and the circumstances in which plaintiffs can recover damages.

2. As the Supreme Court has explained, “Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might be traced to an antitrust violation.”<sup>83</sup>

**C. Treble Damages and Attorney’s Fees**—Treble damages, costs, and attorneys fees for successful plaintiffs are mandatory in federal antitrust suits.<sup>84</sup>

**D. Liability versus Recovery of Damages**—Don’t confuse issues relating to liability under the antitrust laws with issues relating to relief (e.g., recovery of damages under Section 4 of the Clayton Act).

#### **E. Elements of a Section 4 Claim for Damages.**

##### 1. Person.

a. The Sherman Act<sup>85</sup> defines “persons” as including corporations and associations.

b. The Supreme Court has held that states and municipalities are also “persons” for purposes of Section 4(a), and thus may recover treble damages.<sup>86</sup>

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<sup>82</sup> 15 U.S.C. § 15(a)

<sup>83</sup> *Associated Gen Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983).

<sup>84</sup> *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 955 F.2d 425 (3d Cir. 1995); *Va. Panel Corp. v. Mac Panel Co.*, 1996-2 Trade Cas. (CCH) ¶ 71,483 (W.D. Va. 1996), *rev’d in part and modified on other grounds*, 133 F.3d 860 (Fed. Cir. 1997).

<sup>85</sup> 15 U.S.C. § 12.

<sup>86</sup> *Ga. v. Pa. R.R. Co.*, 324 U.S. 439 (1945) (states); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (municipalities).

c. In *United States v. Cooper Corp.*,<sup>87</sup> the Supreme Court held that the federal government is not a “person” for purposes of Section 4(a). Reacting to the *Cooper Corp.* decision, Congress enacted Section 4A of the Clayton Act,<sup>88</sup> which explicitly authorizes the federal government to recover treble damages (but not attorneys fees).

d. In *Pfizer v. Gov’t of India*,<sup>89</sup> the Supreme Court held that foreign governments are “persons” for purposes of Section 4(a). As a result, Congress enacted Section 4(b) of the Clayton Act,<sup>90</sup> which limits their recovery to single damages in most situations.

e. In 1976, Congress enacted Section 4C of the Clayton Act,<sup>91</sup> which authorizes state attorneys general to bring *parens patriae* suits in federal court for damages on behalf of their citizens in the aggregate who are injured by antitrust violations.

## 2. Injury.

a. Injury merely requires that the plaintiff experience some loss.

(1) Typically, for example, a firm suffers no injury from a price-increasing price-fixing conspiracy among its competitors in which it is not a participant. Indeed, it may benefit from the violation because the supracompetitive price set by the cartel may allow it to raise its prices or increase its sales under the “umbrella” of the conspirators’ price increase.<sup>92</sup>

(2) Likewise, if the defendants’ conduct is unsuccessful in achieving anticompetitive effects, typically no plaintiff is injured even if defendants’ conduct is unlawful.<sup>93</sup>

3. Business or property—Section 4(a) provides that a plaintiff’s injury must be to its “business or property.” The Supreme Court has held that the phrase includes anything of

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<sup>87</sup> 312 U.S. 600 (1941).

<sup>88</sup> 15 U.S.C. § 15a (emphasis added).

<sup>89</sup> 434 U.S. 308 (1978).

<sup>90</sup> 15 U.S.C. § 15(b).

<sup>91</sup> *Id.* § 15c.

<sup>92</sup> *E.g.*, *JTC Petrol. Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Arista Records LLC v. Lime Group, LLC*, 532 F. Supp. 2d 556 (S.D.N.Y. 2007).

<sup>93</sup> *E.g.*, *Davric Maine Corp. v. Rancourt*, 216 F.3d 143 (1st Cir. 2000).

material value<sup>94</sup> but that it does not include personal or emotional injuries.<sup>95</sup>

#### 4. Causation.

a. The injury for which plaintiff seeks damages must have been *caused* by the antitrust violation. There must be some direct causal connection between the antitrust violation and plaintiff's injury—causation is the bridge between the two. A plaintiff cannot recover where the defendant's conduct was unlawful and plaintiff was injured, but its injury resulted from a cause other than the unlawful conduct.<sup>96</sup>

b. The antitrust violation, however, need only be a “material” cause of plaintiff's injury, not the sole cause.<sup>97</sup>

(1) To be a “material” cause, the violation must have been a “substantial contributing factor” to plaintiff's injury.<sup>98</sup>

(2) Some courts apply a “but for” standard—that absent the violation, plaintiff would not have been injured.<sup>99</sup>

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<sup>94</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). It includes things such as money and employment. *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Fund v. Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999).

<sup>95</sup> *Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006) (noting that the phrase “business or property” excludes personal injuries, derivative injuries such as loss in stock value or employment opportunities, injuries to reputation or dignity, and emotional damages).

<sup>96</sup> *E.g.*, *Heary Bros. Lightning Protection Co. v. Lightning Protection Inst.*, 262 Fed. App'x 815 (9th Cir. 2008); *In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785 (8th Cir. 2006).

<sup>97</sup> *E.g.*, *In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (“[A]n antitrust defendant's unlawful conduct need not be the sole cause of the plaintiff's alleged injuries; to prove a ‘causal connection’ between the defendant's unlawful conduct and the plaintiff's injury, the plaintiff need only ‘demonstrate that [the defendant's] conduct was a substantial or materially contributing factor’ in producing that injury.”); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, 485 F.3d 880, 887 (6th Cir. 2007) (“The plaintiff ‘bears the burden of showing that the violation was a material cause of its injury, a substantial factor in the occurrence of damages or that the violation was the proximate cause of the damage.’ . . . [T]he defendant's actions need not be the sole proximate cause of any alleged injuries.”).

<sup>98</sup> *E.g.*, *Read v. Med. X-Ray Ctr.*, 110 F.3d 543, 545 (8th Cir. 1997) (“A material cause is a ‘substantially contributing factor’”); *Irvin Indus., Inc. v. Goodyear Aerospace Corp.*, 974 F.2d 241, 245 (2d Cir. 1992) (explaining that the violation must be a “‘substantial or materially contributing factor’”).

<sup>99</sup> *Publication Paper Antitrust Litig.*, *supra* (“[T]o prevail on an antitrust claim, a plaintiff must establish that ‘the injuries alleged would not have occurred *but for* [the defendants'] antitrust violation’ . . . adding necessity to the materiality requirement of our causation analysis.”) (emphasis in original); *SAS v. Puerto Rico Tel. Co.*, 48 F.3d 39 (1st Cir. 1995); *Stamatakis Indus. v. King*, 965 F.2d 469 (7th Cir. 1992); *World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 425 F. Supp. 2d 484 (S.D.N.Y. 2006); *Twin Cities Bakery Workers Health & Welfare Fund v. Biovail Corp.*, 2005-1 Trade Cas. (CCH) ¶ 74,741 (D.D.C. 2005).

(3) Many courts hold that plaintiff must prove causation with a “fair degree of certainty.”<sup>100</sup>

#### 5. Antitrust injury.

a. Antitrust injury is one of the most important, and sometimes most confusing, concepts in antitrust law. It is a key essential element in every antitrust action for damages<sup>101</sup> and for injunctive relief.<sup>102</sup>

b. Antitrust injury is “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.”<sup>103</sup>

c. The type of injury the antitrust laws were intended to prevent and the characteristic “which makes defendants’ acts unlawful” are the violation’s anticompetitive effects. Thus, plaintiff’s injury must have resulted from the challenged conduct’s anticompetitive effects (a reduction in competition), not from some other cause or effect.<sup>104</sup> Hence, conduct can violate the antitrust laws and injure the plaintiff, yet not cause the plaintiff “antitrust injury.”

(1) For antitrust injury to result, there must be a violation of the antitrust laws (although if there is no antitrust violation, the antitrust-injury inquiry seems moot). And for a violation of the antitrust laws (and antitrust injury), there must be an injury to market-wide competition, not just to competitors.<sup>105</sup>

(2) Therefore, to constitute antitrust injury, “[t]he injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the

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<sup>100</sup> E.g., *J.B.D.L. Corp., supra*; *Taylor Publ’g Co. v. Josten’s, Inc.*, 216 F.3d 465 (5th Cir. 2000).

<sup>101</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (the seminal decision).

<sup>102</sup> *Cargill Corp. v. Montfort of Colo.*, 479 U.S. 104 (1986).

<sup>103</sup> *Brunswick Corp., supra*, 429 U.S. at 489.

<sup>104</sup> E.g., *Ky. Speedway, LLC v. Nat’l Ass’n of Stock Car Auto Racing*, 588 F.3d 908, 920 (6<sup>th</sup> Cir. 2009) (“An injury does not qualify as antitrust injury unless it is attributable to an anti-competitive aspect of the practice under scrutiny.”) (internal quotation marks omitted).

<sup>105</sup> *Brunswick Corp., supra*, 429 U.S. at 488 (explaining that “[t]he antitrust laws . . . were enacted for “the protection of *competition*, not *competitors*”” (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis added); *CBC Cos. v. Equifax, Inc.*, 561 F.3d 569, 572 (6<sup>th</sup> Cir. 2009) (explaining that “the key inquiry is whether *competition*—not necessarily a competitor—suffered as a result of the challenged business practice”; no antitrust injury results unless plaintiff’s injury arises from an anticompetitive aspect of the challenged conduct) (emphasis in original).



violation.”<sup>106</sup> In other words, antitrust injury is injury a plaintiff suffers from the *competition-reducing effect* of the violation, not from some other effect.<sup>107</sup>

(3) No antitrust injury results if, for example, the alleged conduct increases competition (or is competitively benign), even if it injures plaintiff and even if it is unlawful.<sup>108</sup> For example, antitrust injury does not result from conduct permitting plaintiffs’ competitors to compete more effectively, even if it injures plaintiff,<sup>109</sup> or from losses it suffers from having to lower its prices to compete against defendant.<sup>110</sup> Thus, a plaintiff suffers no antitrust injury where it’s injury results from the conduct’s effect increasing defendant’s efficiency.

(4) To recover damages, plaintiff must prove antitrust injury even if the challenged conduct is per se unlawful and thus proof of liability requires no proof of any actual competition-reducing effect.<sup>111</sup>

(5) Under most circumstances, only participants in the relevant market can suffer antitrust injury (i.e., competitors, customers, or suppliers of the defendant).<sup>112</sup>

## 6. Antitrust standing.

a. To recover damages, plaintiff must show that it has “*antitrust* standing”—i.e., that it is a proper party to bring the case.<sup>113</sup> The antitrust-standing requirement significantly limits the universe of parties injured by the violation who may recover damages.<sup>114</sup>

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<sup>106</sup> *Brunswick Corp.*, *supra*, 429 U.S. at 489.

<sup>107</sup> *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 344 (1990) (“The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant’s behavior.”); *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117 (2d Cir. 2007); *Harper v. Colo. State Bd. of Land Comm’rs*, 248 Fed. App’x 4 (10th Cir. 2007).

<sup>108</sup> *Theme Promotions, Inc. v. News Am. Mktg. Fsi*, 539 F.3d 1046, 1055 (9th Cir. 2008) (“If the injury flows from aspects of defendant’s conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant’s conduct is illegal.”); *James Cape & Sons v. PPC Constr. Co.*, 453 F.3d 396 (7th Cir. 2006); *Dial-A-Car, Inc. v. Transp., Inc.*, 82 F.3d 484 (D.C. Cir. 1996).

<sup>109</sup> *Glen Holly Entm’t, Inc. v. Tiktronix, Inc.*, 352 F.3d 357 (9th Cir. 2003); *Midwest Gas Servs., Inc. v. Ind. Gas Co.*, 317 F.3d 703 (7th Cir. 2003); *Balaklaw v. Lovell*, 14 F.3d 793 (2d Cir. 1994).

<sup>110</sup> *Fair Issac Corp. v. Experian Information Solutions, Inc.*, 650 F.3d 1139 (8<sup>th</sup> Cir. 2011).

<sup>111</sup> *Atl. Richfield*, *supra*; *Pace Elecs., Inc. v. Canon Computer Sys., Inc.*, 213 F.3d 118 (3d Cir. 2000).

<sup>112</sup> *E.g., Ethypharm S.A. v. Abbot Labs.*, 707 F.3d 223, 233 (3d Cir. 2013) (“Generally, antitrust injury . . . ‘is limited to consumers and competitors in the restrained market.’”).

<sup>113</sup> *See generally Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983) (the seminal decision).

<sup>114</sup> *E.g., Del. Valley Surgical Supply, Inc. v. Johnson & Johnson*, 523 F.3d 1116 (9th Cir. 2008).

b. “Antitrust standing” is significantly narrower than constitutional standing under Article III of the Constitution.<sup>115</sup> Article III standing requires only proof of an injury-in-fact that is actual or imminent and a likely favorable judicial response preventing or redressing the injury.<sup>116</sup> *Antitrust* standing requires more; absent constitutional standing, a plaintiff cannot establish antitrust standing.<sup>117</sup>

c. Antitrust standing is a threshold question of law determined from the face of the complaint.<sup>118</sup> Article III constitutional standing is jurisdictional,<sup>119</sup> but antitrust standing is not.

d. Courts examine and balance six factors in determining whether a plaintiff has antitrust standing:

- (1) The degree of causal connection between the violation and plaintiff’s injury;
- (2) The defendant’s intent and whether it intended to harm plaintiff;
- (3) The nature of plaintiff’s injury, particularly whether plaintiff is a customer or competitor in the relevant market in which competition is adversely affected by the alleged violation;
- (4) The directness of the injury, including whether other victims are injured more directly than the plaintiff and are likely to sue;
- (5) The degree to which plaintiff’s damage claim is speculative; and
- (6) The risk of duplicative recoveries and problems in apportioning damages.<sup>120</sup>

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<sup>115</sup> *E.g., Sunbeam TV Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264, 1270 (11<sup>th</sup> Cir. 2013) (“Antitrust standing requires that a party must do more than meet the basic ‘case or controversy’ or ‘injury in fact’ required by Article III of the Constitution.”); *Gerlinger v. Amazon.com, Inc.*, 526 F.3d 1253 (9<sup>th</sup> Cir. 2008); *Ross v. Bank of Am., N.A.*, 524 F.3d 217 (2<sup>d</sup> Cir. 2008); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6<sup>th</sup> Cir. 2007) (en banc); *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302 (4<sup>th</sup> Cir. 2007).

<sup>116</sup> *Summers v. Earth Inst.*, 555 U.S. 488 (2009); *Osborn v. Visa, Inc.*, 797 F.3d 1057 (D.C. Cir. 2015).

<sup>117</sup> *E.g., Duty Free Americas, Inc. v. Estee Lauder Cos.*, 797 F.3d 1248 (11<sup>th</sup> Cir. 2015) (since plaintiff lacked Article III standing, “it plainly follows that it cannot establish . . . ‘antitrust standing’”).

<sup>118</sup> *E.g., Del. Valley Surgical Supply, supra*; *JES Props., Inc. v. USA Equestrian, Inc.*, 458 F.3d 1224 (11<sup>th</sup> Cir. 2006).

<sup>119</sup> *E.g., Dominguez v. UAL Corp.*, 666 F.3d 1359, 1361 (D.C. Cir. 2012) (“Article III strictly limits the federal judicial power to resolving ‘Cases’ and ‘Controversies.’ . . . [S]tanding is a necessary ‘predicate to any exercise of our jurisdiction,’ and if it is lacking, then ‘the dispute is not a proper case or controversy, [and] the courts have no business deciding it.’”).

<sup>120</sup> *See Associated General Contractors, supra*; *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112 (1<sup>st</sup> Cir. 2011); *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677 (2<sup>d</sup> Cir. 2009); *Ross v. Bank of Am., N.A.*, 524 F.3d 217 (2<sup>d</sup> Cir. 2008); *Novell, Inc. v. Microsoft Corp., supra*; *Paycom Billing Servs., Inc. v. MasterCard Int’l, Inc.*, 467 F.3d 283 (2<sup>d</sup> Cir. 2006).

e. Many courts have synthesized these elements into two more general requirements: that (1) plaintiff suffer *antitrust injury*; and (2) plaintiff is an *efficient enforcer* of the antitrust laws—meaning primarily that the plaintiff is the party most directly injured by the violation or the party most likely to sue to redress the violation.<sup>121</sup>

f. Antitrust injury is always a necessary, but not sufficient, condition for antitrust standing.<sup>122</sup> Factor 3 above reflects the antitrust-injury requirement. Absent the plaintiff’s injury constituting “antitrust injury,” it lacks antitrust standing.

g. In most situations, plaintiff must be a competitor or customer in the relevant market to have antitrust standing (or to suffer antitrust injury).<sup>123</sup>

(1) The primary exception to this rule arises where plaintiff is not a customer or competitor in the relevant market but its injury is “inextricably intertwined” to the injury to competition in the relevant market in the sense that the plaintiff was the direct target of the unlawful conduct and injury to it was necessary to injure competition in the relevant market.<sup>124</sup> There is some disparity, however, in how courts interpret and apply this principle.

h. Several categories of plaintiffs rarely have antitrust standing:

(1) “Indirect purchasers” suing for overcharges resulting from the violation cannot recover damages but may obtain equitable relief.

(a) An “indirect purchaser” is a purchaser from a seller (the “direct purchaser”) who itself purchased from the parties engaging in the antitrust violation. For example, where a cartel of widget manufacturers agrees to raise the price of widgets and sell them to wholesalers who then resell them to retailers, the wholesalers are the direct purchasers, and the retailers are indirect purchasers. The direct purchasers can sue for and retain the entire amount of the overcharge.

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<sup>121</sup> *Palmyra Park Hosp., Inc. v. Phoebe Putney Mem’l Hosp.*, 604 F.3d 1291 (11th Cir. 2010); *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117 (2d Cir. 2007); *Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006).

<sup>122</sup> *Sunbeam TV Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264 (11<sup>th</sup> Cir. 2013); *NicSand, Inc. v. 3M Co.*, *supra.*; *In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785 (8th Cir. 2006); *Tal v. Hogan*, *supra.*; *see also Theme Promotions, supra*, 539 F.3d at 1055 (“Several factors are relevant in considering whether a plaintiff has established antitrust standing. The most important is whether the plaintiff has established antitrust injury.”).

<sup>123</sup> *McCullough v. Zimmer, Inc.*, 382 Fed. App’x 225, 229 (3d Cir. 2010) (explaining that “typically, a ‘plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust injury’ and therefore lacks standing to bring suit under the antitrust laws”); *Jebaco, Inc. v. Harrah’s Operating Co.*, 587 F.3d 314, 320 (5th Cir. 2009); *Norris v. Hearst Trust*, 500 F.3d 454 (5th Cir. 2007).

<sup>124</sup> *Blue Shield v. McCready*, 457 U.S. 465, 484 (1982) (the seminal case); *see also Novell, Inc. v. Microsoft Corp.*, *supra.*; *Caruna v. Gen. Motors Corp.*, 204 Fed. App’x 511 (6th Cir. 2006).

(b) Frequently, the direct purchaser will pass on part or all of the overcharge it paid as a result of the antitrust violation to its customers—the indirect purchasers. Subject to several narrow exceptions, indirect purchasers lack antitrust standing to recover damages from the violators, even if the direct purchaser passed on some or all the overcharge, thus actually damaging them.<sup>125</sup> Of course, the indirect purchaser has no claim against the direct purchaser because it was not a participant in the violation. There are three narrow exceptions to the no-antitrust-standing-for-indirect-purchasers principle:

(i) Where the contract between the direct purchaser and indirect purchaser is a pure cost-plus contract for a fixed quantity of the product, so it is clear that the entire overcharge paid by the direct purchaser was passed-on to the indirect purchaser.<sup>126</sup>

(ii) Where the direct purchaser was a co-conspirator with its suppliers in the violation so that the plaintiff is a direct purchaser from at least one of the conspirators;<sup>127</sup> and

(iii) Where the direct purchaser is effectively controlled by the conspirators.<sup>128</sup>

(c) Lower courts have refused to create additional exceptions to the indirect-purchaser principle, even in situations where its rationales are inapplicable.<sup>129</sup>

(d) But many states have enacted state antitrust statutes specifically granting indirect purchasers antitrust standing to recover damages in cases brought under the state's antitrust laws. The federal antitrust laws do not preempt these statutes.<sup>130</sup>

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<sup>125</sup> *Ill. Brick Co. v. Ill.*, 431 U.S. 720 (1977) (the seminal decision); *see also Kan. v. UtiliCorp. United, Inc.*, 497 U.S. 199 (1990); *Lakeland Reg'l Med. Ctr. v. Astellas US*, 763 F.3d 1280, 1285 (11<sup>th</sup> Cir. 2014) (“Under the direct purchaser rule, only the customer who purchased the goods or services . . . directly from the alleged violator can recover damages.”); also noting that “the direct purchaser rule does not apply to claims for injunctive and declaratory relief”); *Simon v. Keyspan Corp.*, 694 F.3d 196 (3d Cir. 2012); *In re ATM Fee Antitrust Litig.*, 686 F.3d 741 (9<sup>th</sup> Cir. 2012); *Warren Gen. Hosp. v. Amgen, Inc.*, 643 F.3d 77 (3d Cir. 2011); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 533 F.3d 1 (1st Cir. 2008); *Kendall v. VISA U.S.A., Inc.*, 523 F.3d 1116 (9th Cir. 2008).

<sup>126</sup> *Kan. v. UtiliCorp United, supra*; *Del. Valley Surgical Supply, Inc. v. Johnson & Johnson*, 523 F.3d 1116 (9th Cir. 2008).

<sup>127</sup> *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 797 F.3d 538 (8<sup>th</sup> Cir. 2015) (explaining that indirect purchasers have standing “if they allege the direct purchasers are ‘party to the violation’ and join the direct purchasers as defendants”); *Del. Valley Surgical Supply, supra*; *Howard Hess Dental Labs., Inc. v. Dentsply Int’l, Inc.*, 424 F.3d 363 (3d Cir. 2005).

<sup>128</sup> *Del. Valley Surgical Supply, supra*; *Howard Hess Dental Labs., supra*; *City of Moundridge v. Exxon Mobil Corp.*, 471 F. Supp. 2d 20 (D.D.C. 2007).

<sup>129</sup> *See Warren Gen. Hosp. v. Amgen, Inc.*, 2010-1 Trade Cas. (CCH) ¶ 77,043 (D.N.J. 2010) (not-for-publication opinion) (noting that “courts are loath to recognize exceptions to the *Illinois Brick* doctrine”).

<sup>130</sup> *Cal. v. ARC Am. Corp.*, 490 U.S. 93 (1989).

(e) Rather than viewing the indirect-purchaser doctrine as one of “antitrust standing,” some courts view it as one of “injury,” applying a fiction that indirect purchasers are not injured for purposes of Section 4(a).

(2) Typically, officers, directors, shareholders, employees, creditors, distributors, brokers, sales representatives, and suppliers of a business injured by an antitrust violation lack antitrust standing because their injuries are usually derivative of the injuries to the business and thus too remote to justify permitting recovery.<sup>131</sup>

i. In determining whether potential entrants—i.e., firms planning to enter the market but which have not yet entered—have antitrust standing, courts examine (1) their background and experience in the prospective business, (2) their affirmative actions to engage in the proposed business, (3) their ability to finance entry, and (4) their consummation of contracts necessary for entry.<sup>132</sup>

7. Fact of damage—Plaintiff must prove “fact of damage”—i.e., that it suffered some damage from the antitrust violation—with “reasonable certainty.”<sup>133</sup>

8. Amount of damages.

a. Finally, plaintiff must prove the amount of damages if suffered from the antitrust violation. But once plaintiff proves fact of damage with reasonable certainty, its burden in proving amount of damages is lenient and relaxed. The Supreme Court and lower courts have explained that plaintiff need not prove its amount of damages with exactness but need only provide a reasonable estimate. The estimate, however, cannot be based on conjecture, guesswork, or speculation.<sup>134</sup>

b. The basic task in calculating damages is to estimate plaintiff’s situation had the violation not occurred. The measure of damages might be lost profits, the value of plaintiff’s business, or the amount plaintiff was overcharged as a result of the violation, depending on the type of antitrust violation, the context in which it occurs, and its effect on plaintiff. Expert

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<sup>131</sup> For citations to numerous decisions, see 1 John J. Miles, *Health Care & Antitrust Law* § 9:7, at 9-88 n.35 (Supp. 2015).

<sup>132</sup> E.g., *Cyntegra, Inc. v. IDEXX Labs., Inc.*, 322 Fed. App’x 569 (9th Cir. 2009) (per curiam).

<sup>133</sup> E.g., *Continental Airlines, Inc. v. United Airlines, Inc.*, 136 F. Supp. 2d 542 (E.D. Va. 2001), *vacated on other grounds*, 277 F.3d 499 (4th Cir. 2002); *Microbix Biosys., Inc. v. Biowhittaker, Inc.*, 172 F. Supp. 2d 680 (D. Md. 2000), *aff’d*, 11 Fed. App’x 279 (4th Cir. 2001).

<sup>134</sup> *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251 (1946); see also *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990); *Magnetar Techs. Corp. v. Intamin, Ltd.*, 801 F.3d 1150 (9th Cir. 2015) (plaintiff must “provide evidence such that the jury is not left to ‘speculation or guesswork’ in determining the amount damages to award”); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517 (6th Cir. 2008); *El Aguila Food Prods., Inc. v. Gruma Corp.*, 131 Fed. App’x 450 (5th Cir. 2005).

witnesses (economists and accountants) are almost always necessary, and damages can be estimated using various methodologies, depending on the situation.<sup>135</sup>

c. In many cases, plaintiff's damages will result from both lawful and unlawful causes. A plaintiff can recover only damages resulting from unlawful conduct,<sup>136</sup> and, if possible, it must segregate or disaggregate its damages into those resulting from unlawful conduct and those resulting from lawful conduct or other causes.<sup>137</sup>

d. In addition, plaintiff has a duty to mitigate its damages to the extent it reasonably can, although defendant bears the burden of showing that the plaintiff failed to do so.<sup>138</sup>

**F. Antitrust Defenses**—Some of the more important antitrust defenses (or non-defenses) are the following:

1. Statute of limitations.

a. Section 4B of the Clayton Act provides a four-year statute of limitations for the recovery of damages.<sup>139</sup>

b. The statute of limitations does not apply to actions for equitable relief, but the doctrine of laches does.<sup>140</sup> In assessing whether an equitable claim is barred by laches, courts use the four-year statute of limitations on damage claims as guidance.

c. As a general rule, the statute of limitations begins to run at the time of an unlawful act that injures plaintiff.<sup>141</sup>

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<sup>135</sup> See generally ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* (2d ed. 2010).

<sup>136</sup> See, e.g., *El Aguila Food Prods., supra*.

<sup>137</sup> *Id.*; *Magnetar Techs. Corp. v. Intamin, Ltd.*, 801 F.3d 1150 (9<sup>th</sup> Cir. 2015) (granting defendants summary judgment, in part because plaintiff failed to segregate the losses caused by lawful acts); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8<sup>th</sup> Cir. 2000); *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781 (7<sup>th</sup> Cir. 1999); *In re Linerboard Antitrust Litig.*, 497 F. Supp. 2d 666 (E.D. Pa. 2007).

<sup>138</sup> E.g., *Pierce v. Ramsay Winch Co.*, 753 F.2d 416 (5<sup>th</sup> Cir. 1985).

<sup>139</sup> 15 U.S.C. § 15b.

<sup>140</sup> E.g., *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9<sup>th</sup> Cir. 2014) (four-year statute of imitations serves as a guideline for applying laches); *Little Rock Cardiology Clinic, PA v. Baptist Health*, 573 F. Supp. 2d 1125, 1151 (E.D. Ark. 2008) (noting that “antitrust claims for equitable relief are subject to the equitable doctrine of laches. . . . Some courts have said that the four-year statutory limitation period for damage actions should be used a guideline in considering whether claims for equitable relief are barred”), *aff’d*, 591 F.2d 591 (8<sup>th</sup> Cir. 2009).

<sup>141</sup> *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 902 (6<sup>th</sup> Cir. 2009) (stating the general rule and explaining that the statute begins to run at the time of the cause of the injury, not when plaintiff feels its effects); *RX.com v. Medco Health Solutions, Inc.*, 322 Fed. App’x 394 (5<sup>th</sup> Cir. 2009); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3<sup>d</sup> Cir. 2008); *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170 (4<sup>th</sup> Cir. 2007).

d. The statute of limitations is an affirmative defense; accordingly, the defendant must plead it in its answer, and it bears the burden of persuasion to prove that the statute bars plaintiff's claim. Several courts have held that the *Twombly/Iqbal* "plausibility" pleading standard applies to pleading affirmative defenses in answers, meaning that the defendant must plead sufficient facts so that the defense is plausible from the face of the answer rather than pleading merely naked conclusions.

e. Several factors can extend, restart, or begin a new limitations period:

(1) Continuing violations—Continuing violations result when a plaintiff is repeatedly injured by the violation over time after the initial violation and injury, including, e.g., new acts that are part of a "continuing conspiracy" among the defendants.

(a) Each new injury resulting from the continuing violation starts a new limitations period as to damages resulting *from that act* but not from previous acts occurring more than four years prior to filing the suit.<sup>142</sup>

(b) But to start a new limitations period, the later act must (1) be a new and independent act, not merely a reaffirmation of a previous act; and (2) inflict new and accumulating injury on the plaintiff.<sup>143</sup> The circuits differ to some extent on what acts are sufficient to start a new limitations period as opposed to constituting mere reaffirmations of previous acts.

(2) Fraudulent concealment—If the defendants undertook affirmative conduct to conceal the violation that injured the plaintiff, the statute of limitations does not begin to run (or is "tolled") until the time at which the plaintiff knew, or should have known, about the violation.

(a) Fed. R. Civ. P. 9(b) requires that plaintiff plead fraudulent conduct with particularity.

(b) To prove fraudulent concealment, the plaintiff must plead and show:

(i) Affirmative acts by the defendants to conceal their conduct;

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<sup>142</sup> *E.g. Hazeltine Research, supra; Toledo Mack Sales & Serv., supra; Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073 (10th Cir. 2006); *In re Wholesale Grocery Prods. Antitrust Litig.*, 2010 WL 2710680, at \*5 (D. Minn. Jul. 7, 2010) ("In the context of an alleged conspiracy, each time a plaintiff is injured by an act of the defendants, a cause of action accrues and the statute of limitations runs from the commission of that act, allowing the plaintiff to recover for the damages from that act.").

<sup>143</sup> *Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199 (9th Cir. 2014); *Champagne Metals, supra; Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004); *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462 (6th Cir. 1996); *Kaw Valley Elec. Co-op Co. v. Kan. Elec. Power Co-op, Inc.*, 872 F.2d 931 (10th Cir. 1989).

(ii) That the plaintiff did not discover the facts forming the basis of its claim during the limitations period; and

(iii) That the plaintiff exercised due diligence in attempting to discover the facts and the violation.<sup>144</sup>

(c) The circuits differ about what constitutes the requisite affirmative acts to conceal the violation and about what the plaintiff must show to prove its due diligence to discover the violation.<sup>145</sup>

(3) Speculative damages—The limitations period does not begin to run until plaintiff’s damages are reasonably ascertainable.<sup>146</sup> But mere uncertainty as to the extent or amount of damages, rather than the fact of damages, is insufficient to toll the statute.<sup>147</sup>

(4) Federal government actions—Section 5(i) of the Clayton Act<sup>148</sup> provides that the limitations period is tolled during a government enforcement action and for one year thereafter for filing subsequent private civil actions for damages that are “based in whole or in part on any matter complained of” in the government’s suit.<sup>149</sup>

## 2. In pari delicto or “equal involvement” defense.

a. “In pari delicto” means “of equal fault,” i.e., the plaintiff itself was a participant in the unlawful conduct. As a general matter, courts have rejected this as a defense in antitrust cases.<sup>150</sup>

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<sup>144</sup> *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430 (6<sup>th</sup> Cir. 2012); *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170 (4<sup>th</sup> Cir. 2007); *Hamilton County Bd. of Comm’rs v. NFL*, 481 F.3d 310 (6<sup>th</sup> Cir. 2007); *Morton’s Mkt., Inc. v. Gustafson’s Dairy, Inc.*, 198 F.3d 823 (11<sup>th</sup> Cir. 1999).

<sup>145</sup> As to the necessary affirmative acts to conceal the violation, see *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119 (4<sup>th</sup> Cir. 1995).

<sup>146</sup> *Hazeltine Research, supra*; *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265 (8<sup>th</sup> Cir. 2004).

<sup>147</sup> E.g., *Kabealo v. Huntington Nat’l Bank*, 17 F.3d 822 (6<sup>th</sup> Cir. 1994).

<sup>148</sup> 15 U.S.C. § 16(i).

<sup>149</sup> For discussions of this provision and how it applies, see *Minn. Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965); *Novell v. Microsoft Corp.*, 505 F.3d 302 (4<sup>th</sup> Cir. 2007); *In re Evanston Nw. Healthcare Corp.*, 2008-1 Trade Cas. (CCH) ¶ 76,182 (N.D. Ill. 2008).

<sup>150</sup> *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134 (1968); *Gatt Commc’ns, Inc. v. PMC Assocs., LLC*, 711 F.3d 68, 80 (2<sup>d</sup> Cir. 2013) (“The Supreme Court has cautioned . . . against broad-brush application of the *in pari delicto* defense . . . , reasoning that antitrust interests ‘are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating [unlawful] behavior.’”).



b. Some courts, however, have, constructed a so-called “complete involvement” or “equal involvement” defense, under which the plaintiff is precluded from recovering damages where it bears at least equal responsibility with the defendant for the violation.<sup>151</sup>

## **G. Liability.**

1. Joint and several liability—Defendants in civil antitrust cases are jointly and severally liable for any damages. Plaintiffs are not required to sue all participants in the violation and may recover all damages awarded from any of the defendants found liable, regardless of that defendant’s degree of responsibility for causing the damages.<sup>152</sup>

2. Contribution—There is no right of contribution among defendants in antitrust cases. Thus, where all defendants are found liable but plaintiff chooses to enforce the judgment against only one or more of the defendants, they cannot obtain contribution from the others.<sup>153</sup>

3. Agency principles apply—A corporation is liable for damages caused by its agents’ actions, including those agents exercising only ostensible or apparent authority.<sup>154</sup> Additionally, corporate officers, directors, employees and agents are personally liable for antitrust violations in which they actually participate or that they authorize.<sup>155</sup>

4. Parents and subsidiaries—Parents and subsidiaries are not automatically liable for each other’s antitrust violations, even if they constitute single entities under the *Copperweld* doctrine.<sup>156</sup> A parent may be liable if it controls, directs, encourages, or participates in its subsidiary’s violation.<sup>157</sup> Subsidiaries are not vicariously liable for the acts of their parents.<sup>158</sup>

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<sup>151</sup> See, e.g., *Howard Hess Dental Labs., Inc. v. Dentsply Int’l, Inc.*, 424 F.3d 363 (3d Cir. 2005) (not deciding the issue because plaintiffs were not substantially responsible for the violation); *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994) (applying the defense); *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995); *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276 (9th Cir. 1976).

<sup>152</sup> E.g., *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *Paper Sys., Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629 (7th Cir. 2002).

<sup>153</sup> *Tex. Indus., supra*.

<sup>154</sup> *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *Wilk v. Am. Med. Ass’n*, 719 F.2d 207 (7th Cir. 1983).

<sup>155</sup> E.g., *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991) (criminal case); *Reifert v. S. Cent. Wis. MLS Corp.*, 368 F. Supp. 2d 912 (W.D. Wis. 2005) (civil case).

<sup>156</sup> E.g., *Mitchael v. Intracorp, Inc.*, 179 F.3d 847 (10<sup>th</sup> Cir. 1999).

<sup>157</sup> E.g., *Nobody in Particular Presents, Inc. v. Clear Channel Commc’ns, Inc.*, 311 F. Supp. 2d 1048 (D. Colo. 2004).

<sup>158</sup> *In re Mercedes-Benz*, 2006-2 Trade Cas. (CCH) ¶75,509 (D.N.J. 2006).

**H. Effect of Prior Government Judgments**—Section 5(a) of the Clayton Act<sup>159</sup> provides that a litigated final judgment in a criminal or civil antitrust action by the United States holding that a defendant violated the antitrust laws is prima facie evidence of the violation in subsequent private civil suits in which the judgment would serve as an estoppel between the parties.<sup>160</sup> Section 5(a), however, does not provide prima facie effect to government consent orders and decrees, or to nolo contendere pleas.

## **I. Injunctive Relief.**

1. Section 16 of the Clayton Act<sup>161</sup> provides that plaintiffs may “sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust law . . . , and upon . . . a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.”<sup>162</sup>

2. The Supreme Court explained the requirements for an injunction in *eBay, Inc. v. MercExchange LLC*,<sup>163</sup> a non-antitrust case: “A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”

3. The Supreme Court has explained that “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest,” emphasizing that irreparable injury must be “likely,” not merely “possible.”<sup>164</sup> Although the requirements for preliminary injunctive relief in private antitrust actions vary to some extent from circuit to circuit<sup>165</sup> all require some combination of (a) likelihood of success on the merits, (b) irreparable injury, (c) balance of hardships favoring the moving party, and (d) the injunction serving the public interest.<sup>166</sup>

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<sup>159</sup> 15 U.S.C. § 16(a).

<sup>160</sup> See *Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558 (1951); *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024 (9th Cir. 2001).

<sup>161</sup> 15 U.S.C. § 26.

<sup>162</sup> See, e.g., *Fair Issac Corp. v. Experian Information Solutions, Inc.*, 650 F.3d 1139 (8th Cir. 2011); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008).

<sup>163</sup> 547 U.S. 388, 391 (2006)

<sup>164</sup> *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008) (non-antitrust case).

<sup>165</sup> For the standards in the different circuits, see 1 John J. Miles, *Health Care & Antitrust Law* § 9:15, at 9-162 n.6 (Supp. 2015).

<sup>166</sup> E.g., *New York v. Actavis, plc*, 787 F.3d 638 (2d Cir. 2015); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517 (4th Cir. 2003); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712 (6th Cir. 2003).

4. District courts have substantial discretion in determining whether to issue preliminary injunctions,<sup>167</sup> and their decisions are reviewed by appellate courts under the abuse-of-discretion standard.<sup>168</sup>

#### **IV. SECTION 1 OF THE SHERMAN ACT.**

**A. Text of the Statute:** “Every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States . . . is . . . illegal.”<sup>169</sup>

**B. Essential Elements**—Section 1 prohibits every (1) *agreement* or conspiracy that (2) *unreasonably restrains competition*,<sup>170</sup> and these are the essential elements of the violation.

1. Why Section 1 is necessary: “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”<sup>171</sup>

#### **C. The “Agreement” Requirement.**

1. For a violation of Section 1, the challenged conduct *must* result from an agreement or concerted action. Unilateral or independent action (i.e., action by a single entity) never violates Section 1.<sup>172</sup> The terms “contract,” “combination,” “conspiracy,” “agreement,” “understanding,” and “concerted action” are synonymous for purposes of Section 1.

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<sup>167</sup> E.g., *Coastal Fuels, Inc. v. Caribbean Petrol. Corp.*, 990 F.2d 25 (1st Cir. 1993).

<sup>168</sup> E.g., *Theme Promotions, Inc. v. News Am. Mktg. Fsi*, 539 F.3d 1046 (9th Cir. 2008); *Samuel v. Herrick Mem’l Hosp.*, 201 F.3d 830 (6th Cir. 2000).

<sup>169</sup> Section 1 of the Sherman Act, 15 U.S.C. § 1.

<sup>170</sup> See generally *SD3, LLC v. Black & Decker (U.S.), Inc.*, 801 F.3d 412 (4<sup>th</sup> Cir. 2015) (elements are (1) a contract, combination, or conspiracy (2) that imposed an unreasonable restraint of trade); *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass’n*, 776 F.3d 321 (5<sup>th</sup> Cir. 2015) (essential elements are (1) a conspiracy that (2) produced anticompetitive effects (3) in the relevant market); *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 284 (4<sup>th</sup> Cir. 2012) (“To establish a § 1 violation, a plaintiff must prove, and therefore plead, ‘(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade.’”); *William O. Gilley Enters. v. Atl. Richfield Co.*, 588 F.3d 659 (9th Cir. 2009); *Total Benefits Planning Agency, Inc. v. Blue Cross & Blue Shield*, 552 F.3d 430 (6th Cir. 2008); *Benson v. St. Joseph’s Reg’l Health Ctr.*, 575 F.3d 542 (5<sup>th</sup> Cir. 2008).

<sup>171</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).

<sup>172</sup> See, e.g., *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383 (3d Cir. 2015) (“§1 liability cannot be predicated on a defendant’s unilateral actions, no matter its anticompetitive motivations”); *Evergreen Partnering Group, Inc. v. PactIV Corp.*, 720 F.3d 33, 42 (1<sup>st</sup> Cir. 2013) (“Section 1 of the Sherman Act does not prohibit all unreasonable restraints of trade but ‘only restraints effected by a contract, combination, or conspiracy.’”); *Agnew v. NCAA*, 683 F.3d 328 (7<sup>th</sup> Cir. 2012).

2. Almost all agreements raising antitrust issues are either “horizontal” (i.e., among competitors) or “vertical” (i.e., between firms at different levels in the chain of production or distribution).<sup>173</sup> Firms are “competitors” if they sell or buy in the same relevant market or, more generally, if they have the ability to take significant sales from one another. Horizontal agreements are much more antitrust-sensitive than vertical agreements.<sup>174</sup>

3. Agreements can affect “interbrand competition” (i.e., competition among different brands of the same product or service) or “intra-brand competition” (i.e., competition among sellers of the same brand of the product or service). Agreements affecting interbrand competition are more antitrust-sensitive than those affecting intra-brand competition because even if intra-brand competition is restrained, interbrand competition may remain strong. Indeed, the main focus of the antitrust laws is on horizontal agreements affecting interbrand competition.

4. To sustain Section 1’s agreement requirement, (1) the alleged conspirators must have the *legal capacity* to conspire, and (2) the challenged conduct, as a factual matter, must have resulted from an agreement or conspiracy, not from unilateral action.

a. *The “capacity to conspire requirement” or the “intraenterprise conspiracy” or “single-entity defense”*—In *Copperweld Corp. v. Independence Tube Corp.*,<sup>175</sup> the Supreme Court held that a parent and its wholly-owned subsidiary, because they share a unity of economic interests and lack divergent interests, are incapable of conspiring as a matter of law; rather, they are a single entity for antitrust purposes, even though they may be separate corporate entities, and thus their internal “agreements” do not meet Section 1’s requirement for an agreement. Importantly, *Copperweld* held that the substance of the relationship between the entities, not its form, governs this analysis.<sup>176</sup> Although the *Copperweld* decision applied only to a parent and its wholly-owned subsidiary, lower courts have extended its holding to many other situations involving affiliated entities:

(1) Parents and their wholly-owned subsidiaries are single entities.<sup>177</sup>

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<sup>173</sup> E.g., *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 186 (9<sup>th</sup> Cir. 2015) (“the Supreme Court has distinguished between agreements made up and down a supply chain, such as between a manufacturer and a retailer (‘vertical agreements’) and agreements made among competitors (‘horizontal agreements’).”); *Osborn v. Visa, Inc.*, 797 F.3d 1057 (D.C. Cir. 2015) (noting difference between horizontal and vertical agreements); *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 272 (6<sup>th</sup> Cir. 2014) (“An agreement ‘between competitors at the same level of the market structure’ is horizontal. . . . Vertical restraints [are] agreements between parties ‘at different levels of the market structure, such as manufacturers and distributors . . . .’”); *Anderson, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162 (2d Cir. 2012).

<sup>174</sup> E.g., *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1119 (10<sup>th</sup> Cir. 2008) (antitrust “concern is greatest when actual competitors enter agreements. . . . Vertical arrangements . . . do not generally give rise to the same concerns and often have pro-competitive effects”).

<sup>175</sup> 467 U.S. 752 (1984).

<sup>176</sup> See also *Am. Needle, Inc. v. NFL*, *supra*, 560 U.S. at 195 (quoting *Copperweld*: “‘substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1’”).

<sup>177</sup> *Copperweld*, *supra*; *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537 (2d Cir. 1993).

(2) Parents and their second-tier subsidiaries (i.e., companies wholly owned by a parent's wholly-owned subsidiary) are single entities.<sup>178</sup>

(3) Parents and their less-than-wholly-owned subsidiaries—Substantial confusion exists regarding whether parents and their less-than-wholly-owned subsidiaries constitute single entities, and the decisions are not consistent.<sup>179</sup> Some courts conduct a fact-based analysis, focusing on the degree of actual control that one entity holds over another and whether their economic interests are divergent or aligned.<sup>180</sup> Some decisions require almost 100% ownership by the parent for single-entity status, while others require only majority ownership.

(a) But the leading antitrust treatise concludes that “majority ownership with its centralized power to control, whether or not exercised in detail on a day-to-day basis, creates a single entity for antitrust purposes.”<sup>181</sup>

(b) It is *control*—more than mere ownership—that is the decisive factor. And as a factual matter, an entity need not necessarily own 50% of another entity to effectively control it.

(4) Merged firms—Once completely merged, the merging firms are a single entity for antitrust analysis, and their actions are unilateral, not concerted.

(5) Corporations and their stockholders, directors, officers, and employees—Usually, corporations and their employees, officers, directors, and stockholders are incapable of conspiring either among themselves or with the corporation.<sup>182</sup>

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<sup>178</sup> *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139 (4th Cir. 1990); *Shaw v. Rolex Watch, U.S.A.*, 673 F. Supp. 674 (S.D.N.Y. 1987).

<sup>179</sup> See, e.g., *Livingston Downs Racing Ass’n v. Jefferson Downs*, 257 F. Supp. 2d 819, 835 (M.D. La. 2002) (explaining that “there can be no § 1 conspiracy between one corporation and another corporation that it legally controls”) (emphasis added); *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211 (S.D. Ga. 1997) (51% control sufficient for single-entity status); *Aspen Title & Escrow Co. v. Jen-Wen, Inc.*, 677 F. Supp. 1477 (D. Ore. 1987) (holding that *Copperweld* applies only to wholly owned subs and those owned a de minimis amount less than 100%); *Square D Co. v. Schneider, S.A.*, 760 F. Supp. 362 (S.D.N.Y. 1991) (holding that a parent and less-than-wholly-owned subsidiary are capable of conspiring); *Novatel Commc’ns, Inc. v. Cellular Tel. Supply, Inc.*, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. 1986) (51% control sufficient for single-entity status).

<sup>180</sup> *Coast Cities Truck Sales, Inc. v. Navistar Int’l Transp.*, 912 F. Supp. 747 (D.N.J. 1995).

<sup>181</sup> 7 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1467a at 239 (3d ed. 2010).

<sup>182</sup> See, e.g., *Copperweld*, *supra*; *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133 (9<sup>th</sup> Cir. 2003); *Patel v. Scotland Mem’l Hosp.*, 91 F.3d 132 (4th Cir. 1996) (per curiam unpublished opinion reprinted at 1996-2 Trade Cas. (CCH) ¶ 71,469) (“Under the doctrine of intraenterprise immunity, courts generally find that a company cannot conspire with its officers and employees because of the unity of economic interests between the company and its employees”); *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990); *Solla v. Aetna Health Plans*, 14 F. Supp. 2d 252 (E.D.N.Y. 1998), *aff’d*, 182 F.3d 901 (2d Cir. 1999) (Table) (unpublished opinion reprinted at 1999 WL 464989).

(a) Some courts apply an exception to this rule—the “independent personal stake” exception—where the employee has a personal economic interest in the success of the conspiracy separate from the interest of the employer.<sup>183</sup> In that situation, the corporation and employee are not a single entity and their “agreement” is subject to Section 1. Or, for example, if two employees of a corporation reach an agreement that benefits their personal interests, but not the corporation’s interests, the agreement may be subject to Section 1. But some circuits, such as the Sixth Circuit, explicitly reject the independent personal stake exception.<sup>184</sup>

(6) Integrated medical practices and their physician members constitute a single entity.<sup>185</sup> But loose affiliations among physicians (e.g., office-sharing arrangements, “clinics without walls,” and limited liability companies comprised of individual physician practices involving little integration) may not be sufficiently integrated to constitute a single entity.<sup>186</sup>

(7) Sister corporations—i.e., wholly owned subsidiaries of the same parent—are single entities incapable of conspiring among themselves or with their parent.<sup>187</sup>

(8) Companies and their unincorporated divisions are single entities incapable of conspiring.<sup>188</sup>

(9) Partners and their partnerships are single entities incapable of conspiring.<sup>189</sup>

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<sup>183</sup> See, e.g., *Gregory v. Ft. Bridger Rendezvous Ass’n*, 448 F.3d 1195, 1200 (10th Cir. 2006) (“employees are capable of combining with their corporate employer when they have an ‘independent personal stake,’ and thus stand to benefit from conspiring with the corporation to restrain trade”); *Stark v. Ear Nose & Throat Specialists*, 185 Fed. App’x 120, 124 (3d Cir. 2006) (explaining that “to trigger this limited exception, [plaintiff] must allege that [the owner] or an employee of [defendant] was acting outside [defendant’s] interests”); *Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212 (4th Cir. 2004) (recognizing the exception); *New York Medscan, LLC v. New York Univ. Sch. of Med.*, 430 F. Supp. 2d 140, 150 n.5 (S.D.N.Y. 2006) (explaining that “[w]here an employer or an officer has a personal interest or an interest with another entity . . . , it may be possible for that individual to conspire with the board”).

<sup>184</sup> E.g., *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606 (6th Cir. 1999).

<sup>185</sup> See *Smith v. N. Mich. Hosps.*, 703 F.2d 942 (6th Cir. 1983); *Allen v. Washington Hosp.*, 34 F. Supp. 2d 958 (W.D. Pa. 1999).

<sup>186</sup> See generally Jeff Miles, *The Importance of Integration in Healthcare Antitrust Counseling: Yakima and Susquehanna*, AHLA Health Lawyers News, Mar. 2004, at 17.

<sup>187</sup> E.g., *Gonzales-Maldonado v. MMM Healthcare, Inc.*, 693 F.3d 244, 249 (1<sup>st</sup> Cir. 2012) (“sister corporations that are wholly owned subsidiaries of the same parent” are a single entity for antitrust purposes); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430 (6th Cir. 2008); *Advanced Health-Care Servs. v. Radford Cmty. Hosp.*, 910 F.2d 139 (4th Cir. 1990).

<sup>188</sup> *Copperweld*, *supra*; *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994).

<sup>189</sup> E.g., *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1147-48 (9th Cir. 2003).

(10) Separate corporations controlled by the same shareholders—If the overlap in ownership of the different companies is complete, the corporations are usually incapable of conspiring.<sup>190</sup> Where the same persons own all of one defendant company and less than all of an alleged co-conspirator, more facts relating to control may be necessary.<sup>191</sup>

(11) Principals and their agents—Whether a principal and its agents are capable of conspiring depends on their relationship, particularly the degree of control the principal exercises over its agent and whether they have divergent or aligned economic interests.<sup>192</sup>

(12) Joint ventures, sports leagues, and trade and professional associations—In general, the actions of these entities result from joint action subject to Section 1 because they are comprised of competitors, and the courts have consistently held that the actions of organizations controlled by entities that compete with one another result from concerted, rather than unilateral, action.<sup>193</sup> But there is much confusion here and a number of exceptions and unanswered questions, including:

(a) In a joint venture where the participants totally integrate a line of business and cease competing with each other in that line of business, the joint venture's pricing decisions may be treated as those of a single entity.<sup>194</sup>

(b) The joint venture may be treated as a combination subject to Section 1 with regard to functions in which participants compete against one another but not with regard to joint-venture operations not implicating competition among them.<sup>195</sup>

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<sup>190</sup> E.g., *Guzowski v. Hartman*, 969 F.2d 211 (6th Cir. 1992); *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316 (5th Cir. 1984); but see *Fishman v. Wirtz*, 807 F.2d 520 (7th Cir. 1986) (holding that companies are capable of conspiring absent total overlap in ownership); *Am. Vision Ctrs., Inc. v. Cohen*, 711 F. Supp. 721 (E.D.N.Y. 1989) (holding that a conspiracy is possible between two companies where a group owned 100% of one but only 54% of the other).

<sup>191</sup> See *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Racing, Inc.*, 588 F.3d 908 (6th Cir. 2009).

<sup>192</sup> See, e.g., *Day v. Taylor*, 400 F.3d 1272 (11th Cir. 2005); *Seigel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125 (3d Cir. 1995).

<sup>193</sup> See, e.g., *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010); *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984); *N.C. State Bd. of Dental Examiners v. FTC*, 717 F.3d 359 (4<sup>th</sup> Cir. 2013), *aff'd*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1101 (2015); *Osborn v. Visa, Inc.*, 797 F.3d 1057 (D.C. Cir. 2015) (noting that a single entity may violate § 1 when it is controlled by a group of competitors and serves in essence as a vehicle for ongoing concerted action; *Robertson v. Sea Pines Estate Cos.*, 679 F.3d 278 (4<sup>th</sup> Cir. 2012); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir. 2010); *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 356 (5<sup>th</sup> Cir. 2008) (“When an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members.”); *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56 (1st Cir. 2002) (excellent discussion); *Addamax Corp. v. Open Software Found.*, 152 F.3d 48, 52 (1st Cir. 1998) (explaining that “the operations of the joint venture represent collaboration of the separate entities that own or control it”); *Jung v. Ass'n of Am. Med. Colls.*, 300 F. Supp. 2d 119 (D.D.C. 2004) (holding that the actions of an association of competitors are subject to §1).

<sup>194</sup> *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).

<sup>195</sup> See, e.g., *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593 (7th Cir. 1996).

(i) For example, in *American Needle, Inc. v. NFL*,<sup>196</sup> the Supreme Court held that an agreement among National Football League teams to license their trademarks and logos jointly through the NFL rather than individually resulted from an agreement rather than from unilateral action by the NFL, in part because, absent the agreement, teams would have competed to license their marks.

(13) “Virtual mergers and joint-operating agreements”—One court has held that a hospital “virtual merger”—i.e., where operations of two hospitals are consolidated but the parties retain their assets and certain limited reserved powers over their facilities—resulted in a single entity for antitrust purposes because the hospitals actually functioned as a single-hospital entity would.<sup>197</sup> But this is another unsettled area. For example, a 1969 Supreme Court decision held that a newspaper joint-operating agreement through which the two newspapers pooled their profits constituted a per se violation of Section 1,<sup>198</sup> implying that participants in a joint-operating agreement remain separate entities. And a recent decision, regarding a four-hospital joint operating agreement, held that whether they constituted a single entity could not be determined at summary judgment but was a matter for trial.<sup>199</sup>

(14) Provider-controlled contracting networks, such as physician independent practice associations (IPAs), are treated as combinations among their members, whose actions are subject to Section 1.<sup>200</sup> On the other hand, where a hospital or health plan employs physicians, all usually constitute a single entity.

(15) Attorneys and their clients—Attorneys and their clients are capable of conspiring when the attorney helps the client formulate business strategies that violate the antitrust laws, but not when the attorney merely provides legal, as opposed to business, advice.<sup>201</sup>

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<sup>196</sup> 560 U.S. 183 (2010).

<sup>197</sup> *HealthAmerica Pa., Inc. v. Susquehanna Health Sys.*, 278 F. Supp. 2d 423 (M.D. Pa. 2003); *but cf. N.Y. v. St. Francis Hosp.*, 94 F. Supp. 2d 423 (S.D.N.Y. 2000) (applying the per se rule to price-fixing and market-allocation agreements between hospitals participating in a joint-operating agreement).

<sup>198</sup> *Citizen Publ’g Co. v. United States*, 394 U.S. 131 (1969).

<sup>199</sup> *Med. Ctr. v. Atrium Health System*, \_\_\_ F.3d \_\_\_, 2016 WL 1105023 (6<sup>th</sup> Cir. Mar. 22, 2016).

<sup>200</sup> See *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5<sup>th</sup> Cir. 2008); *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs. Inc.*, 996 F.2d 537, 544 (2d Cir. 1993) (“As members of the [IPA], the doctors are not staff physicians employed by the HMO . . . . Instead, these health care professionals are independent practitioners with separate economic interests.”).

<sup>201</sup> *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1156 (9<sup>th</sup> Cir. 2008); *Amarel v. Connell*, 102 F.3d 1494, 1523 (9<sup>th</sup> Cir. 1996) (explaining that an attorney is capable of conspiring with his or her client if the “attorney ‘exerted [his or her] influence over [a client] so as to direct [the client] to engage in the complained of acts for an anticompetitive purpose’”); *Brown v. Donco Enters., Inc.*, 783 F.2d 644 (6<sup>th</sup> Cir. 1986); *United States v. Buzzard*, 540 F.2d 1383 (10<sup>th</sup> Cir. 1976) (criminal prosecution); *Tillamook Cheese & Dairy Ass’n v. Tillamook County Creamery Ass’n*, 358 F.2d 115 (9<sup>th</sup> Cir. 1966).



(16) Hospitals and their medical staffs engaging in peer-review credentialing to determine whether a physician obtains privileges to practice at a hospital—The circuits split on whether hospitals and their medical staffs constitute a single entity when engaging in medical-staff credentialing based on peer review and thus are not capable of conspiring.<sup>202</sup> Most circuits hold that they are a single entity.

(17) State regulatory boards, such as state boards of medicine or state boards of dentistry where competitors regulate competitors—The FTC has held and the Fourth Circuit and Supreme Court affirmed where a state professional regulatory board consists of practitioners who compete among themselves and against those they regulate, the board’s actions result from concerted conduct subject to Section 1.<sup>203</sup>

b. Fact of conspiracy.

(1) Assuming the parties are legally capable of conspiring among themselves, the question becomes whether the challenged conduct, as a factual matter, resulted from concerted or unilateral action. This is often the most hotly contested issue in Section 1 cases.<sup>204</sup>

(2) Although there is some authority to the contrary, the terms “contract,” “combination,” and “conspiracy” are generally interchangeable terms meaning merely an “agreement,” “understanding,” or “concerted action” to which Section 1 applies.

(3) Technical definition of antitrust agreement or conspiracy: parties acting with “a unity of purpose or a common design and understanding, or a meeting of the minds.”<sup>205</sup>

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<sup>202</sup> The Third, *e.g.*, *Nanavati v. Burdette Tomlin Mem’l Hosp.*, 857 F.2d 96 (3d Cir. 1988); Fourth, *e.g.*, *Oksanen v. Page Mem’l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc); Sixth, *e.g.*, *Alba v. Marietta Mem’l Hosp.*, 202 F.3d 267 (6th Cir. 2000); and Seventh, *e.g.*, *Pudlo v. Adamski*, 2 F.3d 1153 (7th Cir. 1993), Circuits have held that, when engaging in peer review, the hospital and its medical staff are a single entity. The Ninth, *see Oltz v. St. Peter’s Cmty. Hosp.*, 861 F.3d 1440 (9th Cir. 1988); and Eleventh, *e.g.*, *Crosby v. Hosp. Auth.*, 93 F.3d 1515 (11th Cir. 1996), have indicated that they are capable of conspiring.

<sup>203</sup> *N.C. State Bd. of Dental Examiners*, 2011-2 Trade Cas. (CCH) ¶ 77,705 (FTC 2011) (noting that the Supreme “Court has ‘repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity’”), petition for review denied, 717 F.3d 359 (4<sup>th</sup> Cir. 2013), *aff’d*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1101 (2015).

<sup>204</sup> *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (explaining that “[t]he crucial question” [for a § 1 claim] is whether the challenged anticompetitive conduct “[s]tems from independent decision or from an agreement”).

<sup>205</sup> *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); *see also United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) (“Identifying the existence and nature of a conspiracy requires determining whether the evidence ‘reasonably tends to prove that the [defendants] has a conscious commitment to a common scheme designed to achieve an unlawful objective.’”); *W. Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010) (“An agreement exists when there is a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme.”).

(4) No formal or express agreement is necessary, and the agreement can be inferred from the defendants' conduct. For example, in *Esco Corp. v. United States*, the court explained:

A knowing wink can mean more than words. Let us suppose five competitors meet on several occasions, discuss their problems, and one finally states—"I won't fix prices with any of you, but here is what I am going to do—put the price of my gadget at X dollars; now you all do what you want." He then leaves the meeting. Competitor number two says—"I don't care whether number one does what he says he's going to do or not; nor do I care what the rest of you do, but I am going to price my gadget at X dollars." Number three makes a similar statement—"My price is X dollars." Number four says not one word. All leave and fix "their" price at X dollars.

We do not say the foregoing *compels* an inference . . . that the competitors' conduct constitutes a price-fixing conspiracy . . . , but neither can we say, as a matter of law, that an inference of no agreement is compelled. As in so many other instances, it remains a question for the trier of fact to consider and determine what inference appeals to it . . . as most logical and persuasive, after it has heard all the evidence of what these competitors had done before such meeting and what actions they took thereafter, or what actions they did not take.<sup>206</sup>

(5) Agreements can be proved by direct evidence, circumstantial evidence, or both.<sup>207</sup> Direct evidence usually, but not always, negates the need for additional circumstantial evidence.<sup>208</sup>

(a) Direct evidence—Evidence that requires no inferences to establish the asserted proposition or conclusion,<sup>209</sup> e.g., testimony that the parties reached and agreement or an executed contract.

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<sup>206</sup> 340 U.S. 1000, 1007 (9th Cir. 1965). See also *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) (holding that an inference of conspiracy is permissible where, even absent an outright agreement, each defendant knew that concerted action was contemplated and invited and that the other defendants were participating).

<sup>207</sup> E.g., *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954); *Hyland v HomeServs. of Am.*, 771 F.3d 310 (6<sup>th</sup> Cir. 2014); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383 (3d Cir. 2015); *Evergreen Partnering Group, Inc. v. PactIV Corp.*, 720 F.3d 33 (1<sup>st</sup> Cir. 2013); *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. Apr. 2012) (explaining that "conspiracies are rarely evidenced by explicit agreement, but nearly always must be proven through 'inferences that may be fairly drawn from the behavior of the alleged conspirators'"); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("To plead unlawful agreement, a plaintiff may allege either an explicit agreement . . . , or 'sufficient circumstantial evidence tending to exclude the possibility of independent conduct.'").

<sup>208</sup> See *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073 (10th Cir. 2006).

<sup>209</sup> E.g., *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225 (3d Cir. 2011) ("Direct evidence of a conspiracy is 'evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.'"); *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 706 (7th Cir. 2011) (explaining that "'with direct

(b) Circumstantial evidence—Evidence that requires inferences to support the asserted proposition or conclusion.<sup>210</sup>

(6) In antitrust cases, if the evidence of agreement is wholly circumstantial, several limiting principles come into play:

(a) Antitrust analysis limits the range of permissible inferences the fact-finder may draw from circumstantial evidence.<sup>211</sup>

(b) More evidence than otherwise is necessary if the plaintiff's theory of conspiracy makes no economic sense, is implausible, or the defendants had no motive to conspire.<sup>212</sup>

(c) No conspiracy can be inferred, and the court should grant defendants summary judgment, if the evidence is as consistent with independent action by the defendants as with concerted action—if the evidence is in equipoise.<sup>213</sup> Rather, plaintiff must adduce evidence *tending to exclude* the possibility that the defendants were acting independently.<sup>214</sup> But the plaintiff is not required to “‘exclude’ or ‘dispel’ the possibility that the defendants acted independently.”<sup>215</sup>

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evidence, the fact finder is not required to make inferences to establish facts.”) (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999)); *Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148 (9th Cir. 2001).

<sup>210</sup> *E.g.*, *Tunica Web Adver. v. Tunical Casino Operators Ass’n.*, 496 F.3d 403, 409 (5<sup>th</sup> Cir. 2007) (“Direct evidence of concerted action is that which explicitly refers to an understanding between the alleged conspirators, while circumstantial evidence requires additional inferences in order to support a claim of conspiracy.”) (internal quotation marks omitted).

<sup>211</sup> *E.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383 (3d Cir. 2015); *Abraham v. Intermountain Health Care, Inc.*, 461 F.3d 1249 (10<sup>th</sup> Cir. 2006).

<sup>212</sup> *Matsushita, supra*; *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 51 (3d Cir. 2007) (“The Supreme Court has cautioned that fact finders should not be permitted ‘to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.’”).

<sup>213</sup> *Hyland v. HomeServs. of Am.*, 771 F.3d 310 (6<sup>th</sup> Cir. 2014) (noting that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of conspiracy); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 73 (3d Cir. 2010) (“When the evidence in the record is as consistent with permissible competition as with conspiracy, such evidence, standing alone, fails to support an inference of an illegal conspiracy.”); *Craftsman Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761 (8<sup>th</sup> Cir. 2004); *Euromodas v. Zanella, Ltd.*, 368 F.3d 11 (1<sup>st</sup> Cir. 2004); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11<sup>th</sup> Cir. 2003).

<sup>214</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (explaining that “proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, . . . and at the summary judgment stage a § 1 plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently”); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (same).

<sup>215</sup> *In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012).

(d) In many Section 1 conspiracy cases, plaintiffs rely on the defendants' consciously parallel behavior to provide an inference of agreement. *Conscious parallelism* results when competitors, absent an agreement to do so, engage in identical behavior (e.g., raise prices simultaneously), believing that their competitors will do likewise. It is probative of a conspiracy. But because it is as consistent with lawful unilateral action (indeed, it is expected in oligopolistic markets) as with concerted action, consciously parallel action, standing alone, is insufficient circumstantial evidence from which a conspiracy can be inferred.<sup>216</sup>

(i) In *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, the Supreme Court explained:

[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement, or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.<sup>217</sup>

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<sup>216</sup> E.g., *Twombly*, *supra*, 540 U.S. at 553-54 ("Even 'conscious parallelism,' a common reaction of 'firms in a concentrated market [that] recognize[] their shared economic interests and their interdependence with respect to price and output decisions' is 'not in itself unlawful.'"); *SD3, LLC v. Black & Decker (U.S.), Inc.*, 801 F.3d 412 (4<sup>th</sup> Cir. 2015) ("parallel conduct, standing alone, does not establish the required agreement because it is equally consistent with lawful conduct"); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383 (3d Cir. 2015) ("evidence of conscious parallelism cannot alone create an inference of a conspiracy"); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 186 (9<sup>th</sup> Cir. 2015); *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 797 F.3d 538 (8<sup>th</sup> Cir. 2015) ("Pleading only 'parallel conduct' or other conduct 'merely consistent with an agreement' is not sufficient to show a conspiracy."); *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) ("Parallel action is not, by itself, sufficient to prove the existence of a conspiracy."); *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 872 (7<sup>th</sup> Cir. 2015) ("the plaintiffs' counsel demonstrate a failure to understand the fundamental distinction between express and tacit collusion. Express collusion violates the antitrust law; tacit collusion does not"; "Tacit collusion, also known as conscious parallelism, does not violate section 1 of the Sherman Act. Collusion is illegal only when based on agreement."); *Erie County v. Morton Salt, Inc.*, 702 F.3d 860, 868 (6<sup>th</sup> Cir. 2012) ("Although an agreement may be inferred from circumstantial evidence, the bare fact that defendants engaged in parallel conduct is not sufficient to establish a Sherman Act violation."); *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012) ("A complaint alleging merely parallel conduct is not sustainable."); *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212 (3d Cir. 2011); *White v. R.M. Packer Co.*, 635 F.3d 571, 575 (1st Cir. 2011) (explaining that "bare 'conscious parallelism' is 'not in itself unlawful.' Conscious parallelism . . . is a phenomenon of oligopolistic markets in which firms 'might in effect share monopoly power, setting their prices at a profit-maximizing supracompetitive level by recognizing their shared interests and their interdependence with respect to price and output decisions.' Each producer may independently decide that it can maximize profits by matching one or more other producers' price, on the hope that the market will be able to maintain high prices if the producers do not undercut one another").

<sup>217</sup> 346 U.S. 537, 541 (1954); *see also Starr v. Sony BMG Entm't*, 592 F.3d 314, 322 (2d Cir. 2010) ("[A]n allegation of parallel conduct coupled with only a bare assertion of conspiracy is not sufficient to state a Section 1 claim. . . . Examples of a parallel conduct allegation that would suffice . . . include 'parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.'"); *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d

(ii) To permit the fact finder to infer a conspiracy, a plaintiff must introduce, in addition to evidence of consciously parallel conduct, evidence of certain “plus factors” probative of conspiracy or that tend to negate the possibility that the identical action resulted from individual decisions. Plus factors commonly include that the defendants (1) had a motive to conspire, (2) had an opportunity to conspire, (3) acted in a way that would not be expected absent an agreement—i.e., that the action each defendant took was, absent an agreement that all would take that action, against each defendant’s *individual* economic self-interest, (4) can offer no legitimate explanation or procompetitive business justification for the action, and (5) posited pretextual justifications for their actions.<sup>218</sup>

(iii) But any fact probative that the challenged conduct resulted from concerted action rather than unilateral action can constitute a plus factor. For example, if the question is whether the defendants’ simultaneous price increases resulted from concerted or unilateral action, a court might examine the following, each of which is somewhat suggestive that the action resulted from an agreement:

- (1) Whether the market is highly concentrated.<sup>219</sup>
- (2) Whether defendants informed one another of their prices through some type of information exchange.

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266, 271 (5th Cir. 2008) (“Independent parallel conduct, or even conduct among competitors that is consciously parallel, does not alone establish the . . . conspiracy required by § 1.”).

<sup>218</sup> See *Twombly*, *supra*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Hyland v. HomeSrvs. of Am.*, 771 F.3d 310 (6<sup>th</sup> Cir. 2014) (mentioning as plus factors whether defendants’ actions, if taken individually, would be contrary to their economic interests; whether defendants’ actions were uniform; whether defendants exchanged or had the opportunity to exchange competitively sensitive information; and whether defendants had a common motive to conspire); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383 (3d Cir. 2015) (citing motive to conspire, action contrary to individual self-interest, and evidence of traditional conspiracy, but recognizing that the first two may reflect mere lawful interdependent action); *Mayor and City Council of Baltimore v. Citigroup, Inc.*, 709 F.3d 129 (2d Cir. 2013); *Milberg Factors*, *supra*, 662 F.3d at 226 (“We have identified at least three types of facts, often referred to as ‘plus factors,’ that tend to demonstrate the existence of an agreement: ‘(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy.’”); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007); *Abraham v. Intermountain Health Care*, 461 F.3d 1249 (10th Cir. 2006); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350 (3d Cir. 2004). For more complete listings of factors suggestive of agreement, see *R.M. Packer Co.*, *supra*; *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697 (7<sup>th</sup> Cir. 2011); *In re Text Messaging Antitrust Litig.*, 630 F.3d 622 (7<sup>th</sup> Cir. 2010). See generally 1 John J. Miles, *Health Care & Antitrust Law* pp. 2A-89 through -114 (Supp. 2014).

<sup>219</sup> See, e.g., *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 871 (7<sup>th</sup> Cir. 2015):

It is true that if a small number of competitors dominates the market, they will find it safer and easier to fix price than if there are many competitors of more or less equal size. For the fewer the conspirators, the lower the cost of negotiation and the likelihood of defection; and provided that the fringe of competitive firms is unable to expand output sufficiently to drive the price back down to the competitive level, the leading firms can fix prices without worrying about competition from the fringe. But the other side of this coin is that the fewer the firms, the easier it is for them to engage in “follow the leader” pricing (“conscious parallelism,” as lawyers call it, “tacit collusion” as economists prefer to call it)—which means coordinating their pricing without an actual agreement to do so.

or lower costs. (3) Whether the price increase occurred in the face of decreasing demand

product. (4) Whether the product involved is a homogeneous, fungible, commodity

(5) Whether demand for the product is price-inelastic.

(6) Whether there are few good substitute products.

(7) Whether entry barriers into the market are high.

(8) Whether any of the defendants made public announcements of future price increases, thus “signaling” its competitors what it planned to do.

(9) Whether the defendants have significant excess capacity.

(10) Whether there are few purchasers, lacking market power as buyers.

(11) Whether prices are quite transparent in the sense that the defendants can quickly discover the prices of their competitors.

(12) Whether market shares have remained constant over a long period of time.

(13) Whether the defendants have a history of conspiring with regard to competitive sensitive variables.

(14) Whether sales are rather frequent and small rather than infrequent and large.

(iv) The court aggregates the different pieces of circumstantial evidence in determining whether, together, they are sufficient to permit an inference of agreement. It does not examine each piece individually, wiping the slate clean after each.<sup>220</sup>

(v) A recommendation by one party and the mere acceptance of that recommendation by a decision maker is not sufficient to permit an inference of conspiracy between the decision maker and the party providing the recommendation.<sup>221</sup>

#### **D. The “Unreasonable Restraint of Competition” Requirement.**

1. If the plaintiff proves that the challenged conduct resulted from concerted action, the analysis turns to the second essential element of a Section 1 violation—proof that the concerted action “unreasonably restrained competition.”

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<sup>220</sup> *E.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S.690, 698-99 (1962) (“plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each”); *SD3, LLC v. Black & Decker (U.S.), Inc.*, 801 F.3d 412 (4<sup>th</sup> Cir. 2015) (court does not “parse each ‘plus factor’ individually and ask whether that factor, standing alone, would be sufficient to provide the ‘more’”); *Evergreen Partnering Group, Inc. v. Pact IV Corp.*, 720 F.3d 33, 47 (1<sup>st</sup> Cir. 2013) (“While each of [plaintiff’s] allegations of circumstantial evidence standing alone may not be sufficient to imply agreement, taken together, they provide a sufficient basis to plausibly contextualize the agreement necessary for pleading a § 1 claim.”); *Erie County v. Morton Salt, Inc.*, 702 F.3d 860 (6<sup>th</sup> Cir. 2012).

<sup>221</sup> *See, e.g.*, *Intermountain Health Care, supra*, 461 F.3d at 1259; *Gordon v. Lewistown Hosp.*, 423 F.3d 184 (3d Cir. 2005); *Podiatrist Ass’n, Inc. v. La Cruz Azul de Puerto Rico, Inc.*, 332 F.3d 6, 14-15 (1st Cir. 2003); *Oksanen v. Page Mem’l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc).

2. Although read literally, Section 1 prohibits “[e]very” conspiracy “in restraint of trade,” the courts have long held that it prohibits only agreements that *unreasonably* restrain competition<sup>222</sup> because, as the Supreme Court explained long ago, almost every contract restrains competition to some extent.<sup>223</sup>

3. The question in every Section 1 case is whether the agreement, on balance, has “substantial” or “significant” anticompetitive effects.<sup>224</sup>

4. What constitute “anticompetitive effects”? Primarily, supracompetitive prices, sub-competitive output, and sub-competitive quality.<sup>225</sup>

5. To determine effect on competition and whether that effect is “unreasonable,” courts, as a general matter, apply one of three standards that lie on a continuum with regard to the depth of required analysis: (a) the per se rule; (b) the rule of reason, or (c) a middle approach variously called the “quick-look,” “abbreviated,” or “truncated” rule of reason.<sup>226</sup> The applicable standard depends on the nature and character of the agreement in question—i.e., how likely it is that the

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<sup>222</sup> See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015); *Omincare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 705 (7<sup>th</sup> Cir. 2011) (“By its own terms, § 1 prohibits ‘[e]very . . . conspiracy in restraint of trade or commerce,’ . . . though courts have long restricted its reach to agreements that unreasonably restrain trade.”); *W. Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010) (“Despite its seemingly absolute language, section 1 has been construed to prohibit only *unreasonable* restraints of trade.”) (emphasis in original); *N.C. State Bd. of Dental Examiners*, 2011-2 Trade Cas. (CCH) ¶ 77,705 (FTC 2011).

<sup>223</sup> E.g., *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (explaining that “the legality of an agreement . . . cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade . . . restrains. To bind, to restrain, is of their very essence”); see also *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010) (explaining that the Sherman Act does not prohibit every contract that restrains competition because every contract does restrain competition); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 687-88 (1978) (stating that “restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law”); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 829 (3d Cir. 2010) (“Because even beneficial legitimate contracts . . . restrain trade to some degree, § 1 of the Sherman Act has long been interpreted to prohibit only those contracts . . . that are ‘unreasonably restrictive of competitive conditions.’”).

<sup>224</sup> See, e.g., *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (noting that the issue is whether the agreement’s effect on competition is substantially adverse); *Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 473 (6<sup>th</sup> Cir. 2005) (stating that “a plaintiff alleging an unreasonable restraint of trade . . . must show significant anti-competitive effects of the challenged restraint”).

<sup>225</sup> See, e.g., *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 231 (1<sup>st</sup> Cir. 2011) (“Injury to competition is ‘usually measured by a *reduction in output* or an *increase in prices* in the relevant market.’”) (emphasis in original); *W. Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 100 (3d Cir. 2010) (“Anticompetitive effects included increased prices, reduced output, and reduced quality.”).

<sup>226</sup> See generally *Agnew v. NCAA*, 683 F.3d 328, 335 (7<sup>th</sup> Cir. 2012) (“Courts have established three categories of analysis—per se, quick look, and Rule of Reason—for determining whether actions have anticompetitive effects, although the methods often blend together.”); *Cont’l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499 (4<sup>th</sup> Cir. 2002) (providing an excellent discussion of the three standards).

type of agreement challenged has significant net anticompetitive effects. The appropriate standard is a question of law for the court.<sup>227</sup>

a. Standard 1—*The per se rule*.

(1) Some types of agreements are so obviously unreasonably anticompetitive, on their face in almost all circumstances, that no analysis of their actual effects on competition is needed, warranted, or permitted, and no justifications are allowed. These agreements are “per se illegal.”<sup>228</sup>

(2) What characteristics must the agreement have to warrant per se condemnation?

(a) The per se rule applies to agreements that, “because of their *pernicious effect on competition* and *lack of any redeeming virtue* are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”<sup>229</sup>

(b) The per se rule applies only agreements that, *on their face*, appear to be types that would always, or almost always, tend to restrict competition and decrease output rather than increase economic efficiency or promote competition.<sup>230</sup>

(c) But the per se rule does not apply to types of agreements with which courts have had little experience.<sup>231</sup>

(3) The per se standard has limited applicability.

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<sup>227</sup> E.g., *Deutscher Tennis Bund, supra*, 610 F.3d at 829 n.7 (“The selection of a mode of antitrust analysis is a question of law.”).

<sup>228</sup> See generally *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (“The *per se* rule, treating certain categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.”); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 186 (9<sup>th</sup> Cir. 2015) (“Once the agreement’s existence is established, no further inquiry into the practice’s actual effect on the market or the parties’ intentions is necessary to establish a § 1 violation.”) *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6<sup>th</sup> Cir. 2008) (“The *per se* standard recognizes there are some methods of restraint that are so inherently and facially anti-competitive that an elaborate and burdensome inquiry into a demonstrable economic impact on competition in a relevant market is not required.”).

<sup>229</sup> *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (emphasis added); see also *Leegin, supra*, 551 U.S. at 886 (“To justify a *per se* prohibition a restraint must have ‘manifestly anticompetitive’ effects, . . . and ‘lack any redeeming virtue.’”).

<sup>230</sup> *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985); *Agnew v. NCAA*, 683 F.3d 328 (7<sup>th</sup> Cir. 2012).

<sup>231</sup> *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Ariz. v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982). Thus, the per se rule applies only in “clear cut cases.” *Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6<sup>th</sup> Cir. 2003).



(a) In general, it applies only to three types of agreements, discussed later: (i) horizontal price-fixing agreements, (ii) horizontal market-allocation agreements, and (iii) bid-rigging agreements.<sup>232</sup>

(b) Moreover, courts have been somewhat hesitant to apply the per se rule to joint-venture activities,<sup>233</sup> rules of sports leagues,<sup>234</sup> educational activities,<sup>235</sup> professional and trade association activities,<sup>236</sup> and health-care sector issues involving medical judgment, such as a hospital's decision whether to grant a practitioner clinical privileges to treat patients in the hospital.<sup>237</sup>

(4) “Naked” vs. “ancillary” restraints.

(a) The per se rule applies only to “naked” restraints—i.e., those without plausible efficiencies resulting from, e.g., partial integration or other procompetitive justifications.<sup>238</sup>

(b) The per se rule does not apply to “ancillary restraints”—i.e., restraints that may adversely affect competition but are part of a larger, integrated undertaking, such as a joint venture, and are reasonably necessary for the venture to operate efficiently.<sup>239</sup> For a type of

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<sup>232</sup> See generally *Nitro Distrib., Inc. v. Alitor Corp.*, 565 F.3d 417, 422 (8th Cir. 2009) (noting that plaintiffs’ “claims of price-fixing and customer allocation agreements are among the ‘most elementary’ violations . . . and are generally subject to a *per se* analysis”).

<sup>233</sup> See, e.g., *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984); *Broadcast Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1 (1979); *In re New Energy Corp.*, 739 F.3d 1077, 1079 (7<sup>th</sup> Cir. 2014) (“Joint ventures have the potential to improve productivity as well as the potential to affect prices [adversely]; that’s why . . . they are analyzed under the rule of reason.”).

<sup>234</sup> See, e.g., *Bd. of Regents v. NCAA*, , *supra*, 468 U.S. at 117 (“Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved); *Brookins v. Int’l Motor Contest Ass’n*, 219 F.3d 849 (8th Cir. 2000); *Race Tires of Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 80 (3d Cir. 2010) (noting that “courts have generally accorded sports organizations a certain degree of deference and freedom to act”).

<sup>235</sup> See, e.g., *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521 (6th Cir. 2001); *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993).

<sup>236</sup> See, e.g., *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986).

<sup>237</sup> See, e.g., *Diaz v. Farley*, 215 F.3d 1175 (10th Cir. 2000).

<sup>238</sup> *Broadcast Music*, *supra*.

<sup>239</sup> See, e.g., *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 130, 203 (2010) (“When ‘restraints on competition are essential if the product is to be available at all,’ *per se* rules of illegality are inappropriate, and instead the restraint must be judged according to the flexible rule of reason.”); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir. 2010) (same); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 337 (2d Cir. 2008) (Sotomayor, J., concurring) (noting that the rule of reason applies to ancillary restraints, i.e., those that are a part of a larger endeavor and that are necessary for it to achieve its “efficiency-enhancing benefits”); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 63 (1st Cir. 2004) (explaining that “restraints that are truly ancillary to a

agreement to which the per se rule would normally apply to constitute an ancillary restraint, (1) the parties must have integrated their activities in ways likely to achieve significant efficiencies, and (2) the restraint must be “reasonably necessary” to achieve those efficiencies.

(5) If the per se rule applies, plaintiff need not prove that the agreement had any actual anticompetitive effect, and the defendants are not permitted to introduce evidence that the restraint had procompetitive effects or no effects on competition at all. Rather, the per se rule establishes a conclusive presumption of unreasonableness and thus unlawfulness.<sup>240</sup> To prove liability, a plaintiff only need prove the agreement and that it is a type to which the per se rule applies.<sup>241</sup> As one court explained, “The per se rule is the trump card of antitrust analysis. When the antitrust plaintiff successfully plays it, he need only tally his score.”<sup>242</sup>

(6) Not surprisingly, plaintiffs make every effort to squeeze their allegations into a type of agreement to which the per se rule applies, while defendants argue that the rule of reason is the appropriate standard.

b. Standard 2—The Rule of Reason.

(1) At the other end of the continuum of standards used to assess whether an agreement “unreasonably” restrains competition is the “rule of reason.”

(2) Courts assess the effect on competition of most agreements by applying the so-called full-blown rule of reason. Indeed, there is a presumption that the rule of reason, rather

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larger efficiency-gaining enterprise . . . are not normally condemned per se without looking at likely consequences”); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001) (explaining that “it is commonly understood today that *per se* condemnation is limited to ‘naked’ . . . agreements, that is, those that are not part of a larger pro-competitive joint venture”); *In re Wholesale Grocery Prods. Antitrust Litig.*, 722 F. Supp. 2d 1079, 1093-94 (D. Minn. 2010) (“Determining whether an agreement is ancillary requires a court to consider whether, at the time the agreement was made, it was necessary to promote the enterprise and productivity of an underlying arrangement.”); *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003 (N.D. Cal. 2008); see generally Federal Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 1.2 (2000) (explaining that the rule of reason applies to “agreements of a type that otherwise might be considered per se illegal, provided they are reasonably necessary to achieve procompetitive benefits from an efficiency-enhancing integration of economic activity”).

<sup>240</sup> E.g., *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990); *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 271 (6<sup>th</sup> Cir. 2014).

<sup>241</sup> E.g., *Ariz. v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982); *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 906 (6<sup>th</sup> Cir. 2003) (explaining that when the per se rule applies, “no consideration is given to the intent behind the restraint, to any claimed pro-competitive justifications, or to the restraint’s actual effect on competition”); *Stop & Shop Supermarket Co.*, *supra*, 373 F.3d at 61 (explaining that when the per se rule applies, “liability attaches without need for proof of power, intent, or impact”).

<sup>242</sup> *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1363 (5<sup>th</sup> Cir. 1980).

than the per se standard, applies in assessing the reasonableness of an agreement affecting competition;<sup>243</sup> it “is the presumptive or default standard.”<sup>244</sup>

(3) Under the rule of reason, the ultimate question is whether, on balance, the challenged agreement has significant anticompetitive effects—whether, after weighing an agreement’s procompetitive and anticompetitive effects, it promotes or suppresses competition (or has no effect).<sup>245</sup> In essence, rule-of-reason analysis asks whether the agreement results in the defendants’ obtaining or maintaining market power and, if so, whether efficiencies or other consumer benefits from the agreement outweigh its adverse market-power effects.

(4) Rule-of-reason analysis can be extraordinarily time-consuming, expensive, and “copious.”<sup>246</sup> One FTC commissioner explained that full-blown rule-of-reason analysis is the “antitrust equivalent to Chinese water torture.”<sup>247</sup>

(5) Courts today, in applying rule-of-reason analysis, use a “burden shifting” framework.<sup>248</sup> The Second Circuit explained this approach in *Geneva Pharms. Tech. Corp. v. Barr Labs.*:<sup>249</sup>

Under the rule of reason, Sherman Act plaintiffs bear an initial burden to demonstrate the defendants’ challenged behavior had an actual adverse effect on competition as a whole in the relevant market; if the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the procompetitive effects of their agreement, and if the defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means. . . . Ultimately, the factfinder must engage in a careful weighing of the competitive effects of the agreement—both pro and con—to

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<sup>243</sup> E.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.”); *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (explaining that “this Court presumptively applies rule of reason analysis”).

<sup>244</sup> *Cal. v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9<sup>th</sup> Cir. 2011).

<sup>245</sup> *Nat’l Soc’y of Prof’l Engrs v. United States*, 435 U.S. 679, 691 (1978) (“[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.”); see also *Bd. of Trade v. United States*, 246 U.S. 231 (1918).

<sup>246</sup> *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362 (5<sup>th</sup> Cir. 1980).

<sup>247</sup> *Mass. Bd. of Optometry*, 110 F.T.C. 549, 603 (1988).

<sup>248</sup> For examples, see *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3<sup>d</sup> Cir. 2010); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57 (3<sup>d</sup> Cir. 2010).

<sup>249</sup> 386 F.3d 485, 507 (2<sup>d</sup> Cir. 2004); see also *Agnew v. NCAA*, 683 F.3d 328 (7<sup>th</sup> Cir. 2012); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (2<sup>d</sup> Cir. 2011); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820 (3<sup>d</sup> Cir. 2010); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008); *Nilavar v. Mercy Health Sys.*, 244 Fed. App’x 690, 695 (6<sup>th</sup> Cir. 2007).

determine if the effects of the challenged restraint tend to promote or destroy competition.

(a) Plaintiffs can sustain their initial burden—to prove a significant adverse effect on competition—in either or both of two ways: by (i) direct evidence of anticompetitive effects, such as supracompetitive prices or lower output or quality resulting from the conduct, or (ii) by circumstantial evidence of defendants’ market power—by defining the relevant market, showing that defendants have a dominant share of that market, and showing the existence of significant entry and expansion barriers.<sup>250</sup> In fact, many courts require, in every rule-of-reason case, a threshold showing of market power to quickly dispose of cases that obviously lack merit—because absent market power, no unreasonably adverse effect on competition is possible.<sup>251</sup>

(i) As noted before, there is no magic, black-letter market-share figure from which market power can be inferred. But in general, concern begins to arise when the defendants’ market share is around 30 or 35 percent.<sup>252</sup>

(ii) A large market share, by itself however, is not sufficient to prove market power. Even a firm with a 100% market share has no market power if there are no entry barriers: “without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended period of time.”<sup>253</sup>

(iii) Even proof of market power may not be sufficient, by itself, to show the required anticompetitive effect, absent a showing of some link between defendants’ market power and harm to competition.<sup>254</sup>

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<sup>250</sup> See, e.g., *Realcomp II, Ltd., supra* (explaining that plaintiff can sustain its initial burden with proof of actual detrimental effects or the potential for detrimental effects as shown by market power and the anticompetitive nature of the restraint); *Theme Promotions, Inc. v. News Am. Mktg. Fsi*, 539 F.3d 1046, 1053 (9th Cir. 2008) (“Evidence of restricted output and supracompetitive prices is direct evidence of market power. . . . To establish circumstantial evidence of market power, a plaintiff must first define the relevant market and then show that the defendant plays enough of a role in the market to impair competition significantly.”); *Gordon v. Lewistown Hosp.*, 423 F.3d 184 (3d Cir. 2005); *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74 (2d Cir. 1999).

<sup>251</sup> E.g., *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1007 (7<sup>th</sup> Cir. 2012) (noting that “by definition, without [market power] a firm or group of firms can’t harm competition.”).

<sup>252</sup> See generally *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (indicating that a firm must have at least a 30% market share before market power can be inferred); *Drug Emporium, Inc. v. Blue Cross*, 104 F. Supp. 2d 184, 189 (W.D.N.Y. 2000) (stating the Supreme “Court has concluded that as a matter of law that a defendant with 30% or less of the relevant market lacked market power for an antitrust violation”).

<sup>253</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 591 n.15 (1986); see also *Discon, Inc. v. NYNEX Corp.*, 86 F. Supp. 2d 154, 164 (W.D.N.Y. 2000).

<sup>254</sup> E.g., *Spanish Broad. Sys. v. Clear Channel Commc’ns, Inc.*, 376 F.3d 1065, 1072 (11th Cir. 2004); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997) (explaining that market power, by itself, is not sufficient; rather, plaintiff must adduce additional reasons to believe that defendants’ conduct will adversely affect competition).

(b) If plaintiff fails to sustain its initial burden to prove anticompetitive effects, no further analysis is necessary, and the case should be dismissed without requiring defendants to posit procompetitive justifications.<sup>255</sup>

(c) If, however, plaintiff sustains its initial burden, defendants must “show a sufficient procompetitive justification . . . for the challenged conduct”; if they do, plaintiff “must demonstrate that the restraint itself is not reasonably necessary to achieve the stated objective.”<sup>256</sup>

(i) But to the extent that defendants must justify their conduct, their justifications must relate directly to the effect of the conduct on *competition*. Justifications based on other public-interest or social-welfare considerations do not count.<sup>257</sup>

(d) If both sides carry their burdens, the final step in full-blown rule-of-reason analysis is balancing the agreement’s procompetitive and anticompetitive effects. Fortunately, as noted before, very few antitrust cases reach this point—fortunate because there is no way to measure and compare the two effects with any precision. The balancing is always subjective, and this is one reason why trying antitrust cases to juries can be scary and unpredictable.

c. Standard 3—Intermediate standards—*The quasi-per se rule and the quick-look rule of reason*.

(1) The per se rule and full-blown rule of reason are polar extremes at opposite ends of the spectrum for assessing whether an agreement results in an “unreasonable” restraint of competition. In reality, however, these standards and the quick-look standard are on a continuum.<sup>258</sup> As a leading commentator explains:

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<sup>255</sup> E.g., *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (explaining that “before a fact finder may consider the harms and benefits of the ‘challenged behavior, a plaintiff initially must show that the challenged action had an *actual* adverse effect on competition”) (emphasis in original); *Ill. Corp. Travel, Inc. v. Am. Airlines, Inc.*, 806 F.2d 722 (7th Cir. 1986) (explaining that defendants have no burden to justify their conduct unless and until plaintiff sustains its initial burden to show that the conduct has anticompetitive effects).

<sup>256</sup> *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 75 (3d Cir. 2010).

<sup>257</sup> E.g., *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (“It is this restraint that must be justified under the Rule of Reason, and [defendant’s] attempt to do so on the basis of the potential public threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.”); *Race Tires Am., supra*, 614 F.3d at 74 (“A restraint cannot be justified solely on the basis of social welfare considerations.”); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005) (“A restraint on competition cannot be justified solely on the basis of social welfare concerns.”); *N.C. State Bd. of Dental Examiners*, 2011-2 Trade Cas. (CCH) ¶ 77,705 (FTC 2011) (“Courts have rejected social welfare and public safety concerns as cognizable justifications for restraints on competition.”), *aff’d*, 717 F.3d 359 (4<sup>th</sup> Cir. 2013), *aff’d*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1101 (2015).

<sup>258</sup> See *NCAA v. Bd. of Regents*, 468 U.S. 85, 104 n.26 (1984) (“There is often no bright line separating per se from rule-of-reason analysis.”).

In fact, all legal analysis is “*per se*” to one degree or another. The *per se* rule says that once we know a certain amount about a practice we can pass judgment on its legality without further inquiry. The difference between a “*per se*” and “rule of reason” standard lies in how much we need to know before we can make that decision. A rational decision maker will collect information beginning with that which is the most relevant and easiest to gather, until he reaches a point at which the marginal cost of acquiring any more information exceeds its marginal return. In this case, the “marginal return” is the increased accuracy of the final decision. If the cost of obtaining certain information is very high, and the chance is small that it will make the final decision more accurate, the rational decision maker will not seek the additional information.

Even in so-called rule of reason cases . . . , the parties will not produce *all* the marginally relevant information. They will produce sufficient information to satisfy some judicially created presumptions—for example—that a defendant with 90% of the market has monopoly power. . . Every inquiry is cut off at some point: the label “*per se*” simply refers to a class of situations where we find it appropriate to cut the inquiry off at a relatively early stage.<sup>259</sup>

(2) The more important intermediate standard is the so-called “quick-look” rule of reason. It applies to certain types of agreements—typically agreements among competitors directly affecting price or output that could be considered *per se* unlawful or that are “inherently suspect” because they are a type of agreement that usually results in anticompetitive effects—that may have significant procompetitive effects. As a result, they receive a more extended examination than under the *per se* standard but a more truncated examination than under the full-blown rule of reason.<sup>260</sup>

(a) Under the quick-look rule-of-reason standard, the challenged agreement is conclusively presumed to have anticompetitive effects—the plaintiff need not prove these—but the court permits the defendants to offer plausible procompetitive justifications for the agreement.

(i) If defendants fail to present plausible procompetitive justifications, the court summarily condemns the agreement as it would under the *per se* rule. In effect, plaintiff’s initial burden is sustained by a conclusive presumption rather than by the need for evidence of the relevant market, market power, or anticompetitive effects.

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<sup>259</sup> Herbert Hovenkamp, *Federal Antitrust Policy* § 5.6b at 335 (5th ed. 2016).

<sup>260</sup> See *N.C. State Bd. of Dental Examiners v. FTC*, 717 F.3d 359, 373 (4<sup>th</sup> Cir. 2013) (“In some instances, an examination short of the rule of reason can be substituted, that is, when a ‘quick look’ indicates the anticompetitive effect of the conduct ‘but procompetitive justifications also exist.’”), *aff’d*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1101 (2015).

(ii) But if the defendants do put forth plausible procompetitive justifications, the court permits the defendants the opportunity to prove them, and a more in-depth analysis is required, up to and potentially including the balancing of procompetitive and anticompetitive effects just as a full-blown rule-of-reason analysis requires.<sup>261</sup>

(b) The quick-look approach is appropriate only when “the great likelihood of anticompetitive effects can be easily ascertained” by a quick look, and “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect.”<sup>262</sup>

(c) An ABA Section of Antitrust Law publication provides a helpful summary of the quick-look rule of reason:

Like the per se rule, quick look analysis presumes competitive harm from the very nature of the challenged practice: the plaintiff does not have to establish proof of market power to make out a prima facie case because anticompetitive effects are either readily apparent or will be presumed from the conduct in question. But unlike the per se approach, proof of the challenged practice, without more, does not result in a determination that the practice is unlawful. Instead, the defendant is permitted to produce evidence of procompetitive benefits. If the defendant fails to offer a compelling procompetitive justification, the practice will be declared illegal. If procompetitive effects can be demonstrated, the inquiry will proceed to a full rule of reason analysis.<sup>263</sup>

(d) The D.C. Circuit, in *Polygram Holding, Inc. v. FTC*, explained the quick-look analysis in a case brought by the FTC as follows:

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<sup>261</sup> See generally *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) (noting “the Supreme Court has applied an abbreviated version of the rule of reason—otherwise known as ‘quick look’ review—to agreements whose anticompetitive effects are easily ascertained. . . . [T]his ‘quick look’ review effectively relieves the plaintiff of its burden of providing a robust market analysis . . . by shifting the inquiry directly to a consideration of the defendant’s procompetitive justifications.”); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (2d Cir. 2011) (“Under a quick look analysis, once a restraint is deemed facially anticompetitive, the burden shifts to its proponent for justification on procompetitive grounds.”); *Cal. v. Safeway, Inc.*, 651 F.3d 1118 (9th Cir. Jul. 2011) (en banc); *Deutscher Tennis Bund v. ATP Tours, Inc.*, 610 F.3d 820, 831 (3d Cir. 2010) (“Under ‘quick look’ analysis, the competitive harm is presumed, and ‘the defendant must promulgate some competitive justification for the restraint.’ ‘If no legitimate justifications are set forth, the presumption of adverse impact prevails and the court condemns the practice without ado.’ . . . ‘If the defendant offers sound procompetitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.’”) (some internal quotation marks omitted).

<sup>262</sup> *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999). See *FTC v. Activis, Inc.*, 133 S.Ct. 2223 (2013) (refusing to apply quick-look rule of reason because an observer with a rudimentary understanding of economics could not conclude that the challenged conduct was anticompetitive without further analysis).

<sup>263</sup> ABA Section of Antitrust Law, Monograph No. 23, *The Rule of Reason* 12 (1999). For an extended discussion of the FTC’s views about the different versions of the rule of reason, see *Realcomp II, Ltd.*, 2009-2 Trade Cas. (CCH) ¶ 76,784 (FTC 2009), *petition for review denied*, 635 F.3d 815 (6<sup>th</sup> Cir. 2011).

First, the Commission must determine whether it is obvious from the nature of the challenged conduct that it will likely harm consumers. If so, then the restraint is deemed “inherently suspect” and unless the defendant comes forward with some plausible (and legally cognizable) competitive justification for the restraint, it is summarily condemned.

If the defendant does offer such an explanation, the Commission “must address the justification” in one of two ways. First the Commission may explain why it can confidently conclude, without adducing evidence, that the restraint very likely harmed consumers. . . . Alternatively, the Commission may provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely. . . . If the Commission succeeds in either way, then the evidentiary burden shifts to the defendant to show that the restraint in fact does not harm consumers or has “procompetitive virtues” that outweigh its burden upon consumers.<sup>264</sup>

(e) Thus unfortunately, there is no “rigid template” for applying quick-look analysis; rather, “[i]t must be tailored to fit the circumstances presented in each case.”<sup>265</sup> Full market analysis under the full-blown rule of reason may or may not become necessary, depending on the depth of analysis necessary to reach a firm conclusion about the restraint’s net effect on competition. In terribly ambiguous language, providing counselors and courts with little guidance, the Supreme Court has explained that “[w]hat is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”<sup>266</sup>

## **E. The Role of Purpose and Intent in Section 1 Cases.**

1. In criminal antitrust cases, anticompetitive intent in undertaking the challenged conduct is an essential element of the crime, but the burden of proof is lenient.

a. In cases to which the per se rule applies, the government need only prove that the defendant knowingly joined the conspiracy; the requisite criminal intent may be inferred from that.<sup>267</sup>

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<sup>264</sup> 416 F.3d 29, 35-36 (D.C. Cir. 2004).

<sup>265</sup> *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 361 (5th Cir. 2008).

<sup>266</sup> *Cal. Dental*, *supra*, 526 U.S. at 781; *see also* Federal Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (“*Collaboration Guidelines*”) § 3.1 (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> (“[R]ule of reason analysis involves a flexible inquiry and varies depending on the nature of the agreement and market circumstances. [I]t focuses on only those factors, and undertakes only the degree of factual inquiry necessary to assess accurately the overall competitive effect of the relevant agreement.”).

<sup>267</sup> *E.g.*, *United States v. Therm-All, Inc.*, 373 F.3d 625 (5th Cir. 2004).



b. In criminal cases to which the rule of reason applies, the government must prove criminal intent by proof that the defendant knew that the probable consequences of the agreement would be to restrain competition.<sup>268</sup> Rarely, however, does the Antitrust Division prosecute conduct analyzed under the rule of reason criminally.

2. In civil antitrust cases, anticompetitive intent is not an essential element of a Section 1 violation (although some decisions, in loose language, suggest otherwise).<sup>269</sup>

a. Nor does an anticompetitive intent or purpose, by itself, result in a violation (again, notwithstanding some loose language in some cases).<sup>270</sup>

b. But neither is a benign or procompetitive intent a defense: “Good intentions will not save a plan otherwise objectionable.”<sup>271</sup> The crucial issue in civil antitrust cases is always the challenged conduct’s actual or likely *effect* on competition (whether presumed or proven), not the reason the conduct was undertaken.<sup>272</sup>

3. Intent, however, often helps predict or determine whether the alleged conduct would have, or has had, anticompetitive effects, and thus intent is very relevant.

## **F. Problematic Types of Agreements Under Section 1.**

### **1. Horizontal price-fixing agreements.**

a. A horizontal price-fixing agreement is any agreement among competitors that directly affects the price they charge for their product or service—“any combination which tampers with price structures.”<sup>273</sup>

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<sup>268</sup> *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

<sup>269</sup> See, e.g., *Coalition for ICANN Transparency, Inc. v. VeriSign*, 567 F.3d 1091, 1090 (9th Cir. 2010) (explaining that “restraint of trade claims under Section 1 do require the showing of a conspiracy whose members intended to restrain trade”); *William O. Gilley Enters. v. Atl. Richfield Co.*, 588 F.3d 659, 669 (9th Cir. 2009) (listing “intent[] to harm or restrain trade or commerce” as an essential element in a § 1 case).

<sup>270</sup> E.g., *United States Gypsum Co.*, *supra*, 438 U.S. at 436 n.13 (stating the “general rule” that “a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect”).

<sup>271</sup> *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372 (1933) (stating that “knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences”); *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993) (explaining that courts often examine defendants’ intent to aid in judging the challenged conduct’s likely effect on competition).

<sup>272</sup> See, e.g., *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 239 F. Supp. 2d 180, 189 (D.R.I. 2003) (explaining that “while motive is a relevant consideration in determining whether concerted actions violate the Sherman Act, the ultimate question is whether the challenged conduct unreasonably restrains trade”), *aff’d*, 373 F.3d 57 (1st Cir. 2004).

<sup>273</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) (also defining a price-fixing agreement as any “combination formed for the purpose or with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity”); see also *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10<sup>th</sup> Cir. 2014) (noting that the

b. The Supreme Court has stated that “[n]o antitrust offense is more pernicious than price fixing.”<sup>274</sup>

c. The definition of price-fixing cuts very broadly. The conspirators need not set or agree to charge a specific or final price.<sup>275</sup> Rather, horizontal price-fixing agreements include agreements among competitors as to:

- (1) Minimum prices;<sup>276</sup>
- (2) Maximum prices;<sup>277</sup>
- (3) Discounts or not to offer discounts;<sup>278</sup>
- (4) Credit terms or not to grant credit;<sup>279</sup>
- (5) Pricing formulae;<sup>280</sup>
- (6) Profit margins;<sup>281</sup>
- (7) Starting prices then subject to negotiation;<sup>282</sup>

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essential elements of a price-fixing agreement claim are (1) existence of a conspiracy (2) with the purpose or effect of raising, depressing, fixing, pegging, or stabilizing prices).

<sup>274</sup> *FTC v. Titor Title Ins. Co.*, 504 U.S. 621, 639 (1992); see also *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1144 (9th Cir. 2003) (“No antitrust violation is more abominated than the agreement to fix prices.”).

<sup>275</sup> E.g., *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 222 (“Nor is it important that the prices . . . were not fixed in the sense that they were uniform and inflexible”; rather, “price fixing” includes “agreements to raise or lower price whatever machinery for price fixing was used”); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 990 (9th Cir. 2000) (“To constitute horizontal price fixing, the agreement among competitors need not involve the ultimate price.”).

<sup>276</sup> E.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

<sup>277</sup> *Ariz. v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982).

<sup>278</sup> *Sugar Inst. v. United States*, 297 U.S. 553 (1936); *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133 (9th Cir. 2003).

<sup>279</sup> *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

<sup>280</sup> *Food & Grocery Bureau v. United States*, 139 F.2d 973 (9th Cir. 1943).

<sup>281</sup> *Id.*

<sup>282</sup> *Plymouth Dealers’ Ass’n v. United States*, 279 F.3d 128 (9th Cir. 1960).

- (8) Fee schedules;<sup>283</sup>
- (9) Jointly negotiating prices with customers;<sup>284</sup>
- (10) Suggested prices;<sup>285</sup>
- (11) Reducing output;<sup>286</sup>
- (12) Purchasing surplus supply to keep it off the market;<sup>287</sup>
- (13) Allocating sales volumes among competitors;<sup>288</sup>

d. The principle that naked horizontal price-fixing agreements are per se unlawful is probably the most well-established of all antitrust principles.<sup>289</sup>

e. As in all Section 1 cases where the per se rule applies, it is the agreement itself that is unlawful.<sup>290</sup> Thus, as a technical matter, it does not matter if the agreement is ever executed, implemented, or successful in affecting prices.<sup>291</sup>

f. The Supreme Court has rejected numerous purported defenses in horizontal price-fixing agreement cases, including:

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<sup>283</sup> *Goldfarb v. Va. State Bar*, *supra*.

<sup>284</sup> *N.Y. v. St. Francis Hosp.*, 94 F. Supp. 2d 399 (S.D.N.Y. 2000).

<sup>285</sup> *Plymouth Dealers' Ass'n*, *supra*.

<sup>286</sup> *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004 (7<sup>th</sup> Cir. 2012); *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2001).

<sup>287</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

<sup>288</sup> *United States v. Andreas*, 216 F.3d 645 (7<sup>th</sup> Cir. 2000).

<sup>289</sup> See, e.g., *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("Price-fixing agreements between two or more competitors . . . fall into the category of arrangements that are *per se* unlawful."); *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 218 (explaining that "for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act"); *Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383 (3d Cir. 2015) ("Horizontal price-fixing among competitors . . . is a classic example of a restraint analyzed under the *per se* standard."); *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) ("Horizontal price-fixing conspiracies traditionally have been, and remain, the 'archetypal example of a *per se* unlawful restraint on trade."); *In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 61 (2d Cir. 2012) ("An agreement between competitors to fix prices, known as a horizontal price-fixing agreement, categorically constitutes an unreasonable restraint, and, accordingly, is unlawful per se.")

<sup>290</sup> E.g., *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991).

<sup>291</sup> *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Socony-Vacuum Oil Co.*, *supra*.

- (1) That defendants did not agree on a specific price;
- (2) That defendants' agreed-on price was a "reasonable" price;
- (3) That defendants were combating "ruinous competition" or "competitive abuses";
- (4) That defendants lacked sufficient power to affect prices;
- (5) That defendants agreed on prices with "good intentions";
- (6) That the price-fixing agreement affected only a small amount of commerce;
- (7) That the defendants lacked the ability to accomplish the agreement's objective;
- (8) That that defendants never implemented the conspiracy or engaged in any overt acts to further or accomplish it; and
- (9) That price competition remained notwithstanding the price-fixing agreement.<sup>292</sup>
- (10) That low prices were generating shoddy products.<sup>293</sup>
- (11) That high prices were necessary to induce new entry into the market.<sup>294</sup>

g. Price-fixing agreements among competing buyers, just as those among competing sellers, are per se unlawful.<sup>295</sup>

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<sup>292</sup> *Socony-Vacuum Oil Co., supra*, 310 U.S. at 220-24 & n.59. In *Socony Vacuum*, the Court summed up as follows: "Whatever economic justifications particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Id.* at 224 n.59.

<sup>293</sup> *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

<sup>294</sup> *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).

<sup>295</sup> *Mandeville Is. Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948); *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 705 (7th Cir. 2011) (explaining that "buyers may also violate §1 by forming what is sometimes known as a 'buyers' cartel'"); *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (Sotomayor, J.) (noting that an agreement among employers fixing employee salaries would be per se unlawful); *All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740, 747 (11th Cir. 1998) ("That price fixing is equally violative of antitrust laws whether it is done by buyers or sellers is . . . undisputed."); *Vogel v. Am. Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (explaining that "buyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se"); *Doe v. Ariz. Hosp. & Healthcare Ass'n*, 2009 WL 1423378 at \*3 (D. Ariz. Mar. 9, 2009) ("Price-fixing agreements among buyers, like those among sellers, are prohibited by the Sherman Act, even where the damage caused by the agreement is to sellers and not consumers.").

h. But for the per se rule to apply, the price-fixing agreement, whether among buyers or sellers, must be “naked.” The rule of reason applies to “ancillary” price-fixing agreements—i.e., those that are part of an integration among competitors achieving efficiencies and that are reasonably necessary for the efficient operation of their integration.<sup>296</sup>

i. Attempted price fixing does not violate Section 1.<sup>297</sup> But, as noted before, if the parties reach an agreement, the violation is complete, regardless of whether they actually implement the agreement.

(1) But the FTC has challenged attempts among competitors to collude, or invitations from one competitor to another to collude on prices, as violations of Section 5 of the FTC Act.<sup>298</sup>

(2) And one court has held that a competitor’s invitation to another competitor to fix prices constituted attempted monopolization in violation of Section 2 of the Sherman Act because the parties would have had monopoly power had the invitation been accepted.<sup>299</sup>

j. The Antitrust Division usually prosecutes naked hard-core price-fixing agreements criminally.<sup>300</sup>

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<sup>296</sup> *Broadcast Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1 (1979) (literal price-fixing agreement tested under rule of reason because it was essential for the product to be offered at all); *United States v. Apple, Inc.*, 791 F.3d 290, 2015 WL 3953243 at \*29 (2d Cir. June 30, 2015) (rule of reason, rather than per se rule, applies to price-fixing agreements “only when the restraint . . . was imposed in connection with some kind of potentially efficient joint venture”); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 334-41 (2d Cir. 2008) (Sotomayor, J., concurring); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001) (noting that “it is a standard form of joint venture for local firms to combine to provide offerings—here, one stop shopping for large buyers—that none could as easily provide by itself, and a joint venture often entails setting a single price for the joint offering”); *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206 (9th Cir. 1992) (explaining that price-fixing agreements are analyzed under the rule of reason when necessary for the service to be available at all); *ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1014-16 (N.D. Cal. 2008); see also *Texaco, Inc. v. Dagher*, 547 U.S. 1, 7 (2006) (holding that joint-venture participants’ agreements on prices for the joint-venture’s products is not per se unlawful because agreement among venturers on the price for the venture’s product is a joint-venture “core activity”).

<sup>297</sup> *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967) (noting that if Congress had intended Section 1 to apply to attempts, it would have done so expressly, as it did with the attempted monopolization violation in § 2 of the Sherman Act).

<sup>298</sup> *Jacob J. Alifraghis*, FTC File No. 141 0036 (FTC Jul. 21, 2014) (proposed consent order); *U-Haul, Int’l, Inc.*, Dkt. No. 149 F.T.C. 1 (2010) (consent order); *Valassis Commc’ns, Inc.*, 141 F.T.C. 247 (2006) (consent order).

<sup>299</sup> *United States v. Am. Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984).

<sup>300</sup> E.g., *United States v. Rose*, 449 F.3d 657 (5th Cir. 2006).

## 2. Agreements among competitors to exchange pricing information.

a. Competitors might exchange or verify their prices with one another in several ways—directly over the telephone, in meetings, on the golf course, at association gatherings and the like, or indirectly through trade association or other price or wage surveys. That they exchange information meets Section 1’s requirement of an agreement.

b. Agreements among sellers to exchange price or wage information among competitors can raise three potential antitrust problems:<sup>301</sup>

(1) *First*, these types of exchanges can be a first step leading to a per se unlawful price-fixing agreement.<sup>302</sup>

(2) *Second*, agreements to exchange price information are plus factors in proving a price-fixing agreement.

(2) *Third*, agreements to exchange price information can constitute an independent violation of Section 1 even absent a price-fixing agreement to the extent that they facilitate or result in oligopolistic, interdependent pricing conduct among competitors and thus result in competitors raising their prices interdependently.<sup>303</sup>

(a) Absent a price-fixing agreement, the rule of reason applies to agreements among competitors to exchange price information because the exchanges can generate procompetitive effects.<sup>304</sup>

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<sup>301</sup> See *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1046 (8th Cir. 2000) (“Price verification communications can violate section 1 in one of two ways. First, an agreement to exchange such communications can constitute an unreasonable restraint of trade under the rule of reason if the anticompetitive effects of the agreement outweigh its beneficial effects. . . . Second, the exchange of such information can be evidence of the existence of an agreement to fix or stabilize prices.”).

<sup>302</sup> See *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86 (1975) (noting that agreements to exchange pricing information are probative of price-fixing agreements); *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (“Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement.”; excellent discussion of buyer agreements to exchange prices); *Morton Salt Co. v. United States*, 235 F.2d 573 (10th Cir. 1956) (noting that price exchanges can lead to agreements fixing prices); *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 624 (E.D. Mich. 2012) (where plaintiff nurses alleged a wage-fixing agreement based on defendant hospitals’ exchanges of wage information, court noted that “[t]he parties agree that . . . a conspiracy among competing hospitals to fix wages . . . would be subject to *per se* treatment”); *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130 (N.D.N.Y. 2010) (holding, in effect, that defendants’ exchange of wage information was sufficient to require a jury to determine whether they agreed to fix the wages of their nurse-employees); *Jung v. Ass’n of Am. Med. Colls.*, 300 F. Supp. 2d 119 (D.D.C. 2004) (explaining that exchanges of pricing information can support an inference of a price-fixing agreement).

<sup>303</sup> See generally *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969).

<sup>304</sup> *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (“The exchange of price data . . . among competitors does not invariably have anti-competitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more rather than less competitive. For this reason, we have held that such exchanges . . . do not constitute a *per se* violation of the Sherman Act.”); *Citizens & S. Nat’l Bank, supra*; *United States v. Giordano*, 261 F.3d 1134, 1143 (11th Cir. 2001) (“Exchange of price information is

(b) Courts examine a number of circumstantial-evidence factors to assess whether an agreement to exchange price information is likely to facilitate interdependent pricing decisions by competitors and thus violate Section 1. This effect is more likely if:

- (i) The relevant market is highly concentrated;
- (ii) The prices exchanged are current or future prices;
- (iii) The prices exchanged are firm- or transaction-specific rather than masked;
- (iv) The prices exchanged are specific prices of identifiable firms rather than some form of aggregated price information such as averages, means, or percentiles;
- (v) The products whose prices are exchanged are homogeneous rather than differentiated; and
- (vi) demand for the products is inelastic.<sup>305</sup>

(c) Plaintiff can prove the requisite effect on competition by direct evidence as well—e.g., subcompetitive wages where employers exchange wage information.<sup>306</sup>

(d) Relating to health-care providers, Statement 6 of the federal agencies' *Statements of Antitrust Enforcement Policy in Health Care*,<sup>307</sup> provides an "antitrust safety zone" for the exchange of price and cost information among competing health-care providers. For safety-zone protection (meaning that neither agency will challenge the exchange except in "extraordinary circumstances"), the exchange must meet four requirements:

- (i) The collection of price or cost information must be managed by an independent third party;
- (ii) The price or cost information must be at least three-months old;
- (iii) At least five parties must participate in the exchange; and

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analyzed under the rule of reason."); *Todd, supra*, 275 F.3d at 198 (explaining that "[t]his exchange of information is not illegal *per se*, but can be found unlawful under a rule of reason analysis").

<sup>305</sup> See *United States Gypsum Co., supra*, 438 U.S. at 441 n.16; *Container Corp., supra*; *Todd, supra* (providing an extensive discussion); see generally Herbert Hovenkamp, *Federal Antitrust Policy* § 5.3 at 233-37 (4th ed. 2011).

<sup>306</sup> *Cason-Merenda, supra*.

<sup>307</sup> Available at <http://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/statements-of-antitrust-enforcement-policy-in-health-care-august-1996.pdf>.

(iv) “[A]ny information disseminated must be sufficiently aggregated such that it would not allow recipients to identify the prices charged by any individual provider.”

(e) These antitrust principles apply equally to exchanges of prices charged by sellers and to exchanges of prices paid by buyers (e.g., employee wages).<sup>308</sup>

3. Horizontal market-allocation agreements and agreements not to compete.

a. Horizontal market-allocation agreements are agreements among actual or potential competitors as to:

- (1) The types of *services* they will and will not offer,
- (2) The *geographic areas* they will and will not serve, or
- (3) The types of *customers* they will and will not serve.

b. In a horizontal-market-allocation agreement, the participants simply agree not to compete against one another, or one agrees not to compete against the other. More generally, any type of agreement among competitors or potential competitors not to compete at all or with respect to any competitive variable raises serious antitrust risk.<sup>309</sup>

c. “Naked” horizontal market-allocation agreements are per se unlawful.<sup>310</sup> The Antitrust Division frequently prosecutes horizontal market-allocation agreements criminally.<sup>311</sup>

d. Market-allocation agreements are even more detrimental to competition than

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<sup>308</sup> For the antitrust ramifications of hospitals’ exchanging information about their nurses’ salaries, see *Cason-Merenda*, *supra*; *Fleischman*, *supra*; Jeff Miles, *The Nursing Shortage, Wage-Information Sharing Among Competing Hospitals, and the Antitrust Laws: The Nurse Wage Antitrust Litigation*, 7 Hous. J. Health Law & Pol’y 305 (2007).

<sup>309</sup> See *United States v. Hillsdale Cmty. Health Ctr.*, No. 15-cv-1231 (E.D. Mich. Oct. 21, 2015) (consent decree) (settling Antitrust Division challenge to agreement between hospitals not to advertise in each other’s markets).

<sup>310</sup> *Palmer v. BRG of Ga.*, 498 U.S. 46 (1990) (per curiam); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728 (8<sup>th</sup> Cir. 2014); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010); *Nitro Distrib., Inc. v. Alitor Corp.*, 565 F.3d 417, 423 (8th Cir. 2009) (“[C]laims of price fixing and customer allocation agreements are among the ‘most elementary’ violations . . . and are generally subject to a *per se* analysis.”); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001) (noting that “it is commonly understood today that *per se* condemnation is limited to ‘naked’ market division agreements, that is, to those that are not part of a larger pro-competitive joint venture”).

<sup>311</sup> E.g., *United States v. Rose*, 449 F.3d 627 (5th Cir. 2006) (criminal prosecution holding that the per se rule applies to agreements allocating customers).



price-fixing agreements because they prevent competition based on all variables, not just price.<sup>312</sup>

e. But as with price-fixing agreements, market-allocation agreements may constitute ancillary restraints and thus be subject to rule-of-reason analysis if reasonably necessary for an integrated venture to achieve its efficiency benefits.<sup>313</sup>

f. Covenants not to compete part of employment arrangements, sales of businesses, leases, and the like are usually ancillary restraints subject to rule-of-reason analysis.<sup>314</sup>

g. A competitor's unsuccessful attempt to allocate markets with a competitor does not violate the Sherman Act, but may violate Section 5 of the FTC Act.<sup>315</sup>

#### 4. Bid-rigging agreements.

a. Bid-rigging agreements are agreements among prospective bidders on contracts as to which will win a given bid. The other bidders typically submit artificially high "complimentary" bids to ensure the bidding procedure looks competitive. Often, the conspirators rotate the winning bid on various contracts among themselves, so that each wins its "fair share" of the contracts, but at supracompetitive prices.<sup>316</sup>

b. The per se rule applies whether those rigging bids are sellers (e.g., road builders bidding on construction contracts) or buyers (e.g., bidders at auctions).

c. Bid-rigging agreements are per se unlawful and almost always prosecuted criminally by the Antitrust Division.<sup>317</sup>

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<sup>312</sup> See *Blue Cross & Blue Shield v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) ("It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating all competition among them.").

<sup>313</sup> See, e.g., *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 345 (3d Cir. 2010) ("It is well-settled that 'ancillary' restraints . . . are less suspicious than 'naked' ones, and that to qualify for per se condemnation, a restraint must be of the naked horizontal type. . . . Ancillary restraints are 'those that are part of a larger endeavor whose success they promote.'"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985); *Rozema v. Marshfield Clinic*, 977 F. Supp. 1362, 1374, 1378 (W.D. Wis. 1997) ("Market allocations that accompany and promote the success of larger endeavors are considered 'ancillary' trade restraints and warrant more in-depth analysis under the Rule of Reason. . . . Market allocations are per se illegal only if they do not facilitate cooperative and productive activity.").

<sup>314</sup> See, e.g., *Eichorn v. AT&T Corp.*, 248 F.3d 131, 144-46 (3d Cir. 2001); cf. *Hu v. Huey*, 325 F.3d 436 (7th Cir. 2009) (upholding a lease restriction prohibiting the lessor from leasing space to competitors of the lessee).

<sup>315</sup> *Drug Testing Compliance Group, LLC*, Dkt. C-4565 (FTC Jan. 21, 2016) (consent order).

<sup>316</sup> See generally *United States v. Reicher*, 983 F.2d 168 (10th Cir. 1992) (explaining that bid rigging is any agreement among competitors by which bids are to be submitted to or withheld from a third party).

<sup>317</sup> See *United States v. Rose*, 449 F.3d 627 (5th Cir. 2006); see also *United States v. Green*, 592 F.3d 1057 (9th Cir. 2010) (where defendant admitted that bid-rigging is a per se violation); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010) (noting that bid-rigging agreements are per se unlawful).

5. Horizontal group boycotts or concerted refusals to deal.

a. A group boycott or concerted refusal to deal (the terms are usually used interchangeably) is an agreement among *competitors* not to deal with another *competitor* or not to deal with customers or suppliers who deal with a competitor.<sup>318</sup> Some courts apply the term more broadly to include any agreement among competitors not to deal with any type of party.

b. Group boycotts are ubiquitous, and their antitrust analysis is not always clear. Early decisions, with little thought or analysis, labeled them as a per se violation.<sup>319</sup> Courts, however, frequently found excuses not to apply a strict per se standard<sup>320</sup> because, so often, they have no effect on competition or there is a significant legitimate justification.

c. Finally, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,<sup>321</sup> the Supreme Court held that for the per se rule to apply, plaintiff must show, at a minimum, that the boycotting parties have market power or access to some trade relationship needed by competitors to compete effectively. Of course, if a plaintiff must prove that the defendants have market power, the conduct is not per se unlawful. Rather, this is an example of a “quasi-per” se standard.

d. Today, most courts apply either a full-blown rule-of-reason analysis,<sup>322</sup> or the truncated quasi-per se approach that requires the plaintiff to prove that defendants have market power but also permits the defendants to offer procompetitive justifications for their agreement not to deal.<sup>323</sup>

e. Even satisfaction of these requirements, in reality, fails to show that the group boycott has a market-wide anticompetitive effect because those engaging in the boycott may

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<sup>318</sup> See, e.g., *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (explaining that a “group boycott in the strongest sense” results where “[a] group of competitors threatens to withhold business from third parties unless those third parties would help them injure their directly competing rivals”); *SD3, LLC v. Black & Decker (U.S.), Inc.*, 801 F.3d 412 (4<sup>th</sup> Cir. 2015) (“Most often, group boycotts involve ‘horizontal agreements among direct competitors’ with the aim of injuring a rival.”).

<sup>319</sup> E.g., *Fed. Maritime Comm’n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968).

<sup>320</sup> See, e.g., *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986).

<sup>321</sup> 472 U.S. 284 (1985).

<sup>322</sup> See, e.g., *Palladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1155 (9<sup>th</sup> Cir. 2003).

<sup>323</sup> E.g., *Tunica Web Adver. v. Tunica Casino Operators Ass’n*, 496 F.3d 403, 414 (5<sup>th</sup> Cir. 2007) (explaining that “to determine the applicability of the *per se* rule . . . , the district court should have analyzed the following factors: (1) whether [defendants] hold a dominant position in the relevant market; (2) whether the [defendants] control access to an element necessary to enable [plaintiff] to compete; and (3) whether there exist plausible arguments concerning pro-competitive effects”). This is almost a full-blown rule-of-reason analysis. But cf. *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162 (2<sup>d</sup> Cir. 2012) (suggesting that some group boycotts are still per se illegal).

compete against themselves or sufficient competitors may remain to ensure that the market is competitive.

f. Courts are particularly reluctant to apply the *per se* standard to concerted refusals to deal by professional associations, sports leagues, standard-setting bodies, joint ventures, and health-care credentialing bodies because their effect on competition is so uncertain and strong justifications for the “boycott” often exist.

g. The rule of reason applies to vertical boycotts—i.e., agreements between parties at different levels in the chain of production or distribution not to deal with one or more of the party’s competitors.<sup>324</sup> Their analysis is similar to that of exclusive-dealing agreements discussed below; the potential concern is the foreclosure effect of the agreement not to deal and thus the possibility that a party to the agreement may obtain or maintain market power.

#### 6. Joint ventures.

a. There is no universally accepted definition of “joint venture.” But in general and for purposes of antitrust analysis, a joint venture might be best described as an agreement resulting in collaboration among separate entities, through partial integration of their businesses or operations, to jointly engage in research and development, production, marketing, sales, or purchasing.

(1) The economic integration resulting from the formation of joint ventures typically generates efficiencies—i.e., the whole becomes greater than the sum of its parts, and the joint venture increases output over what it would otherwise be.

(2) A joint venture, on the spectrum of degree of business integration, is between a cartel (no, or almost no, integration) and a merger (complete business integration).

(3) The FTC and Antitrust Division *Collaboration Guidelines*<sup>325</sup> describe the agencies’ framework for analyzing joint ventures and are an excellent reference source.

b. Both the formation of joint ventures and subsequent agreements among the participants in operating the venture (for example, in marketing its products or services) generally result from agreements subject to Section 1 of the Sherman Act—i.e., the venture’s actions are not usually treated as those of a single entity.<sup>326</sup> The venture’s formation is also an

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<sup>324</sup> *NYNEX, supra*, 525 U.S. at 135 (stating that “precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors”).

<sup>325</sup> Federal Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000), available at [http://www.ftc.gov/systems/files/documents/public\\_statements/300481/00407ftcdojguidelines.pdf](http://www.ftc.gov/systems/files/documents/public_statements/300481/00407ftcdojguidelines.pdf)

<sup>326</sup> *E.g., Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010).

“acquisition” and thus subject to Section 7 of the Clayton Act; it is analyzed as a merger, discussed below in Section V.<sup>327</sup>

c. If the joint venture effectively merges the participants’ businesses (or a particular line of their businesses) into the joint venture so that the participants no longer compete against one another in that line of business, the joint venture’s subsequent decisions about the venture’s business (such as an agreement among the participants on the price for the venture’s products) may be treated as those of a single entity.<sup>328</sup> Indeed, the *Collaboration Guidelines* appear to treat this type of arrangement as a “merger.”<sup>329</sup>

d. Even assuming the venture is not deemed a single entity for antitrust purposes, its decisions, even if resulting from a type of agreement to which the per se rule usually applies, frequently will constitute ancillary restraints subject to rule-of-reason analysis. As noted before, a restraint is ancillary when (1) the parties have substantially integrated their operations through the venture in ways likely to achieve significant efficiencies, and (2) the restraint is reasonably necessary for the efficient operation of the venture.<sup>330</sup>

e. It’s difficult to generalize about the antitrust analysis of joint ventures because they can take so many forms, include so many different types of participants, undertake so many different functions, include so many types of internal agreements, and have so many different effects on competition.

f. Regarding health care, the FTC and Antitrust Division *Statements of Antitrust Enforcement Policy in Health Care*<sup>331</sup> provide significant guidance in analyzing several types of joint ventures frequently created by health-care providers. They discuss (1) hospital joint ventures involving high-tech or expensive equipment (Statement 2); hospital joint ventures involving clinical and other expensive services (Statement 3); joint-purchasing ventures (Statement 7); physician-controlled contracting joint ventures (Statement 8); and provider-controlled contracting networks comprised of other types of providers (Statement 9).

## 7. Vertical price-fixing agreements.

a. A vertical price-fixing (or “resale price-maintenance”) agreement is an agreement between a seller and a buyer that resells the product (e.g., a manufacturer and retailer) that

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<sup>327</sup> For a helpful discussion of joint-venture antitrust analysis, see ABA Section of Antitrust Law, *Joint Ventures: An Antitrust Analysis of Collaborations Among Competitors* (2006).

<sup>328</sup> E.g., *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).

<sup>329</sup> *Collaboration Guidelines* § 1.3.

<sup>330</sup> For discussions, see *American Needle, supra*; *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008); *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003 (N.D. Cal. 2008). See generally *Broadcast Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1 (1979); *Collaboration Guidelines* §§ 1.2, 3.2.

<sup>331</sup> Available at [www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf](http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf).

directly affects the price at which the buyer must resell the product.<sup>332</sup> For example, a manufacturer and retailer may enter into an agreement by which the manufacturer sets the price at which the retailer must resell the product.

b. Vertical price-fixing agreements restrain intrabrand competition, not interbrand competition.

c. The antitrust analysis of vertical price-fixing agreements has a torturous antitrust history. From 1911 until 1937, all vertical price-fixing agreements were per se unlawful.<sup>333</sup> In 1937, Congress passed antitrust-exemption legislation permitting states, if they chose, to allow vertical price-fixing agreements in certain circumstances (so-called “Fair Trade” laws). In 1975, Congress repealed that legislation so that all vertical price-fixing agreements were again per se unlawful. In 1988, the Supreme Court clarified that the per se rule applied only to vertical price-fixing agreements that required retailer adherence to *specific* prices or price levels agreed upon with their supplier.<sup>334</sup> The Court modified the rule again in 1999, holding that the per se rule did not apply to vertical price-fixing agreements establishing *maximum* prices,<sup>335</sup> explicitly overruling a prior decision holding the opposite.<sup>336</sup>

d. Finally, because the effect of vertical price-fixing agreements on competition is uncertain, the Supreme Court, in its 2007 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>337</sup> held that the rule of reason applies to *all* vertical price-fixing agreements. That is the federal antitrust rule today, but it is controversial.

e. There is no in-depth discussion of the rule-of-reason framework for analyzing vertical price-fixing agreements.<sup>338</sup> Because they affect only intrabrand competition, it would seem that they should raise no antitrust problem unless interbrand competition for the product in question is weak or a party to the agreement has significant market power.<sup>339</sup> Even then, efficiencies from the arrangement must be considered.

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<sup>332</sup> *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

<sup>333</sup> *See Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

<sup>334</sup> *Bus. Elecs. Corp.*, *supra*.

<sup>335</sup> *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

<sup>336</sup> *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

<sup>337</sup> 551 U.S. 877 (2007).

<sup>338</sup> *But cf. Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008) (including some discussion); Christine A. Varney, *A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason*, Antitrust, Fall 2009, at 22.

<sup>339</sup> *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418-19 (5<sup>th</sup> Cir. 2010) (“To allege a vertical restraint sufficiently, a plaintiff must plausibly allege the defendant’s market power.”).

f. While the rule of reason applies to vertical price-fixing agreements under the federal antitrust laws, some state attorneys general posit that the per se rule continues to apply under their state antitrust laws.<sup>340</sup>

#### 8. Vertical market-allocation agreements.

a. A vertical market-allocation agreement results when a seller and reselling buyer (e.g., a manufacturer and retailer) agree to limitations about the geographic area in which the buyer can resell the seller's product, the location from which it can resell the product, the types of customers to which it can resell the product, or the products that it can resell. For example, a manufacturer and its retailer might agree that the retailer can sell the manufacturer's product from only one location, or a manufacturer may assign different exclusive territories to its retailers and agree not to permit other retailers in that territory to sell the product (often called "exclusive distributorships").

(1) Vertical market allocation agreements, just as vertical price-fixing agreements, restrain *intra*brand competition but may facilitate *inter*brand competition and have other significant procompetitive effects—e.g., preventing discount retailers from free-riding off the costly services provided by full-service retailers selling the same branded products.<sup>341</sup> Their effects are assessed using the rule of reason, and they raise antitrust issues only if the seller or buyer has market power in the *inter*brand market so that competition in the *inter*brand market is restrained or when *inter*brand competition otherwise is weak, and thus *intra*brand competition is necessary for a competitive market.<sup>342</sup>

#### 9. Tying agreements.

a. A tying agreement is a vertical agreement between a seller and buyer in which the seller conditions the sale of one product (the "tying" product) on the buyer's agreement to purchase a second product (the "tied" product) from the seller or from a source designated by the seller.<sup>343</sup>

b. Tying agreements affect *inter*brand competition in the market for the tied product.

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<sup>340</sup> See *N.Y. v. Tempur-Pedic Int'l, Inc.*, 2011-1 Trade Cas. (CCH) ¶ 77,311 (N.Y. Sup. Ct. 2011); *Cal. v. Bioelements, Inc.*, 2011-1 Trade Cas. (CCH) ¶ 77,306 (Cal. Sup. Ct. 2011) (consent order).

<sup>341</sup> See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

<sup>342</sup> See, e.g., *Generac Corp. v. Caterpillar, Inc.*, 172 F.3d 971 (7<sup>th</sup> Cir. 1999); *Ajir v. Exxon Corp.*, 185 F.3d 865 (9<sup>th</sup> Cir. 1999) (Table) (unpublished opinion reprinted at 1999-2 Trade Cas. (CCH) ¶ 72,609).

<sup>343</sup> E.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992); *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676 (4<sup>th</sup> Cir. 2016); *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 267 (6<sup>th</sup> Cir. 2015) ("In a tying arrangement, a seller requires buyers of a product over which it has market power—the 'tying product'—also to purchase a product over which it seeks to gain market power—the 'tied product.'"); *Brantley v. NBC Universal, Inc.*, 649 F.3d 1078 (9<sup>th</sup> Cir. 2011).

c. The requisite concerted action for purposes of Section 1 is the agreement between the buyer and seller by which the buyer agrees to purchase the tied product as a condition of obtaining the tying product.<sup>344</sup>

d. The competitive concern with tying agreements is their ability to foreclose competitors in the market for the tied product. If the foreclosure is sufficiently substantial, the seller may obtain market power in that market.<sup>345</sup>

e. The framework for analyzing tying arrangements is not crystal clear and depends to some extent on the court. Many courts refer to tying agreements, incorrectly, as per se violations. But conventional tying analysis provides that tying arrangements are unlawful, without proof of actual adverse effects on competition (a “quasi-per se” standard), if:

(1) The arrangement involves the sale of two separate distinct products or services—i.e., there are separate demands for the tying and tied products so they could be offered separately efficiently;<sup>346</sup>

(2) The seller has significant market power in the market for the tying product. This can be inferred from a substantial market share,<sup>347</sup> but not from a market share less than 30%.<sup>348</sup> The requisite market power cannot be inferred merely because the tying product is patented.<sup>349</sup> The market-power requirement usually mandates that plaintiff define the relevant market for the tying product;<sup>350</sup>

(3) The seller actually coerces the buyer to purchase the tied product as a condition of obtaining the tying product.<sup>351</sup> Strong persuasion, encouragement, or cajolery to the point of obnoxiousness is not sufficient,<sup>352</sup> and no tying arrangement exists where the seller sells two products together but also offers them individually.<sup>353</sup> But pricing the products so that

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<sup>344</sup> *Systemcare, Inc. v. Wang Lab. Corp.*, 117 F.3d 1137 (10th Cir. 1997) (en banc).

<sup>345</sup> See, e.g., *Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 971 (9th Cir. 2008) (“The injury is reduced competition in the market for the tied product.”); *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312 (7th Cir. 2006).

<sup>346</sup> E.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Rik-Mik Enters.*, *supra*.

<sup>347</sup> *Eastman Kodak*, *supra*.

<sup>348</sup> *Jefferson Parish*, *supra*.

<sup>349</sup> *Ill. Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

<sup>350</sup> E.g., *Surgical Ctr. v. Hosp. Servs. Dist.*, 309 F.3d 836 (5th Cir. 2002).

<sup>351</sup> E.g., *Palladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1159-60 (9th Cir. 2003) (“Essential to . . . a tying claim is proof that the seller *coerced* a buyer to purchase the tied product.”) (emphasis in original).

<sup>352</sup> E.g., *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186 (2d Cir. 1992).

<sup>353</sup> *Jefferson Parish*, *supra*.

purchasing them together is the only viable economic option for the purchaser (e.g., “bundled discounts”) may be sufficient to prove coercion;<sup>354</sup> and

(4) The tying arrangement affects a “not insubstantial” volume of interstate commerce in the tied-product.<sup>355</sup>

f. Some courts apply additional requirements and permit the defendant to raise procompetitive justifications:

(1) Where the tying-product seller designates a source other than itself from which the buyer must purchase the tied product, for the arrangement to violate Section 1, almost all courts require that the seller of the tying product have a “direct economic interest” in the sale of the tied product—e.g., share in the revenues or profits from the sale of the tied product by the designated source.<sup>356</sup>

(2) More recent tying decisions also suggest or hold that plaintiff must show some actual adverse effect on competition in the market for the tied product—for example, evidence that other competitors exist and were actually foreclosed from the tied-product market by the arrangement; or that, absent the tie, the buyer would have purchased the tied product from someone else. If the buyer would not have purchased the tied product at all, there is no foreclosure and no adverse effect on competition in the tied-product market.<sup>357</sup> Older decisions suggest or hold otherwise.<sup>358</sup>

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<sup>354</sup> E.g., *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483 (8th Cir. 1992); see also *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264 (6<sup>th</sup> Cir. 2015) (discussing circumstances under which bundled discounts constitute coercion for a tying claim); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008) (remanding case to district court for determination whether defendant’s bundled discounts constituted coercion).

<sup>355</sup> E.g. *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969); see generally *DSM Desotech, Inc. v. 3D Sys. Corp.*, 749 F.3d 1332 (Fed. Cir. 2014) (listing the elements).

<sup>356</sup> E.g., *Reifert*, *supra*; *Abraham v. Intermountain Health Care, Inc.*, 461 F.3d 1249 (10th Cir. 2006).

<sup>357</sup> E.g., *Jefferson Parish*, *supra*, 466 U.S. at 17 (“[W]hen a purchaser is ‘forced’ to buy a product he would not have otherwise bought from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would have otherwise been available to other sellers has been foreclosed); *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192 (9<sup>th</sup> Cir. 2012) (explaining that plaintiff failed to state a claim because he failed to allege any foreclosure in the tied-product market); *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1089 (9<sup>th</sup> Cir. 2009) (“Zero foreclosure exists where the tied product is completely unwanted by the buyer. . . . In such a case, there is no unlawful tying arrangement because there is no adverse effect on competition in the tied product market.”); *Reifert*, *supra*, 450 F.3d at 318 (“Forcing a buyer to purchase a product he otherwise would not have purchased is insufficient to establish the foreclosure of competition [and thus a tying violation.]”); *U.S. Philips Corp. v. Int’l Trade Comm’n*, 424 F.3d 1179, 1193-94 (Fed. Cir. 2005) (explaining that “to show that a tying arrangement is per se unlawful, a complaining party must demonstrate that it . . . has an anticompetitive effect in the market for the second product”).

<sup>358</sup> E.g., *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276 (4th Cir. 1987).



(3) Some courts have permitted defendants to assert legitimate business justifications for the tying arrangement.<sup>359</sup>

g. If plaintiff fails to meet the requirements above, it can still prove a violation through the usual full-blown rule-of-reason analysis by proving an actual unreasonable effect on competition in the tied-product market.<sup>360</sup> This would require the plaintiff to define the relevant market for the tied product.

h. It's often said that tying arrangements are per se unlawful. As the above indicates, they are not.<sup>361</sup>

i. A variant of tying is "full-line forcing," under which a manufacturer requires its distributors to purchase its full line of products as a condition to purchasing its more popular products. Full-line forcing arrangements are usually analyzed under the rule of reason.<sup>362</sup>

#### 10. Exclusive-dealing agreements.

a. Exclusive-dealing agreements are vertical agreements between a buyer and seller by which the buyer agrees to purchase all its needs of a product or service from the seller and not from the seller's competitors (a "requirements contract"), or the seller agrees with a buyer to sell its product or service only to the buyer and not to the buyer's competitors.<sup>363</sup> They are but one example of a broader genre of exclusionary agreements between a buyer and seller that have the effect of foreclosing competitors of one or the other from buying or selling.

b. Exclusive-dealing agreements can be express or de facto—i.e., the contract may be exclusive in fact, without an express exclusivity provision in the agreement itself, where, the parties deal on an exclusive basis as a factual matter.<sup>364</sup>

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<sup>359</sup> E.g., *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 271 (6<sup>th</sup> Cir. 2015) ("the defendant is still permitted to argue as a sort of affirmative defense that its tying arrangement has procompetitive effects, or alternatively, has a valid business justification"); *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811 (6<sup>th</sup> Cir. 1997); *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961).

<sup>360</sup> E.g., *Brantley, supra*; *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494 (3d Cir. 1998).

<sup>361</sup> See generally *Sheridan v. Marathon Petrol. Co.*, 530 F.3d 590, 594 (7<sup>th</sup> Cir. 2008) ("Since the normal per se rule dispenses with proof of market power, . . . [courts] describe[] tying arrangements as 'quasi' per se illegal.").

<sup>362</sup> E.g., *S. Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869 (11<sup>th</sup> Cir. 1998); *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290 (10<sup>th</sup> Cir. 1989).

<sup>363</sup> See generally *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012) ("An exclusive dealing arrangement is an agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time."); *Allied Orthopedic Appliances, Inc. v. Tyco Health Group, L.P.*, 592 F.3d 991 (9<sup>th</sup> Cir. 2010).

<sup>364</sup> E.g., *E.g., Tampa Elec., supra*; *ZF Meritor, LLC, supra*, 696 F.3d at 270 ("[T]he law is clear that an express exclusivity requirement is not necessary because *de facto* exclusive dealing may be unlawful.");

c. A variant of exclusive contracting is “selective contracting,” under which a firm contracts to sell or buy with some, but not all, parties wishing to contract with it. This is a common arrangement in relationships between health insurers and health-care providers such as hospitals and physicians, where a health plan might contract with some, but not all, providers wishing to provide services to the health plan’s members.<sup>365</sup>

d. As with tying agreements, exclusive-dealing agreements normally, but not always, affect interbrand competition. The potential antitrust concern from them is the same as from tying agreements—foreclosure of the contract beneficiary’s competitors from the market. For example, a health insurer might contract with only a single hospital to treat its members, agreeing not to enter into contracts with that hospital’s competitors. The beneficiary-hospital’s competitors are “foreclosed” from the percentage of hospital business accounted for by the health insurer’s members. Or a hospital might contract with a health insurer to treat its subscribers but agree not to contract with other health plans. The other health plans are thus “foreclosed” from that hospital’s services, which they may need to compete effectively for members.

e. If a sufficient percentage of buyers or sellers are foreclosed from a sufficient percentage of the market for a sufficient period of time, and if the arrangement deters or precludes new entry, the contract beneficiary might obtain or maintain market power by effectively excluding its competitors from the market.<sup>366</sup>

f. Because exclusive-dealing agreements can have procompetitive as well as anticompetitive effects, rule-of-reason analysis always applies, and efficiencies from the contract must be considered.<sup>367</sup>

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*Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1058 (8th Cir. 2000) (“Section 1 claims that allege only de facto exclusive dealing may be viable”); *White & White, Inc. v. Am. Hosp. Supply Corp.*, 540 F. Supp. 951 (W.D. Mich. 1982), *rev’d on other grounds*, 723 F.2d 495 (6th Cir. 1983).

<sup>365</sup> See, e.g., *Abraham v. Intermountain Health Care, Inc.*, 461 F.3d 1249 (10th Cir. 2006); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57 (1st Cir. 2004).

<sup>366</sup> See, e.g., *ZF Meritor, supra*, 696 F.3d at 286 (“The share of the market foreclosed is important because, for the contract to have an adverse effect on competition, the opportunities for other[s] . . . to enter or remain in that market must be significantly limited.”) (internal quotation marks omitted); *Stop & Shop Supermarket Co., supra*, 373 F.3d at 66 (“If an exclusive dealing contract cuts off stores like [plaintiff] from an unduly large percentage of the available market for its goods, it and others like it may cease to provide [the relevant product]. And if this led or was likely to lead to a shortage of competing [sellers] (and new entry was difficult), the few remaining existing competitors might then be able to conspire or otherwise misbehave without being disciplined by competition.”); *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass’n*, 357 F.3d 1, 8 (1st Cir. 2004) (explaining that “at a minimum, substantial foreclosure is essential”); *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997); *McWane, Inc.*, 2014 WL 556261 at \*19 (FTC 2014) (“exclusive dealing can be harmful when it enables a firm to acquire or maintain market power by impairing the ability of rivals to grow into effective competitors that might erode the firm’s dominant position”); see generally Jonathan M. Jacobson, *Exclusive Dealing, “Foreclosure,” and Consumer Harm*, 70 Antitrust L.J. 311 (2002) (excellent discussion).

<sup>367</sup> See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 43-44 (1984) (O’Connor, J., concurring); *Tampa Elec., supra*; *McWane, Inc. v. FTC*, 783 F.3d 814, 827 (11<sup>th</sup> Cir. 2015) (noting that “exclusive dealing arrangements

(1) Plaintiff must usually first define the relevant market.<sup>368</sup> The relevant market is usually the market in which foreclosure occurs.<sup>369</sup>

g. In assessing an exclusive dealing agreement's effect on competition, courts consider a number of factors, the most important of which are:

(1) The percentage of the market foreclosed by the contract.

(a) The "foreclosure percentage" is, by far, is the most important variable.<sup>370</sup>

(b) Most courts require proof of substantial market foreclosure as a "threshold" requirement to quickly weed out obviously unmeritorious claims—typically at least 30% or 40% of the market, although this is only a rough guide.<sup>371</sup> An important consideration, in addition to the percentage of the market foreclosed, is the percentage of other competing

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are 'reviewed under the rule of reason'"); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012) ("Due to the potentially procompetitive benefits of exclusive dealing arrangements, their legality is judged under the rule of reason."); *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 123 (1st Cir. 2011) ("Because vertical exclusive dealing agreements 'can achieve legitimate economic benefits (reduced cost, stable long-term supply, predictable prices), no presumption against such agreements exists today."); *Allied Appliances, Inc. v. Tyco Health Group, L.P.*, 592 F.3d 991 (9th Cir. 2010); *E. Food Servs.*, *supra*, 357 F.3d at 8 (explaining that "it is widely recognized that in many circumstances [exclusive contracts] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like"); *Imaging Ctr., Inc. v. W. Md. Health Sys., Inc.*, 158 Fed. App'x 413 (4th Cir. 2005); *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661 (7th Cir. 2004).

<sup>368</sup> *Tampa Elec.*, *supra*; *Jefferson Parish*, *supra*; *Surgical Care Ctr. v. Hosp. Serv. Dist.*, 309 F.3d 836 (5th Cir. 2002).

<sup>369</sup> *Stop & Shop Supermarket Co.*, *supra*, 373 F.3d at 67; *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494 (3d Cir. 1998).

<sup>370</sup> *ZF Meritor*, *supra*, 696 F.3d at 271 ("The legality of an exclusive arrangement depends on whether it will foreclose competition in such a substantial share of the market so as to adversely affect competition."); *Allied Orthopedic Appliances*, *supra* (noting that under rule-reason analysis, exclusive-dealing agreements violate § 1 only if they foreclose competition in a substantial share of the relevant market).

<sup>371</sup> *E.g.*, *McWane, Inc. v. FTC*, 783 F.3d 814, 837 (11th Cir. 2015) ("Traditionally a foreclosure percentage of at least 40% has been a threshold for liability in exclusive dealing cases. . . . However, some courts have found that a lesser percentage of foreclosure is required when the defendant is a monopolist."); *ZF Meritor*, *supra* (noting that the Third Circuit had previously suggested that a 40 to 50% foreclosure percentage was necessary); *Sterling Merch.*, *supra*; (foreclosure of 30% to 40% necessary); *Theme Promotions, Inc. v. News Am. Mktg. Fsi*, 539 F.3d 1046, 1054 (9th Cir. 2008) (suggesting that 40%-70% foreclosure may be sufficient); *Stop & Shop Supermarket Co.*, *supra*, 373 F.3d at 68 ("For exclusive dealing, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent."); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589 (1st Cir. 1993). As a general rule, foreclosure of less than 30% of the market should not warrant serious antitrust concern.

sellers foreclosed by the arrangement. But the percentage of foreclosure is only a first step—a threshold requirement or screen.<sup>372</sup>

(2) The duration of the contract.<sup>373</sup>

(a) All else equal, the longer the term of the exclusive arrangement, the more adverse its effect on competition is likely to be.

(b) But the actual duration of a contract with a long nominal term may be short if the contract can be terminated on short notice without cause<sup>374</sup>—e.g., a 20-year exclusive contract that either party may cancel on 30 days’ notice.

(c) On the other hand, the nominal term of the contract can understate its actual duration, e.g., where a party has a “strong economic incentive” to extend the exclusive relationship.<sup>375</sup>

(d) In general, an exclusive contract of one or two years, depending on other factors, should usually not warrant concern.<sup>376</sup>

(e) There is a trade-off between the foreclosure percentage and the contract’s duration: the greater the degree of foreclosure, the shorter the duration of the contract should be and vice versa.

(3) The market power of contract beneficiary. The greater the contract beneficiary’s market power, the greater the anticompetitive effect from the exclusive contract is likely to be.<sup>377</sup>

(4) Whether the contract beneficiary has exclusive contracts with other firms in the market. The more exclusive arrangements a firm has, the greater the likelihood of

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<sup>372</sup> E.g., *McWane*, *supra*, 783 F.3d at 835 (“But foreclosure is usually no longer sufficient by itself; rather, it ‘serves a useful screening function’ as a proxy for anticompetitive harm. . . . Thus, foreclosure is one of several factors we now examine in determining whether the conduct harmed competition.”).

<sup>373</sup> E.g., *ZF Meritor*, *supra*, 696 F.3d at 286-87.

<sup>374</sup> E.g., *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997) (explaining that “the short duration and easy terminability of these agreements negate substantially their potential to foreclose competition”).

<sup>375</sup> See *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 194 (3d Cir. 2005).

<sup>376</sup> E.g., *Sterling Merch.*, *supra*, 656 F.3d at 123 (upholding exclusive contracts of 1 and 2 year durations and explaining that “[s]hort contract terms and low switching costs generally allay most fears of injury to competition”); *Balaklaw v. Lovell*, 14 F.3d 793 (2d Cir. 1994); *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 395 (7th Cir. 1984) (“Exclusive-dealing contracts terminable in less than a year are presumptively lawful.”).

<sup>377</sup> *ZF Meritor*, *supra*, 696 F.3d at 284 (“[I]f the defendant occupies a dominant position in the market, its exclusive dealing arrangements invariably have the power to exclude rivals.”); *McWane*, *supra* (noting less tolerance for exclusive contracts when the contract beneficiary has monopoly power).

anticompetitive effects because the greater the degree of foreclosure. But courts disagree about whether a party's exclusive contracts should be aggregated in assessing the effect of an exclusive contract on competition. The more logical view is that they should.

(5) The incentives of the parties to enter into an exclusive contract. Absent coercion or a payment of some type, a party lacks incentive to participate in an exclusive contract that will confer market power on the other party unless the contract creates efficiencies<sup>378</sup> or unless the other party pays for exclusivity.

(6) A hodge-podge of other factors, including (a) level of relevant-market concentration, (b) level of entry barriers into the market (one of which might be the exclusive contract), (c) whether competitors of the contract beneficiary also have exclusive contracts, (d) whether the contract beneficiary's competitors have other channels of distribution through which they can distribute their product or service, (e) whether other parties were able to compete for the exclusive contract, (f) reasons for the exclusive arrangement, and (g) the party initiating the exclusive arrangement.<sup>379</sup>

(7) Efficiencies from the exclusive arrangement—Efficiencies from the contract must be balanced against any anticompetitive effects. Efficiencies from exclusive-dealing agreements can include ensuring a stable source or inputs or customers, reduced search and transaction costs, engendering loyalty, and ensuring stable prices over time.<sup>380</sup>

h. Typically, a party's merely replacing one exclusive contractor with another raises no antitrust concern because it does not reduce the degree of competition.<sup>381</sup>

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<sup>378</sup> *E.g., Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004) (“Why would these entities shoot themselves in the feet by signing . . . or favoring . . . exclusive contracts that entrench [their supplier] as a monopolist that then can apply the squeeze?”)

<sup>379</sup> *See generally McWane, Inc.*, 2014 WL 556261 (FTC 2014) (listing relevant factors).

<sup>380</sup> *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010) (noting that “‘it is widely recognized that in many circumstances [exclusive-dealing arrangements] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like’”).

*See generally ZF Meritor, supra*, 696 F.3d at 271:

There is no set formula for evaluating the legality of an exclusive dealing agreement, but modern antitrust law generally requires a showing of significant market power by the defendant . . . , substantial foreclosure . . . , contracts of sufficient duration to prevent meaningful competition by rivals . . . , and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects . . . . Courts will also consider whether there is evidence that the dominant firm engaged in coercive behavior . . . , and the ability of customers to terminate the agreements . . . . The use of exclusive dealing by competitors of the defendant is also considered.

<sup>381</sup> *E.g., NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007) (en banc). Other helpful exclusive-contract decisions include *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485 (2d Cir. 2004); *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717 (7th Cir. 2004); *Morales-Villalobos v. Garcia-Llorens*, 316 F.3d 51 (1st Cir. 2003); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101 (2d Cir. 2002); *Apani Sw., Inc. v. Coca-Cola Enters.*, 300 F.3d 620 (5th Cir. 2002); *United States v. Microsoft, Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam); *Minn. Ass’n of Nurse*

i. Importantly, the foreclosure percentage is only the starting point in the analysis. The ultimate question is whether the agreement results in the contract beneficiary's obtaining or maintaining market power with adverse effects that outweigh any beneficial efficiency effects.<sup>382</sup>

## V. SECTION 2 OF THE SHERMAN ACT.

**A. Text of the Statute:** “Every person who shall *monopolize, attempt to monopolize, or combine or conspire* with any other person or persons, *to monopolize* any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony.”<sup>383</sup> Thus, Section 2 encompasses three distinct violations: (1) monopolization, (2) attempted monopolization, (3) and conspiracies to monopolize.

**B. Single-Firm Violations**—Monopolization and attempted monopolization violations require no agreement as Section 1 violations do.<sup>384</sup> They are “single-firm” violations.

**C. Market Power Plus Exclusionary Conduct**—In general, Section 2's monopolization and attempted monopolization provisions apply to the “exclusionary” or “predatory” conduct of firms that already have substantial market power.<sup>385</sup>

**D. Monopsonization**—Monopsonization is the mirror image of monopolization, but on the buyer side.<sup>386</sup> “Monopsonistic practices by buyers are included within the practices prohibited by the Sherman Act.”<sup>387</sup> Monopsonization results when a firm with a substantial market share as

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*Anesthetists v. Unity Hosp.*, 208 F.3d 655 (8th Cir. 2000); *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74 (2d Cir. 1999); *Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42 (7th Cir. 1996).

<sup>382</sup> *E.g., Kolon Indus. v. E.I DuPont De Nemours & Co.*, 748 F.3d 160, 175 (4<sup>th</sup> Cir. 2014) (“Once a plaintiff has demonstrated substantial foreclosure, it must then also demonstrate that he conduct had ‘a negative impact on competition in the market as a whole.’”).

<sup>383</sup> 15 U.S.C. § 2 (emphasis added).

<sup>384</sup> *E.g., Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454 (1993) (explaining that “while § 1 . . . forbids contracts or conspiracies . . ., § 2 addresses the actions of single firms that monopolize or attempt to monopolize”).

<sup>385</sup> *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) (explaining that Section 2 applies when “a defendant’s possession of substantial power, combined with his exclusionary or anticompetitive behavior, threatens to defeat or forestall the corrective forces of competition and thereby sustain or extend the defendant’s agglomeration of power”).

<sup>386</sup> *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) (“Monopsony power is market power on the buy side of the market. . . . As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a ‘buyers’ monopoly.’”).

<sup>387</sup> *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008); *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2002).

a buyer engages in predatory or exclusionary conduct with respect to other actual or potential buyers. There are few monopsonization decisions, and the law is not well-developed.<sup>388</sup>

**E. Monopolization and Attempted Monopolization by Non-Competitors**—In general, a firm is unable, as a matter of law, to monopolize or attempt to monopolize (or monopsonize) a relevant market in which it is not a competitor.<sup>389</sup>

**F. Monopolization**—The essential elements: (1) monopoly power; and (2) willful acquisition or maintenance of that power as distinguished from growth resulting from a superior product, business acumen, or historic accident.<sup>390</sup> This means, in essence, *monopoly power* plus *predatory or exclusionary conduct* to obtain, maintain, or increase that power.<sup>391</sup> The essential elements are the same for monopsonization claims against firms with substantial market power as purchasers.<sup>392</sup>

1. Monopoly power.

a. Legal definition—“the power to control prices or exclude competition.”<sup>393</sup> This definition, however, is both redundant and overinclusive because a firm cannot control prices

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<sup>388</sup> E.g., *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705 (E.D. Tenn. 2011) (noting that § 2 covers monopsonization, attempted monopsonization, and conspiracies to monopsonize, as well as seller-side violations; noting that a 40% market share is sufficient to establish monopsony power).

<sup>389</sup> E.g., *Name.space, Inc. v. Interet Corp. for Assigned Names & Numbers*, 795 F.3d 1124 (9<sup>th</sup> Cir. 2015); *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass’n*, 776 F.3d 321 (5<sup>th</sup> Cir. 2015); *Lucas v. Citizens Commc’ns Co.*, 244 Fed. App’x 774 (9<sup>th</sup> Cir. 2007) (per curiam); *Spanish Broad. Sys. v. Clear Channel Commc’ns, Inc.*, 376 F.3d 1065 (11<sup>th</sup> Cir. 2004); *RxUSA Wholesale, Inc. v. Alcon Labs.*, 661 F. Supp. 2d 218 (E.D.N.Y. 2009).

<sup>390</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); see also *New York v. Actavis plc*, 787 F.3d 638 (2d Cir. 2015); *McWane, Inc. v. FTC*, 783 F.3d 814 (11<sup>th</sup> Cir. 2015); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114 (10<sup>th</sup> Cir. 2014) (citing elements); *Loren Data Corp. v. GXS, Inc.*, 501 Fed. App’x 275 (4<sup>th</sup> Cir. 2012); *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435 (4<sup>th</sup> Cir. 2011); *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297 (3d Cir. 2007); *Heerwagen v. Clear Channel Commc’ns*, 435 F.3d 219 (2d Cir. 2006).

<sup>391</sup> E.g., *McWane, Inc.*, 2014 WL 556261 (FTC 2014) (“the Commission must first determine whether [defendant] has monopoly power in a relevant market, and, if it does, whether [defendant] acted to maintain its monopoly power through anticompetitive conduct”); *A.I.B. Express, Inc. v. FedEx Corp.*, 358 F. Supp. 2d 239, 249 (S.D.N.Y. 2004) (“The ‘willful acquisition or maintenance’ of monopoly power refers to anticompetitive conduct.”).

<sup>392</sup> *Allen v. Dairy Farmers*, 2014-1 Trade Cas. (CCH) ¶ 78,807 (D. Vt. 2014); *Steward Health Care Sys., LLC v. Blue Cross & Blue Shield*, 2014-1 Trade Cas. (CCH) ¶ 78,685 (D.R.I. 2014) (“Logically, the same elements apply to a claim for illegal monopsonization [as to monopolization].”); *White Mule Co. v. ATC Leasing Co.*, 540 F. Supp. 2d 869 (N.D. Ohio 2008).

<sup>393</sup> E.g., *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); see also *McWane, Inc. v. FTC*, 783 F.3d 814 (11<sup>th</sup> Cir. 2015) (same); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114 (10<sup>th</sup> Cir. 2014) (“The parties agree that ‘monopoly power’ involves two aspects: the power to control prices and the power to exclude competition.”); *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11<sup>th</sup> Cir. 2004).

without the ability to exclude competition, but the ability to exclude competition, per se, is not sufficient to provide a firm with monopoly power.<sup>394</sup>

b. Monopoly power is simply a substantial degree of market power.<sup>395</sup> There is no bright dividing line between “market power” and “monopoly power.” In law, the difference depends on the size of the defendant’s market share: “monopoly power” requires a larger market share than “market power.” Economists, however, use the terms interchangeably.

c. As in proving market power in a Section 1 case, plaintiffs can prove monopoly power either directly or circumstantially.<sup>396</sup> Typically, plaintiff must define the relevant market,<sup>397</sup> at least when attempting to prove monopoly power based on circumstantial evidence.

(1) Direct evidence—Plaintiff must prove supracompetitive prices and restricted output.<sup>398</sup> Courts disagree on whether plaintiff must define the relevant market when proving monopoly power by direct evidence.<sup>399</sup>

(2) Circumstantial evidence—Plaintiff must prove (1) the relevant market; (2) that defendant has a dominant, monopoly-level share of that market, and (3) existence of significant entry and expansion barriers.<sup>400</sup>

(a) How large a market share is sufficient? The classic (and probably still valid) benchmarks come from *United States v. Aluminum Co. of America*: “[Ninety percent] is

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<sup>394</sup> See *Sheridan v. Marathon Petrol. Co.*, 530 F.3d 590, 594 (7th Cir. 2008), for a better definition: “Monopoly power . . . is a seller’s ability to charge a price above the competitive level (roughly speaking, above cost, including the cost of capital) without losing so many sales to existing competitors or new entrants as to make the price increase unprofitable.” (emphasis in original). Note, however, that this is also the definition of market power.

<sup>395</sup> E.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) (“Monopoly power under § 2 requires . . . something greater than market power under § 1.”); *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951 (10th Cir. 1990) (explaining that market power and monopoly power differ only in degree).

<sup>396</sup> E.g., *Heerwagen v. Clear Channel Commc’ns*, 435 F.3d 219 (2d Cir. 2006); *Harrison Aire, Inc. v. Aerostar Int’l, Inc.*, 423 F.3d 374 (3d Cir. 2005).

<sup>397</sup> E.g., *IGT v. Alliance Gaming Corp.*, 702 F.3d 1338, 1344 (Fed. Cir. 2012) (“As a threshold issue in any monopolization claim, the court must identify the relevant market.”); *Chapman v. N.Y. State Div. for Youth*, 546 F.3d 230 (2d Cir. 2008).

<sup>398</sup> E.g., *Broadcom, supra*, 501 F.3d at 307; *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1999).

<sup>399</sup> Compare *Broadcom, supra*, 501 F.3d at 307 n.3 (stating that “direct proof of monopoly power does not require a definition of the relevant market”) with *Heerwagen, supra*, 435 F.3d at 229 (explaining that “plaintiff cannot escape proving her claims with reference to a particular market even if she intends to proffer direct evidence of controlling prices or excluding competition”).

<sup>400</sup> See *HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 547 (8th Cir. 2007) (“To establish that a defendant possesses the requisite market power required for monopolization liability, a plaintiff must establish that the defendant has a dominant position in a well-defined relevant market.”); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam).



enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.”<sup>401</sup> The general rule today is that, all else being equal, a fact finder may infer monopoly power if the defendant’s market share is 60% or higher.<sup>402</sup>

(b) But market share, per se, is not itself determinative of monopoly power because other variables affect the ability of firms to exercise monopoly power—particularly the level of entry and expansion barriers.<sup>403</sup>

2. “Predatory,” “unreasonably exclusionary,” or “anticompetitive” conduct.

a. Monopoly or monopoly power, by itself, is not unlawful.<sup>404</sup>

b. Accordingly, in addition to monopoly power, a plaintiff must prove that the defendant acquired or maintained its monopoly power by competitively inappropriate conduct—referred to in antitrust jargon as “predatory,” “unreasonably exclusionary,” or “anticompetitive” conduct.<sup>405</sup> The direct targets of the unlawful conduct are the defendant’s competitors, not its customers. Of course, the defendant’s ultimate goal, after weakening or destroying its competitors, is to raise its prices to customers.

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<sup>401</sup> 148 F.2d 416, 424 (2d Cir. 1945).

<sup>402</sup> See, e.g., *Prime Healthcare Servs., Inc. v. Serv. Employees Int’l Union*, 2016 WL 806110 (9<sup>th</sup> Cir. Mar. 2, 2016) (noting that monopoly power cannot be inferred from a 12% market share and any share under 50% is presumably insufficient); *Cohlmia v. St. John’s Med. Ctr.*, 693 F.3d 1269 (10<sup>th</sup> Cir. 2012) (noting a presumption that market shares less than 50 or 60% do not constitute monopoly power); *Cal. v. Safeway, Inc.*, 615 F.3d 1171 (9<sup>th</sup> Cir. 2010) (noting that a market share between 60% and 70% is sufficient to establish monopoly power), *aff’d in part, rev’d in part, and remanded*, 651 F.3d 1118 (9<sup>th</sup> Cir. 2011) (en banc); *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435 (4<sup>th</sup> Cir. 2011) (noting that 70% and above market shares permit a finding of monopoly power).

<sup>403</sup> E.g., *Rambus, Inc.*, 2006-2 Trade Cas. (CCH) ¶ 75,364 (FTC 2006) (“When barriers to entry are low, any attempt to exercise monopoly power (even by a firm with a 100 percent market share) quickly would be countered by competition from new entrants.”), *remanded on other grounds*, 522 F.3d 456 (D.C. Cir. 2008).

<sup>404</sup> E.g., *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 555 U.S. 438, 447-48 (2009) (“Simply possessing monopoly power and charging monopoly prices does not violate § 2.”); *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power . . . is not . . . unlawful.”); see generally *United States v. Int’l Harvester Co.*, 274 U.S. 693, 708 (1927) (“The law . . . does not make mere size of a corporation, however impressive, or the existence of unexercised power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power.”); *Loren Data Corp. v. GXS, Inc.*, 501 Fed. App’x 275, 282 (4<sup>th</sup> Cir. 2012) (“[T]he possession of monopoly power is only unlawful when it is coupled with anticompetitive conduct. To violate Section 2, a defendant must engage in conduct to ‘foreclose competition, gain a competitive advantage, or to destroy competition.’”). *Rambus, Inc. v. FTC*, 522 F.3d 456 (2d Cir. 2008); cf. *It’s My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676 (4<sup>th</sup> Cir. 2016) (“yet big is not invariably bad. An outsized market position may reflect nothing more than business success achieved through superior effort and sound strategy. . . . [T]he purpose of the antitrust laws is to penalize anticompetitive practices, not competitive success.”).

<sup>405</sup> E.g., *Verizon Commc’ns, supra*, 540 U.S. at 407 (emphasizing that “the possession of monopoly power will not be found to be unlawful unless it is accompanied by an element of anticompetitive conduct”); *Morris Commc’ns Corp. v. PGA Golf Tour, Inc.*, 364 F.3d 1288, 1294 (11<sup>th</sup> Cir. 2004) (“The second element requires predatory or exclusionary acts or practices that have the effect of preventing or excluding competition in the relevant market.”).

c. But precisely defining predatory conduct, or delineating a standard for identifying it, has eluded antitrust courts and commentators because it is often difficult to distinguish aggressive, but procompetitive, conduct from predatory and anticompetitive conduct.<sup>406</sup> Even competition on the merits is “exclusionary” in the lay sense when the firm with the best products or lowest prices drives less efficient competitors from the market. As one court stated simply, “the concept of predation defies simple definition.”<sup>407</sup>

d. Courts have posited numerous standards or tests for identifying predatory conduct, but none appears to fit all situations.<sup>408</sup>

(1) The Supreme Court has defined predatory conduct as conduct that “impair[s] competition in an unnecessarily restrictive way,” conduct “attempting to exclude rivals on some basis other than efficiency,” or conduct that “not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.”<sup>409</sup>

(2) One difficulty in identifying predatory conduct is that some types of conduct can be procompetitive in the short run, but anticompetitive in the long run. One example is predatory pricing, discussed below. In the short run, a firm’s pricing below its costs benefits consumers. In the long run, however, if the firm can drive its competitors from the market and later recoup its losses by supracompetitive pricing, consumers suffer.

(3) Perhaps the most that can be said as a general matter is that a defendant’s conduct is predatory for purposes of Section 2 if it has a significant exclusionary effect on the defendant’s competitors and contributes significantly to a firm’s ability to obtain or maintain its market power, but generates none of the benefits of competition, such as lower prices, greater output, higher quality, greater choice, increased access, greater innovation, or efficiency in production or distribution.

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<sup>406</sup> E.g., *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993) (“It is somewhat difficult to distinguish robust competition from conduct with long-term anticompetitive effects.”); *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (per curiam) (“Whether a particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern.”).

<sup>407</sup> *Rebel Oil Co. v. Atl. Richfield Co.*, 133 F.R.D. 41, 43 (D. Nev. 1990).

<sup>408</sup> For a helpful extended discussion, see U.S. Dep’t of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (2008), available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>. The Department of Justice officially withdrew the report in 2009, but it provides helpful commentary and discussion, even if debatable conclusions and recommendations. See also 1 John J. Miles, *Health Care & Antitrust Law* § 5:4 at 5-50 n.11 (Supp. 2014) for a circuit-by-circuit survey of predatory conduct definitions and standards.

<sup>409</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985); see also *W. Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85 (3d Cir. 2010); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 75 (3d Cir. 2010) (noting that predatory conduct results when a firm with substantial market power “competes on some basis other than the merits”); *Microsoft*, *supra* (explaining that conduct is predatory when it harms the competitive process (not just competitors), has no legitimate business justification, and its anticompetitive effects outweigh its procompetitive effects).

e. Some types of conduct may be lawful when implemented by firms without market power but predatory when implemented by firms with substantial market power.<sup>410</sup>

f. Numerous courts have held that conduct is not predatory if the defendant has a “valid business reason,” “legitimate business justification,” or “procompetitive justification” for the conduct.<sup>411</sup>

(1) But the cases disagree whether a legitimate business justification, per se, renders conduct non-predatory or whether the court must balance the procompetitive and

(2) anticompetitive effects of the conduct as in a Section 1 rule-of-reason case.<sup>412</sup> The trend appears toward the latter.<sup>413</sup>

g. Don’t place too much stock in a defendant’s “hot” documents or oral statements indicating its subjective intent “to monopolize,” “kill the competition,” “crush competitors,” “flush those turkeys,” and the like.

(1) Every firm wants to (and probably intends to if it can) obtain a monopoly, and the antitrust laws encourage it to try as long as it does so in ways that benefit consumers.<sup>414</sup> As the Seventh Circuit has explained:

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<sup>410</sup> See, e.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, O’Connor & Thomas, JJ., dissenting) (“Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist.”).

<sup>411</sup> E.g., *Eastman Kodak*, *supra*, 504 U.S. at 483 (explaining that “liability turns . . . on whether ‘valid business reasons’ can explain [defendant’s] actions”); *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007); *Rambus, Inc.*, 2006-2 Trade Cas. (CCH) ¶ 75,364 at 105,505 (FTC 2006) (explaining that once the plaintiff establishes a prima facie case of exclusionary conduct, the burden shifts “to [defendant] to establish nonpretextual procompetitive justifications for its conduct,” which requires showing “that its conduct indeed is a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal”), *remanded on other grounds*, 522 F.3d 456 (D.C. Cir. 2008).

<sup>412</sup> Compare *Microsoft*, *supra*, 253 F.3d at 59, 66-67 (holding that balancing the effects is necessary) with *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group LP*, 592 F.3d 991 (9<sup>th</sup> Cir. 2010) (rejecting the balancing requirement, at least in the context of the facts there).

<sup>413</sup> E.g., *McWane, Inc. v. FTC*, 783 F.3d 824, 833 (11<sup>th</sup> Cir. 2015) (explaining that “[i]f the court accepts the defendant’s proffered justifications, it must then decide whether the conduct’s procompetitive effects outweighs its anticompetitive effects. . . . This approach mirrors the rule of reason analysis”).

<sup>414</sup> See generally *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 696 (7<sup>th</sup> Cir. 2006) (“Yet as we remark frequently in antitrust litigation, ‘cut-throat competition’ is a term of praise rather than condemnation. . . . Businesses need not love their rivals . . . ; consumers gain when firms try to ‘kill’ the competition and take as much business as they can. . . . The question is not whether the defendant has tried to knock out other businesses but whether the means it has employed to that end are likely to benefit or injure consumers.”); *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1199 (3d Cir. 1995) (“The antitrust statutes do not condemn, without more, such colorful, vigorous hyperbole; there is nothing to gain by using the law to mandate ‘commercially correct’ speech within corporate memoranda and business plans. Isolated and unrelated snippets of such language ‘provide no help in deciding whether a defendant has crossed the elusive line separating aggressive competition from unfair

We add, what has become an antitrust commonplace, that if the conduct is not objectively anticompetitive, the fact that it was motivated by hostility to competitors (“these turkeys”) is irrelevant. . . . That [defendant] wanted to “flush these turkeys” tells us nothing about the lawfulness of its conduct.

Most businessmen don’t like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run. . . . The question therefore is not whether defendant withdrew [its cooperation with plaintiff] in order to make money at the expense of [plaintiff], which of course it did, but whether such withdrawal was an objectively anticompetitive act.<sup>415</sup>

(2) Party documents and statements relating to the defendant’s intent, however, can help predict effect.<sup>416</sup>

h. What types of conduct by a firm with substantial market power do (or do not) constitute predatory conduct?

(1) Monopoly pricing—A firm’s charging a supracompetitive or monopoly price, even if it has monopoly power does not constitute predatory conduct because it is not a tactic for maintaining that power. Indeed, all else equal, it attracts new entry.<sup>417</sup> Thus, a firm with monopoly power gained through competition on the merits can lawfully charge whatever price

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competition.”); *Gen. Leaseways, Inc. v. Nat’l Truck Leasing Ass’n*, 744 F.2d 588, 595-96 (7th Cir. 1984) (“We attach rather little weight to internal company documents used to show anticompetitive intent, because, though they sometimes dazzle a jury, they cast only a dim light on what ought to be the central question in an antitrust case: actual or probable anticompetitive effect.”).

<sup>415</sup> *Olympia Equip. Leasing Co. v. W. Union Tele. Co.*, 797 F.2d 370, 379 (7th Cir. 1986); see also *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1078 (10th Cir. 2013) (“Were intent to harm a competitor alone the marker of antitrust liability, the law would risk retarding consumer welfare by deterring vigorous competition—and wind up punishing only the guileless who haven’t figured out not to write such things down despite (no doubt) the instruction they receive in countless ‘antitrust compliance’ seminars.”).

<sup>416</sup> E.g. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *McWane, Inc. v. FTC*, 783 F.3d 814, 840 (6th Cir. 2015) (noting that defendant’s documents expressing the anticompetitive intent behind the conduct “supports the inference that it harmed competition” and that anticompetitive intent, per se, does not prove an antitrust violation, it can help a court interpret facts and predict consequences); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.D. Cir. 2001) (per curiam) (“Evidence of intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist’s conduct.”).

<sup>417</sup> *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”); *Arroyo-Melecio v. Puerto Rico Am. Ins. Co.*, 398 F.3d 56, 69 (1st Cir. 2005) (“A monopolist ‘is free to exploit whatever market power it may possess when that exploitation takes the form of charging uncompetitive prices.’”).

the market will bear. But, of course, if the defendant obtained or maintained the monopoly by predatory conduct injuring its competitors' ability to compete, its customers can recover as damages the difference between the monopoly price and competitive price.

(2) Monopsony pricing—The mirror-image principle applies to monopsony pricing: A buyer with a legitimately obtained monopsony may lawfully bargain for the lowest price it can get, including the monopsony price.<sup>418</sup>

(3) Predatory pricing—"Predatory pricing" constitutes predatory conduct. It results when a firm (a) charges a price below its costs (most courts deem the firm's average variable cost the appropriate cost benchmark) for a significant period of time to drive its competitors from the market and (b) could subsequently recoup its losses, after competitors are weakened or destroyed, by raising its price to supracompetitive levels.<sup>419</sup> Courts tend to be very skeptical about predatory pricing claims because lower prices usually benefit consumers.<sup>420</sup>

(4) Price Squeezes—A "price squeeze" can result when a vertically integrated firm supplies an upstream-market input to firms with which it competes in a downstream market. The defendant can foreclose competition in the downstream market (and thus potentially obtain market power in that market) if it has market power in the upstream market and prices its upstream product price to competitors at such a high level that they are unable to effectively compete against it in the downstream market. Earlier decisions held that price squeezes constituted predatory conduct, but in *Pacific Bell Tel. Co. v. linkLine Communications*,<sup>421</sup> the Supreme Court held that price squeezes are not predatory, at least where the defendant has no duty to deal with its competitors under the antitrust laws in the upstream market and its downstream market price is not predatory in the sense explained above.

(5) Bundled discounts.

(a) A bundled discount results where a defendant-seller charges less for a bundle of products or services than its aggregate price for the products when sold separately. In

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<sup>418</sup> E.g., *W. Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 103 (3d Cir. 2010) ("A firm that has substantial power on the buy side of the market (*i.e.*, monopsony power) is generally free to bargain aggressively when negotiating the prices it will pay for goods and services."); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield*, 883 F.2d 1101 (1st Cir. 1989) (same).

<sup>419</sup> See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 318 (2007) (discussing predatory *buying*, but explaining that "[i]n a typical predatory-pricing scheme, the predator reduces the sale price of its product . . . to below cost, hoping to drive competitors out of business. Then, with the competition vanquished, the predator raises output prices to supracompetitive levels."); *American Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, \_\_\_ F.3d \_\_\_, 2016 WL 759835 (1<sup>st</sup> Cir. Feb. 25, 2016); *Superior Prod. P'ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311 (6<sup>th</sup> Cir. 2015).

<sup>420</sup> E.g., *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 272 (3d Cir. 2012) ("The Supreme Court has expressed deep skepticism of predatory pricing claims. . . . Low, but above cost, prices are generally procompetitive.").

<sup>421</sup> See *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009); see also *Doe v. Abbott Labs.*, 571 F.3d 930 (9th Cir. 2009).

some cases, the defendant's price for the bundled product is sufficiently low that a competitor that sells only one of the products in the defendant's bundle (the "competitive product") cannot effectively compete in selling that product because it cannot match the amount of the defendant's discount across the entire bundle.

(b) Under certain conditions, bundled discounts constitute predatory pricing—e.g., if the defendant's price for the competitive product when sold separately, minus the entire amount of the bundled discount, is less than the defendant's average variable cost of producing the competitive product.<sup>422</sup> Other courts have applied different standards.<sup>423</sup> The circumstances under which bundled discounts constitute predatory conduct are complex and unsettled at present.<sup>424</sup>

(c) Plaintiffs have challenged other types of allegedly exclusionary discounts (e.g., so-called "loyalty discounts" and "market-share discounts") used by sellers alleged to have substantial market power, although relatively few cases have been successful.<sup>425</sup>

#### (6) Refusals to deal with competitors.

(a) Many Section 2 cases involve a plethora of different situations in which a firm with substantial market power refuses to deal in some form with its competitors who allegedly need that firm's cooperation to compete effectively. For example, a firm that competes against others in a downstream market (e.g., steel) might have a monopoly over an essential input (iron ore) and refuse to sell that input to its competitors.

(b) As a general principle, even a firm with monopoly power has no duty to deal with or otherwise aid its competitors.<sup>426</sup>

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<sup>422</sup> *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9<sup>th</sup> Cir. 2008).

<sup>423</sup> See *LePage's, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003); *Se. Mo. Hospital v. C.R. Bard, Inc.*, 642 F.3d 608 (8<sup>th</sup> Cir. 2011); *Ortho Diagnostic Sys. v. Abbott Labs.*, 822 F. Supp. 145 (S.D.N.Y. 1993).

<sup>424</sup> See generally Dennis W. Carlton & Michael Waldman, *Safe Harbors for Quantity Discounts and Bundling*, 15 Geo. Mason L. Rev. 1231 (2008); Richard M. Steuer, *Bundles of Joy*, Antitrust, Spring 2008, at 25.

<sup>425</sup> E.g., *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608 (8<sup>th</sup> Cir. 2011) (unsuccessful challenge to defendant's market-share discount).

<sup>426</sup> *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (explaining that "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a firm] . . . freely to exercise his own independent discretion as to parties with whom he will deal'"); *Duty Free Americas, Inc. v. Estee Lauder Cos.*, 797 F.3d 1248 (11<sup>th</sup> Cir. 2015); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10<sup>th</sup> Cir. 2013); *Loren Data Corp. v. GXS, Inc.*, 501 Fed. App'x 275, 280 (4<sup>th</sup> Cir. 2012) ("[A] business generally has 'the right to deal or not deal with whomever it likes, as long as it does so independently.'"); *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188 (10<sup>th</sup> Cir. 2009); *Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7<sup>th</sup> Cir. 2006) (explaining that "antitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals compete. . . . Cooperation is a *problem* in antitrust, not one of its obligations.") (emphasis added); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.3d 370, 376 (1986) ("Today, it is clear that a firm with lawful monopoly power has no duty to help its competitors.").

(c) But the right of a firm with monopoly power to refuse to deal is not absolute.<sup>427</sup> The circumstances under which a duty to deal exists are far from clear, however. For example, most courts hold or suggest that a refusal to deal is predatory only if there had been a voluntary and profitable pre-existing cooperative relationship that the defendant terminated for no justifiable reason.<sup>428</sup>

(d) More generally, some courts indicate that a refusal to deal is predatory if done for the purpose of monopolizing and the defendant has no legitimate business justification for the refusal.<sup>429</sup>

(e) One variant of refusal-to-deal theory is the so-called “essential facilities doctrine,” which holds that a defendant firm with a monopoly over a facility or trade relationship has a duty to provide competitors with access to that relationship where (1) access is essential for the competitors to compete effectively; (2) competitors cannot, as a practical matter, duplicate the needed facility or relationship; and (3) the defendant’s providing access is feasible.<sup>430</sup> The doctrine has been heavily criticized,<sup>431</sup> and the Supreme Court has emphasized that it has “never recognized such a doctrine.”<sup>432</sup>

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<sup>427</sup> *E.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

<sup>428</sup> *E.g.*, *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10<sup>th</sup> Cir. 2013) (explaining that the Supreme Court has held that at least two factors must be present for liability: “First, . . . there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and its rival. . . . Second, . . . the monopolist’s discontinuance of a preexisting course of dealing must ‘suggest[] a willingness to forego short-term profits to achieve an anticompetitive end.’”); *Loren Data Corp. v. GXS, Inc.*, 501 Fed. App’x 275, 283 (4<sup>th</sup> Cir. 2012) (explaining that refusals to deal may be unlawful when “[t]he unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.”); *Eatoni v. Ergonomics, Inc. v. Research in Motion Corp.*, 486 Fed. Appx. 186 (2d Cir. 2012) (summary order) (dismissing claim because parties had no pre-existing profitable cooperative relationship); *Williams v. Citigroup, Inc.*, 433 Fed. App’x 36, 37 (2d Cir. 2011) (summary order) (explaining that “where . . . the alleged monopolization is based on a monopolist’s refusal to deal, the plaintiff must allege that the defendant terminated a prior, voluntary course of dealing”); *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr.*, 582 F.3d 1216, 1223 (10<sup>th</sup> Cir. 2009) (noting that the key fact resulting in liability for a monopolist’s refusal to deal is its terminating a profitable relationship without any justification other than intent to preclude competition); *LiveUniverse, Inc. v. MySpace, Inc.*, 304 Fed. App’x 554 (9<sup>th</sup> Cir. 2008).

<sup>429</sup> *E.g.*, *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 483 (1992) (“If Kodak adopted its . . . policies [not to deal] as part of a scheme of willful acquisition of monopoly power, it will have violated § 2.”); *Aspen Skiing, supra*; *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117 (2d Cir. 2007); *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297 (3d Cir. 2007).

<sup>430</sup> *See, e.g.*, *Loren Data, supra*; *MCI Commc’ns Corp. v. AT&T Co.*, 708 F.2d 1081 (7<sup>th</sup> Cir. 1983) (the seminal case); *MetroNet Corp. v. Quest Corp.*, 383 F.3d 1124 (9<sup>th</sup> Cir. 2004); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080 (D.C. Cir. 1998).

<sup>431</sup> *See, e.g.*, Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1990).

<sup>432</sup> *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004); *see also Loren Data Corp. v. GXS, Inc.*, 501 Fed. App’x 275, 284 (4<sup>th</sup> Cir. 2012) (“The Supreme Court has not adopted the essential

(i) The competitive concern with denials of access to essential facilities is not in the market for the essential facility (the market in which the defendant has substantial market power) but that the defendant controlling the facility can use its power over the facility to monopolize or attempt to monopolize the “downstream” market in which it and the excluded competitors compete.

(f) Courts universally hold that a refusal to deal is not predatory if the defendant has a “legitimate business justification” for its refusal.<sup>433</sup> But what constitutes a “legitimate business justification” is not clear; nor is it clear whether that justification must be balanced against the refusal’s anticompetitive effect.

(7) *Refusals to deal with non-competitors*—A firm has no duty under Section 2 to deal with non-competitors because refusing to do so does not affect its market power.<sup>434</sup> It is not clear whether Section 5 of the FTC Act prohibits this type of refusal to deal.<sup>435</sup>

(8) *Refusals to deal with customers that deal with competitors*—Absent a procompetitive justification, it almost always constitutes predatory conduct for a firm with substantial market power to condition its dealing with customers on their not dealing with that firm’s competitors.<sup>436</sup> In essence, this is an exclusive dealing arrangement that bolsters defendant’s market power.

(9) Leveraging.

(a) Leveraging results when a firm with substantial market power in one market uses that power to induce customers to purchase not just that product but a second product as well—the firm “leverages” its market power in one market into market power in a second market.<sup>437</sup>

(b) Tying arrangements are a form of leveraging, but Section 2 leveraging is a broader concept. While a tying arrangement requires the seller of the tying product to coerce the

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facilities doctrine.”); *Four Corners Nephrology, supra*, 582 F.3d at 1222 (noting “the Supreme Court’s skepticism about the ‘essential facilities doctrine’”).

<sup>433</sup> E.g., *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *Covad Commc’ns Co. v. Bell Atl. Corp.*, 398 F.3d 666 (D.C. Cir. 2005).

<sup>434</sup> E.g., *Official Air Line Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980).

<sup>435</sup> See *Fulton v. Hecht*, 580 F.2d 1243 (5th Cir. 1978) (suggesting that § 5 may apply); *General Motors Corp.*, 99 F.T.C. 464 (1982).

<sup>436</sup> *Lorain J. v. United States*, 342 U.S. 143 (1951); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

<sup>437</sup> See generally *Eastman Kodak Co., supra*; *AD/SAT v. Associated Press*, 181 F.3d 216 (2d Cir. 1999) (per curiam).



buyer to purchase the tied product as well, leveraging requires only that it provide some type of improper inducement to do so.<sup>438</sup>

(c) The leveraging doctrine is controversial, and a plaintiff must show, at a minimum, that defendant's leveraging would result in its obtaining a monopoly in the second market or at least a dangerous probability of its doing so.<sup>439</sup>

(10) Vertical integration.

(a) Vertical integration results when a firm integrates up or down into a different level of production or distribution—e.g., a manufacturer's integrating into the distribution of its product ("forward" or "downstream") or a wholesaler's integrating into manufacturing the product it sells ("backward" or "upstream" integration).

(b) Vertical integration, per se, rarely raises an antitrust issue because it is typically procompetitive.<sup>440</sup> But there are actions that vertically integrated firms might take that can raise antitrust questions.

(c) Vertical integration can result in the price-squeeze situation mentioned before. As one court explained, "[T]he traditional price squeeze involves a defendant who as a monopolist supplies the plaintiff at one level (e.g., wholesale), competes at another (e.g., retail), and seeks to destroy the plaintiff by holding up the wholesale price to the plaintiff while depressing the retail price to common customers."<sup>441</sup> In other words, the defendant's price in the downstream market is so close to the price that it charges its competitors for the upstream input that they cannot profitably compete in the downstream market. Numerous courts have held that price squeezes constitute predatory conduct,<sup>442</sup> but, as noted before, the Supreme Court held otherwise in *linkLine Communications*,<sup>443</sup> except in narrow and likely unusual circumstances—i.e., where the defendant has a duty to deal under the antitrust laws in the upstream market and prices its downstream product below its cost.

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<sup>438</sup> See, e.g., *Covad Commc'ns Co. v. Bell South Corp.*, 299 F.3d 1272, 1284 (11th Cir. 2002) ("Monopoly leveraging occurs when a firm uses its market power in one market to gain market share in another market other than by competitive means."), *vacated on other grounds*, 540 U.S. 1147 (2004).

<sup>439</sup> E.g., *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, *supra*, 540 U.S. at 415 n.4 (2004); *Four Corners Nephrology*, *supra*.

<sup>440</sup> See *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 124 (2d Cir. 2007) (explaining that "[v]ertical expansion by a monopolist, without more, does not violate section 2 of the Sherman Act" because "when a monopolist has acquired its monopoly power at one level of a product market, its vertical expansion into another level . . . will ordinarily be for the purpose of increasing its efficiency"). See generally Roger D. Blair & David L. Kaserman, *Antitrust Economics* Ch. 14 (2d ed. 2009).

<sup>441</sup> E.g., *Town of Norwood v. New Eng. Power Co.*, 202 F.3d 408, 418 (1st Cir. 2000).

<sup>442</sup> E.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

<sup>443</sup> *Pac. Bell Tel. Co. v. linkLine Commc'ns*, 555 U.S. 438 (2009).

(d) A firm's terminating its independent distributors and vertically integrating by taking over the distribution function itself does not constitute predatory conduct.

(11) Certain violations of Section 1—Forms of exclusionary conduct suspect under Section 1 of the Sherman Act, such as tying and exclusive-dealing agreements, can also constitute predatory conduct for purposes of a monopolization or attempted monopolization claim.<sup>444</sup>

(12) Sham litigation—“Sham litigation” is baseless litigation undertaken merely to damage a competitor by the litigation process itself, rather than by the outcome of the litigation.<sup>445</sup> To constitute sham litigation, the Supreme Court has explained that “the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits” and “the baseless lawsuit” must “conceal[] ‘an attempt to interfere *directly* with the business relationships of a competitor.’”<sup>446</sup> Thus, there is both an objective-intent and subjective-intent requirement.

(13) Enforcement of patents known to be invalid or obtained by knowing and willful fraud on the Patent Office<sup>447</sup>

(14) Horizontal Mergers—While horizontal mergers are not exclusionary, they can serve as the predicate conduct for a monopolization or attempted monopolization violation if, indeed, they result in (or would result in) a merged firm with monopoly power—i.e., a “merger to monopoly.”<sup>448</sup>

**G. Attempted Monopolization**—The essential elements: (1) specific intent to monopolize, (2) predatory conduct implementing that intent, and (3) a dangerous probability of actual

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<sup>444</sup> E.g., *McWane, Inc. v. FTC*, 783 F.3d 814 (11<sup>th</sup> Cir. 2015) (exclusive contracts used to maintain monopoly power); *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 441 (4<sup>th</sup> Cir. 2010) (explaining that “exclusive dealing arrangements can constitute an improper means of acquiring monopoly power”); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3<sup>d</sup> Cir. 2005) (“Although not illegal in themselves, exclusive dealing arrangements can be an improper means of maintaining monopoly.”); *Highland Capital, Inc. v. Franklin Nat'l Bank*, 350 F.3d 558, 565 (6<sup>th</sup> Cir. 2003) (“A tying arrangement may also support a claim for monopolization.”); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam) (tying and exclusive dealing).

<sup>445</sup> See *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993); *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395 (3<sup>d</sup> Cir. 2000).

<sup>446</sup> *Prof'l Real Estate Investors*, *supra*, 508 U.S. at 60.

<sup>447</sup> E.g., *Walker Process Equip. Co. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); *Ritz Camera & Image, LLC v. Sandisk Corp.*, 700 F.3d 503 (Fed. Cir. 2012).

<sup>448</sup> E.g., *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 61 (1<sup>st</sup> Cir. 2002) (stating that “‘merger to monopoly’ . . . is a feasible section 2 claim”).

This is a partial list of conduct that might be deemed predatory for purposes of Section 2. For a more complete list, see 1 John J. Miles, *Health Care & Antitrust Law* § 5:12 (Supp. 2014).

monopolization if the predatory conduct continues.<sup>449</sup> The only practical difference between monopolization and attempted monopolization claims is in the necessary size of the defendant's market share.

1. Specific intent to monopolize—Specific intent in this context means the “specific intent to destroy competition or build a monopoly,”<sup>450</sup> or “something more than an intent to compete vigorously.”<sup>451</sup> The requirement in large part is redundant to the predatory-conduct element because specific intent can be inferred from predatory conduct, and thus the two elements, as a practical matter, collapse into one.<sup>452</sup> Or, specific intent to monopolize can be proved by defendant's statements or documents. As noted before, however, care is necessary not to read too much into a defendant's statements or documents, because almost every firm wants to monopolize its market, and its documents often disclose that “intent.” The antitrust laws encourage them to try as long as their means benefit consumers.

2. Predatory conduct—The meaning and types of predatory conduct for purposes of attempted monopolization claims are the same as for monopolization claims, discussed before. Conduct not predatory for purposes of a monopolization claim cannot be predatory for purposes of an attempted monopolization claim.<sup>453</sup>

3. Dangerous probability of actual monopolization.

a. Even if the defendant specifically intended to monopolize the market and engaged in predatory conduct, no attempted monopolization violation results if it could not actually monopolize the market<sup>454</sup> or that were unlikely, given the relevant market's characteristics and the type of predatory conduct alleged.

b. The primary, but not sole, indicator of a dangerous probability of monopolization is the size of defendant's market share.<sup>455</sup> Indeed, some courts require proof of a sufficient market share as a “threshold showing.”<sup>456</sup>

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<sup>449</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993); *New York v. Actavis plc*, 787 F.3d 638 (2d Cir. 2015); *Superior Production P'ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311 (6<sup>th</sup> Cir. 2015); *Loren Data Corp. v. GXS, Inc.*, 501 Fed. App'x 275 (4<sup>th</sup> Cir. 2012); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008); *Andrx Pharms., Inc. v. Elan Corp.*, 421 F.3d 1227 (11th Cir. 2005).

<sup>450</sup> *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953).

<sup>451</sup> *Spectrum Sports*, *supra*, 506 U.S. at 459.

<sup>452</sup> *Id.* (“Such conduct may be sufficient to prove the necessary intent to monopolize.”); *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435 (4th Cir. 2011).

<sup>453</sup> *E.g.*, *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986).

<sup>454</sup> *E.g.*, *Abraham v. Intermountain Health Care*, 461 F.3d 1249 (10th Cir. 2006).

<sup>455</sup> *HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 550 (8th Cir. 2007) (“Dangerous probability of success is ‘examined by reference to the offender's share of the relevant market.’”).

<sup>456</sup> *AD/SAT v. Associated Press*, 181 F.2d 216, 226 (2d Cir. 1999) (*per curiam*).

c. No magic market-share percentage is sufficient because other variables are relevant as well, but most courts require a market share of at least 40% to 50%.<sup>457</sup> In *M&M Medical Supplies & Service, Inc. v. Pleasant Valley Hospital*, the court explained:

(1) claims of less than 30% market shares should be presumptively rejected;

(2) claims involving between 30% and 50% should usually be rejected, except when conduct is very likely to achieve monopoly or when conduct is invidious, but not so much as to make the defendant per se liable; (3) claims involving greater than 50% shares should be treated as attempts at monopolization when the other elements for attempted monopolization are satisfied.<sup>458</sup>

d. Because market share is an important factor in the dangerous-probability determination, plaintiff must define the relevant market.<sup>459</sup>

e. Other factors that courts consider include the defendant's conduct, the level of entry barriers, strength of the competition, probable development of the industry, and elasticity of demand for the relevant product.<sup>460</sup>

f. A dangerous probability of monopolization can result in very limited circumstances when a defendant's market share is small—e.g., where a firm with a 10% market share burns down the plants of its competitors, combined with high entry barriers.

g. Even when a defendant's market share is substantial, other evidence might show that the defendant could never actually monopolize the market.<sup>461</sup> Or, it might be that even if the defendant drove the plaintiff out of business, the addition of plaintiff's entire market share to defendant's would not meet the market-share requirement for monopolization.

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<sup>457</sup> *Id.* at 229 (33% insufficient); see *Duty Free Americas, Inc. v. Estee Lauder Cos.*, 797 F.3d 1248 (11<sup>th</sup> Cir. 2015) (dangerous probability of monopolization can be inferred from a 50% or more market share); *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9<sup>th</sup> Cir. 1997).

<sup>458</sup> 981 F.2d 160, 168 (4<sup>th</sup> Cir. 1992).

<sup>459</sup> E.g., *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 75 (3<sup>d</sup> Cir. 2010) (explaining that the dangerous probability element “requires an inquiry into the relevant product and geographic market as well as the defendant's economic power in that market”); *United States v. Microsoft Corp.*, 253 F.3d 34, 81 (D.C. Cir. 2001) (per curiam) (“A court's evaluation of an attempted monopolization claim must include a definition of the relevant market.”).

<sup>460</sup> *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 318 (3<sup>d</sup> Cir. 2007); *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745 (10<sup>th</sup> Cir. 1999).

<sup>461</sup> E.g., *Ind. Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7<sup>th</sup> Cir. 1989) (explaining that there was no dangerous probability of monopolization where plaintiff admitted that defendant would never gain the ability to control prices); cf. *Sterling Merch., Inc. v. Nestle's, S.A.*, 656 F.3d 112, 126 (1<sup>st</sup> Cir. 2011) (explaining that “where a plaintiff remains profitable and in fact has expanded its market share since the allegedly anticompetitive conduct has begun, it faces an uphill battle in proving such a dangerous probability exists”).

h. Even if the defendant drives the plaintiff out of business, no dangerous probability of monopolization results if numerous other competitors remain.<sup>462</sup> This is an example of the antitrust axiom that the antitrust laws protect competition, not competitors.

i. But it is not determinative that defendant's attempt to monopolize was ultimately unsuccessful. Whether the dangerous-probability requirement is met is determined at the time of defendant's predatory conduct, thus requiring a prediction about the future. But whether the defendant actually did monopolize the market is relevant to whether a dangerous probability of monopolization existed at the time of the predatory conduct.<sup>463</sup>

**H. Conspiracies to Monopolize**—The essential elements: (1) a conspiracy, (2) specific intent to monopolize, and (3) an overt act in furtherance of the conspiracy.<sup>464</sup>

1. As in Section 1 cases, the *Copperweld* doctrine applies: The different components of a single integrated entity are incapable of conspiring to monopolize.<sup>465</sup>

2. For a violation, the alleged conspirators must share an intent to monopolize. No violation results where only one intends to monopolize.<sup>466</sup>

3. Conspiracy-to-monopolize claims are largely redundant to Section 1 claims.<sup>467</sup>

4. Arguably, the difference between a Section 1 violation and a Section 2 conspiracy-to-monopolize violation (in addition to the specific intent to monopolize required for the latter but not the former) is that to prove a conspiracy to monopolize, plaintiff need not prove the relevant market, market power, dangerous probability of monopolization, success of the conspiracy in monopolizing, or any actual or likely effect on competition.<sup>468</sup> Thus, the claim seems silly

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<sup>462</sup> *E.g., Ramallo Bros. Printing, Inc. v. El Dia, Inc.*, 392 F. Supp. 2d 118 (D.P.R. 2005).

<sup>463</sup> *E.g., GMA Cover Corp. v. SAAB Barracuda LLC*, 2012 WL 639528 (E.D. Mich. Feb. 28, 2012).

<sup>464</sup> *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237 (3d Cir. 2010); *Spanish Broad. Sys. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065 (11th Cir. 2004); *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Discount Ctrs., Inc.*, 200 F.3d 307 (5th Cir. 2000).

<sup>465</sup> *E.g., Total Renal Care, Inc. v. W. Nephrology & Metabolic Disease, P.C.*, 2009 WL 2596493 at \*14 (D. Colo. Aug. 21, 2009) (explaining that “numerous cases have extended *Copperweld* to Section 2 conspiracy claims”).

<sup>466</sup> *E.g., HIS Dialysis, Inc. v. Davita, Inc.*, 2013-1 Trade Cas. (CCH) ¶ 78,330 (S.D.N.Y. 2013); *Deborah Heart & Lung Ctr. v. Penn Presbyterian Med. Ctr.*, 2012-1 Trade Cas. (CCH) ¶ 77,760 (D.N.J. 2011); *Total Renal Care*, *supra*, 2009 WL 2596493, at \*16.

<sup>467</sup> *See JTC Petrol. Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 779-80 (7th Cir. 1999) (noting that the violation “is a puzzling offense, as it seems entirely duplicative of a claim under section 1”); *TruePosition, Inc. v. Ericsson Tel. Co.*, 2012-1 Trade Cas. (CCH) ¶ 77,821 (E.D. Pa. 2012) (“Commentators have noted that, to the extent it bans *conspiracies* to monopolize, section 2 is largely superfluous, as conspiracies to monopolize will usually—if not always—run afoul of section 1’s prohibition of conspiracies that unreasonably restrain trade.”).

<sup>468</sup> *E.g., Lantac, Inc. v. Novell, Inc.*, 306 F.3d 1003 (10th Cir. 2002); *Morgan, Strand, Wheeler & Biggs v. Radiology Ltd.*, 924 F.2d 1484 (9th Cir. 1991).

because the essential elements can be sustained where there is no effect, and no possibility of any effect, on competition at all.

a. Perhaps for that reason, the Supreme Court has explained that “[u]nless those agreements harmed the competitive process, they did not amount to a conspiracy to monopolize,”<sup>469</sup> and since *NYNEX*, the circuits have split on whether plaintiff must show an effect on competition.<sup>470</sup>

b. If plaintiff must prove an anticompetitive effect, it follows that it must prove the relevant market and that defendants have, or will obtain, market power—or prove anticompetitive effects directly.

5. Some courts hold that for a viable conspiracy-to-monopolize claim, at least one of the defendants must be a competitor in the relevant market.<sup>471</sup> But all the conspirators need not be competitors of one another.

6. In most antitrust suits, conspiracy-to-monopolize claims are “throw-away claims”—seeming afterthoughts by plaintiffs.

## **VI. SECTION 7 OF THE CLAYTON ACT.**

**A. Text of the Statute:** “No person . . . engaged in any activity affecting commerce shall *acquire*, directly or indirectly, the . . . *stock* . . . and no person . . . shall acquire . . . the *assets* of another person . . . , where *in any line of commerce* . . . *in any section of the country*, the effect of such acquisition *may be* substantially to *lessen competition*, or to *tend to create a monopoly*.”<sup>472</sup> In sum, Section 7 prohibits mergers and all other forms of acquisition that *may* have significant anticompetitive effects.

1. Section 7 applies to all forms of acquisitions, including the formation of joint ventures, leases, licenses, partial acquisition, and even employment.

2. The acquisition need not *actually* lessen competition—plaintiff need not prove actual anticompetitive effects. Section 7 is an “incipiency” statute, intended to prevent acquisitions before they ripen into actual unreasonable restraints of competition. There only need be a

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<sup>469</sup> *NYNEX Corp. v. Discon Corp.*, 525 U.S. 128, 139 (1998).

<sup>470</sup> See *Gregory v. Fort Bridger Rendezvous Ass’n*, 448 F.3d 1195 (10th Cir. 2006) (indicating plaintiff must prove that the alleged conspiracy harmed the competitive process); *Spanish Broad.*, *supra* (dismissing a conspiracy-to-monopolize claim because plaintiff failed to allege anticompetitive effects); *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002) (indicating plaintiff must prove an anticompetitive effect).

<sup>471</sup> E.g., *Hackman v. Dickerson Realtors, Inc.*, 595 F. Supp. 2d 875 (N.D. Ill. 2009); *Boczar v. Manatee Hosps. & Health Sys.*, 731 F. Supp. 1042, 1047 (M.D. Fla. 1990).

<sup>472</sup> Section 7 of the Clayton Act, 15 U.S.C. § 18 (emphasis added).

“reasonable probability” that the acquisition will substantially lessen competition,<sup>473</sup> and “doubts are to be resolved against the transaction.”<sup>474</sup>

3. Merger analysis requires a burden-shifting rule-of-reason analysis:<sup>475</sup>

a. If the merger results in a firm with a sufficiently high market share or level of market concentration (discussed later), a rebuttable presumption arises that it will be anticompetitive, and it is “prima facie unlawful.”<sup>476</sup>

b. The burden of going forward then shifts to the defendants to introduce evidence that the merger will not be anticompetitive.

c. If the defendants meet their burden, the burden shifts back to the plaintiff to introduce additional evidence of likely anticompetitive effects.

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<sup>473</sup> See generally *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) (noting that Congress used the term “may” “to indicate that its concern was with probabilities, not certainties”); *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 564 (6<sup>th</sup> Cir. 2014) (“Section 7 deals in ‘probabilities, not certainties.’”); *Polypore Int’l, Inc. v. FTC*, 686 F.3d 1208, 1214 (11<sup>th</sup> Cir. 2012) (“Congress enacted § 7 to ‘arrest anticompetitive tendencies in their ‘incipiency.’”); *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850 (6<sup>th</sup> Cir. 2005); *United States v. Bazaarvoice, Inc.*, 2014 WL 203966 at \*1 (N.D. Cal. 2014) (“to establish a violation of Section 7, the government need not prove that the merger has resulted in higher prices or had other anticompetitive effects. Rather, the government must show a ‘reasonable likelihood’ or anticompetitive effects in the relevant market,” but “an ephemeral possibility’ of anticompetitive effect is insufficient”); see also U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (“*Merger Guidelines*”) § 1 (2010), available at <http://www.ftc.gov/os/2010/08/10081hmg.pdf> (“[T]hese Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.”).

<sup>474</sup> *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1073 (N.D. Ill. 2012) (quoting *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7<sup>th</sup> Cir. 1989)); see also *ProMedica Health Sys.*, 2011 WL 1155392 (FTC Mar. 22, 2012) (“*ProMedica FTC Decision*”).

<sup>475</sup> For a recent explanation, see *FTC v. Sysco Corp.*, \_\_\_ F. Supp. 3d \_\_\_, \_\_\_, 2015 WL 3958568 at \*9 (D.D.C. June 23, 2015):

[T]he FTC bears the initial burden of showing that the merger would lead to “undue concentration in the market for a particular product in a particular geographic area.” . . . Such a showing establishes a “presumption” that the merger will substantially lessen competition. . . . The burden then shifts to the defendant to rebut the presumption by offering proof that “the market-share statistics [give] an inaccurate account of the [merger’s] probable effects on competition in the market.” . . . “If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains on the government at all times.”

<sup>476</sup> *Merger Guidelines* § 5.3. E.g., *St. Alphonsus Med. Ctr. v. St. Luke’s Health Sys.*, 778 F.3d 775, 785 (9<sup>th</sup> Cir. 2015) (“A prima facie case can be established simply by showing high market share.”); *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 568 (6<sup>th</sup> Cir. 2014); *Polypore Int’l, Inc. v. FTC*, 686 F.3d 1208, 1214 (11<sup>th</sup> Cir. 2012) (“Once the Government makes a showing that the firm controls an undue percentage of the relevant market and the acquisition would cause a significant increase in the concentration, the defendant must produce evidence that shows the market share statistics inaccurately show the probable effect on competition.”).

d. The plaintiff always bears the ultimate burden of persuasion.<sup>477</sup>

4. Although private plaintiffs may challenge mergers, almost all antitrust merger challenges are enforcement actions by the Antitrust Division or FTC. The vast majority of cases are brought prior to consummation as preliminary-injunction actions to block the merger,<sup>478</sup> which means that the court must predict the merger's likely effect. But the agencies have also challenged consummated mergers where direct evidence of actual post-merger price increases indicated their anticompetitive effects.<sup>479</sup>

5. The government's burden in obtaining preliminary injunctions blocking mergers is fairly lenient. Where the motion for preliminary injunction is brought by the FTC, the court's role is not to decide whether the transaction violates Section 7, but rather whether the merger's lawfulness appears sufficiently in doubt that it should be held in abeyance until the FTC, through its administrative trial process, can examine the transaction in greater detail to make that determination.<sup>480</sup>

6. Importantly, “Section 7 does not require proof that a merger . . . has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future.”<sup>481</sup>

7. The Supreme Court has not decided a merger case on substantive grounds since 1975.<sup>482</sup> Accordingly, most decisional guidance comes from lower court decisions and the enforcement agencies' *Horizontal Merger Guidelines*.

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<sup>477</sup> See generally *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975); *Chicago Bridge & Iron Co., N.V. v. FTC*, 534 F.3d 410 (5th Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *United States v. Bazaarvoice, Inc.*, 2014 WL 203966 (N.D. Cal. 2014) (outlining the burden-shifting analysis); *ProMedica FTC Decision*, Slip Op.; *FTC v. ProMedica Health Sys.*, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011) (“*ProMedica Federal Court Decision*”); *FTC v. Lab. Corp. of Am.*, 2011-1 Trade Cas. (CCH) ¶ 77,348 (C.D. Cal. 2011).

<sup>478</sup> E.g., *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008).

<sup>479</sup> E.g., *Evanston Nw. Healthcare Corp.*, 2007-2 Trade Cas. (CCH) ¶ 75,814 (FTC 2007) (merger consummated in 2000, challenged by the FTC in 2004, and final order issued in 2008). See generally J. Thomas Rosch, Commissioner, FTC, “Consummated Merger Challenges—The Past Is Never Dead,” Text of Remarks Before the ABA Section of Antitrust Law Spring Meeting (Mar. 29, 2012).

<sup>480</sup> See *Whole Foods Mkt.*, *supra*, 548 F.3d at 1035 (explaining that “the FTC will usually be able to obtain a preliminary injunction blocking a merger by ‘rais[ing] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation’ and emphasizing that, at the preliminary-injunction stage, ‘a district court must not require the FTC to prove the merits’”); *Sysco Corp.*, *supra*; *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012) (granting FTC motion to enjoin a hospital merger).

<sup>481</sup> E.g., *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 788 (9<sup>th</sup> Cir. 2015).

<sup>482</sup> See *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975).



8. There is no statute of limitations for challenging mergers and obtaining injunctive relief.<sup>483</sup>

9. If the merger is sufficiently large, the parties, prior to consummation, must report it to both the Antitrust Division and FTC pursuant to the Hart-Scott-Rodino pre-merger notification requirements of Section 7A of the Clayton Act (discussed below).<sup>484</sup>

## **B. Categories of Mergers.**

1. Horizontal—Mergers between competitors—i.e., either competing sellers or competing buyers.

a. This category includes so-called “potential competition” mergers, in which one of the merging firms is either (1) on the edge of the market threatening to enter (and thus constraining competitive behavior by firms in the market) (2) or, but for the merger, would actually have entered the market, reducing the level of market concentration.<sup>485</sup>

2. Vertical—Mergers between firms at different levels in the chain of distribution—i.e., a firm and its customer or supplier.<sup>486</sup>

3. Conglomerate—Mergers between firms lacking a horizontal or vertical relationship; the merging firms may be *potential* competitors or have no relationship to each other at all.<sup>487</sup> This outline discusses only horizontal mergers, which are the main concern of Section 7 because they destroy direct competition between the merging firms.

4. A new category of merger the agencies are beginning to examine are so-called “cross-market” or “adjacent market” mergers, in which the merging parties are in different product or geographic markets (and thus are not “competitors” in the usual sense) but, together, may be able to exercise market power. The theory of how these may harm competition is very undeveloped.<sup>488</sup>

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<sup>483</sup> *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

<sup>484</sup> 15 U.S.C. § 18a.

<sup>485</sup> For a recent example, see *FTC v. Steris Corp.*, 2015 WL 5657294 (N.D. Ohio 2015).

<sup>486</sup> See generally *Ford Motor Co. v. United States*, 405 U.S. 562 (1972). This outline does not discuss vertical mergers, but see ABA Section of Antitrust Law, *Antitrust Law Developments* 386-92 (7<sup>th</sup> ed. 2012).

<sup>487</sup> See generally *Antitrust Law Developments*, *supra*, at 392-93. For a relatively recent example of the analysis of mergers between potential competitors, see *Ginsburg v. InBev NV/SA*, 623 F.3d 1229 (8th Cir. 2010).

<sup>488</sup> See generally Gregory S. Vistnes & Yianis Sarafidis, *Cross-Market Mergers: A Holistic Approach*, 79 ANTITRUST L. J. 253 (2013).

### C. Horizontal Mergers.

1. *The Antitrust Division and FTC Merger Guidelines*—The single most important resource for analyzing horizontal mergers are the federal enforcement agencies’ *Horizontal Merger Guidelines*.<sup>489</sup> issued in August 2010.

a. The *Merger Guidelines* are not “the law,” but they explain how the Antitrust Division and FTC analyze horizontal mergers and the circumstances under which they likely will challenge them. And courts frequently apply the *Merger Guidelines* in deciding merger cases.<sup>490</sup>

2. *Reasons for antitrust concern*—The *Merger Guidelines* encapsulate the overarching antitrust concern with mergers: “mergers should not be permitted to *create, enhance, or entrench market power* or to *facilitate its exercise*.”<sup>491</sup>

3. *Potential anticompetitive effects*—Horizontal mergers can raise two primary types of potential antitrust concern—(1) “coordinated effects,”<sup>492</sup> and (2) “unilateral effects,”<sup>493</sup> both of which may result in post-merger prices increases. Some mergers raise only one of these concerns, but some raise both.<sup>494</sup> Of less, but some, concern is that the merger might permit the merged firm to obtain the market power necessary to engage in exclusionary or predatory conduct aimed at its rivals.<sup>495</sup>

a. “*Coordinated effects*” resulting from “coordinated interaction”—The merger may generate high market concentration, resulting in an oligopoly; i.e., the competitive decisions (such as pricing decisions) of firms in the relevant market become interdependent, resulting in stabilized or higher prices than otherwise would prevail. Economic theory predicts that, all else equal, the more concentrated a market is, the worse the market is likely to perform and the higher prices are likely to be.

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<sup>489</sup> U.S. Dep’t of Justice & Federal Trade Comm’n, *Horizontal Merger Guidelines* (Aug. 19, 2010), available at [www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf](http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf).

<sup>490</sup> See *ProMedica Health Sys. v. FTC*, 749 F.3d 549, 565 (6<sup>th</sup> Cir. 2014) (noting that the court considers the *Merger Guidelines* “useful but not binding on us”); *Chicago Iron & Bridge, supra*, 534 F.3d at 434 (explaining that “the *Merger Guidelines* are not binding on the courts and agency during adjudication but are only highly persuasive authorities as a ‘benchmark of legality.’”); *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2011) (noting that “the *Merger Guidelines* are not binding on the Court”).

<sup>491</sup> *Merger Guidelines* § 1 (emphasis added); see also *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001) (“*Merger enforcement, like other areas of antitrust, is directed at market power.*”).

<sup>492</sup> *Merger Guidelines* § 7.

<sup>493</sup> *Id.* § 6.

<sup>494</sup> For a merger raising both concerns, see *United States v. H&R Block, Inc.*, 833 F. Supp.2d 36 (D.D.C. 2011).

<sup>495</sup> *Merger Guidelines*. § 1 (noting that the “enhanced market power” resulting from a merger “may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct”).

(1) The merger facilitates the exercise of market power by firms in the market through interdependent decision making—so-called “coordinated interaction” or “tacit collusion,” i.e., collusion without agreement.<sup>496</sup> As the *Merger Guidelines* explain, “Coordinated interaction involves action by *multiple firms* that is profitable for each of them only as a result of the *accommodating reactions* of others.”<sup>497</sup>

b. “*Unilateral effects*”—The second concern is that the merger may result in a merged firm that, *by itself*, may be able to raise prices, regardless of its competitors’ actions.<sup>498</sup> A corollary concern is that if the merged firm itself can raise its price unilaterally, its higher price may serve as a price “umbrella,” permitting other firms in the market to raise their prices as well.

(1) There are several scenarios under which a merger may result in unilateral effects, but the simplest is that where the products or services of the merging firms are relatively homogeneous or undifferentiated and the merger results in a firm with a large market share.<sup>499</sup> Here, the most important variable in determining whether unilateral effects are likely is the merged firm’s post-merger market share, but other factors must be examined as well, particularly entry barriers and the excess capacity (if any) of other firms in the market.

(2) Other theories of unilateral effects, particularly when the merging firms’ products are differentiated rather than homogeneous (discussed below), are more complex.<sup>500</sup>

4. *Steps in analyzing a horizontal merger*—The steps below outline the traditional, or “linear,” approach to analyzing a horizontal merger. The *Merger Guidelines*, however, emphasize that the agencies need not follow this approach, e.g., by initially defining relevant markets, and will “consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition.”<sup>501</sup> Many courts, however, continue to follow this traditional approach.

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<sup>496</sup> See generally *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 n.23 (D.C. Cir. 2001) (“In an oligopolistic market characterized by few producers, price leadership occurs when firms engage in interdependent pricing, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests with respect to price and output decisions.”).

<sup>497</sup> *Merger Guidelines* § 7 (emphasis added). See *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 123 (D.D.C. 2004) (explaining that “the theory of merger law is that in a market with few rivals, firms are able to coordinate behavior, ‘either by overt collusion or implicit understanding,’ to restrict output and achieve anticompetitive profits.”).

<sup>498</sup> See *Merger Guidelines* § 6; see, e.g., *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011) (“A merger is likely to have unilateral effects if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms.”).

<sup>499</sup> *Merger Guidelines* § 6.3.

<sup>500</sup> See generally *id.* § 6.1; see also *Evanston Nw. Healthcare Corp.*, 2007-2 Trade Cas.(CCH) ¶ 75,814 (FTC 2007) (discussing differentiated products unilateral-effects merger analysis); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); see generally Carl Shapiro, *Mergers with Differentiated Products*, Antitrust, Spring, 1996, at 23.

<sup>501</sup> *Merger Guidelines* § 2.

a. Step 1—Define the relevant product market.

(1) The Supreme Court and lower courts have stated repeatedly that definition of the relevant market is a first, essential requirement in every merger case.<sup>502</sup> Section 7, by its own terms, requires the condemned effect to occur “in any line of commerce” (i.e., a relevant product market), “in any section of the country” (i.e., a relevant geographic market).

(a) But in *Evanston Nw. Healthcare Corp.*,<sup>503</sup> the FTC suggested that market definition might not be essential in cases involving consummated mergers where direct evidence of the merger’s actual effects shows that it resulted in supracompetitive prices. The *Merger Guidelines* indicate the same.<sup>504</sup>

(i) The logic is that the purpose for defining a relevant market is to help assess the merger’s effect on competition, so, as a matter of logic, there is no need to define the relevant market if plaintiff can prove the anticompetitive effects of the merger directly by, for example, post-merger actual supracompetitive prices.

(ii) Stated differently, proof that the merged firm was actually able to raise prices as a result of the merger may, itself, show that the relevant market includes only the merging firms.<sup>505</sup> Under this “smallest market principle,” discussed before, the relevant market includes only the merging firms *and only* those firms, if any, that would prevent the merged firm from exercising market power by customers turning to them if the merged firm attempted to raise price anticompetitively. If the evidence shows that the merged firm could raise price, no firms exercise this constraint, so the relevant market includes only the merging firms.

(b) The *Guidelines* state that “[i]n any merger enforcement action, the Agencies will normally identify one or more relevant markets.”<sup>506</sup> FTC officials have confirmed

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<sup>502</sup> E.g., *United States v. Marine Bancorp.*, 418 U.S. 602 (1974); *St. Alphonsus Med. Ctr. v. St. Luke’s Health Sys.*, 778 F.3d 775 (9<sup>th</sup> Cir. 2015); *FTC v. Lunbeck, Inc.*, 650 F.3d 1236, 1239 (8<sup>th</sup> Cir. 2011) (“To prevail, the FTC bears the burden of identifying a relevant market.”); *City of N.Y. v. Group Health Inc.*, 649 F.3d 151 (2d Cir. 2011); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8<sup>th</sup> Cir. 1999); *FTC v. Sysco Corp.*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 3958568 at \*10 (D.D.C. June 23, 2015); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1075 (N.D. Ill. 2012) (“It is . . . essential that the FTC identify a credible relevant market . . . because a merger’s effect on competition cannot be properly evaluated without a well-defined relevant market.”).

<sup>503</sup> 2007-2 Trade Cas. (CCH) ¶ 75,814 (FTC 2007).

<sup>504</sup> See *Merger Guidelines* § 4 (“The Agencies’ analysis need not start with market definition.”); § 6.1 (noting that some methods for determining effect on competition do not require market definition).

<sup>505</sup> See *Evanston Nw. Healthcare Corp.*, *supra*, 2007-2 Trade Cas. (CCH) at 108,586, 108,587, 108,602; *id.* at 108,608 (Rosch, Comm’r, concurring); see also *Polypore Int’l, Inc.*, 149 F.T.C. 486 (2010) (Rosch, Comm’r, concurring) (noting that while the FTC may be required to define a relevant market as a technical matter, “I would instead focus on the direct evidence of competitive effects . . . and let that direct evidence define the market that is relevant in this case”), *aff’d*, 686 F.3d 1208 (11<sup>th</sup> Cir. 2012).

<sup>506</sup> *Merger Guidelines* § 4.

this in speeches but note that proof of anticompetitive effects may themselves show that the relevant market is limited to the merging firms.<sup>507</sup> But courts mandate definition of the relevant market.

(2) “The first principle of market definition is substitutability.”<sup>508</sup> The *Merger Guidelines* define the relevant product market based solely on “demand substitution,” i.e., in terms of products (and their suppliers) to which consumers would switch their demand if the post-merger firm attempted to exercise market power by raising price.

(a) The *Guidelines* apply the “hypothetical monopolist” methodology for defining relevant markets—i.e., the relevant product market includes only the products of the merging parties and those substitutes over which a hypothetical monopolist of those products would need control to profitably raise their price and sustain that price increase.<sup>509</sup>

(i) The analysis begins by identifying the product or service sold by both merging firms (the “candidate” product market)—e.g., widgets—and asks whether a hypothetical monopolist of that product could profitably raise price—i.e., whether the merged firm, if it attempted to raise price post-merger, would lose too few sales to make the price increase unprofitable. If the hypothetical price increase (typically assumed to be 5%)<sup>510</sup> would be profitable, that product, by itself, constitutes the relevant product market.

(ii) But if the price increase would be unprofitable because the firm would lose too many sales to other products (i.e., would lose more revenue from customers switching to other products that it would gain from the price increase), the next-best-substitute product is added to the candidate market, and the profitability test is repeated.<sup>511</sup>

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<sup>507</sup> E.g., J. Thomas Rosch, Commissioner, FTC, “The Past and Future of Direct Effects Evidence,” Text of Remarks Before the ABA Section of Antitrust Law 59<sup>th</sup> Spring Meeting (Mar. 30, 2011) (explaining that “the statute requires that the relevant markets be defined. But neither the statute nor the Supreme Court requires that they be defined upfront or as a predicate to analyzing the competitive effects of a transaction. . . . For example, evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can itself establish that those products form a relevant market”).

<sup>508</sup> *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 565 (6<sup>th</sup> Cir. 2014).

<sup>509</sup> *Merger Guidelines* § 4.1.1; see *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1075 (N.D. Ill. 2012) (“A relevant product market is one in which a hypothetical monopolist could increase prices profitably by a ‘small but significant’ amount for a meaningful period of time.”); *ProMedica FTC Decision*, Slip Op. at 15 (explaining that under the *Merger Guidelines*, “the product market is defined by asking whether a hypothetical monopolist of the proposed product market could impose a small but significant and nontransitory increase in price and not lose an amount of its sales to alternative products that would make the price increase unprofitable”).

<sup>510</sup> *Merger Guidelines* § 4.1.2

<sup>511</sup> See, e.g., *FTC v. Sysco Corp.*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 3958568 at \*\_\_\_ (D.D.C. June 23, 2016) (explaining that the hypothetical monopolist methodology “asks whether a hypothetical monopolist who has control over a set of substitutable products could profitably raise prices on those products. If so, the products may comprise the relevant product market. . . . If enough consumers are able to substitute away from the hypothetical monopolist’s product to another product and thereby make a price increase unprofitable, then the relevant market cannot include only the monopolist’s product and must also include substitute goods.”).

(iii) Next-best-substitute products are added to the candidate product market just to the point at which a price increase of all those products by a hypothetical monopolist of them would be profitable because too few additional consumers would switch to yet other substitute products.<sup>512</sup>

(b) Importantly, although traditional case law mandates that *all* reasonably substitutable products be included in the relevant product market, under the *Merger Guidelines* approach, the relevant market may not include *all* reasonable substitutes (whether product or geographic), but only those that, together, would prevent the merged firm from profitably increasing its price.<sup>513</sup> Again, this is the “smallest market principle.”

b. Step 2—Define the relevant geographic market.

(1) The *Merger Guidelines* require the same framework of analysis in defining the relevant geographic market.<sup>514</sup>

(a) Again, the “hypothetical monopolist” approach applies.<sup>515</sup> The analysis begins with the smallest possible relevant geographic market serving as the candidate market and asks if a hypothetical monopolist of the relevant product in that area could profitably raise price because too few customers would switch to more distant sellers to render the price increase unprofitable. If too few would switch, the price increase would be profitable and that area, by itself, constitutes the relevant geographic market. In that situation, the merging firms are the only competitors in the relevant market. That was true in the *Evanston Northwestern Healthcare* case, where the evidence showed that the merged hospitals actually increased their prices significantly after the merger. Based on this evidence, the FTC concluded that the relevant geographic market included only the merging hospitals and not other area hospitals.

(b) But if the price increase would be unprofitable because too many customers would switch patronage to more distant sellers, the next-closest seller is added to the candidate market, and the profitability test is repeated. More distant sellers are added to the

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<sup>512</sup> *Id.* § 4.1.1; see generally *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008) (“If a small price increase would drive consumers to an alternative product, then that product must be reasonably substitutable for those in the proposed market and must therefore be part of the market properly defined.”); *United States v. Engelhard Corp.*, 126 F.3d 1302 (11th Cir. 1997); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

<sup>513</sup> *Merger Guidelines* § 4.1.1 (“Groups of products may satisfy the hypothetical monopolist test without including the full range of substitutes from which customers choose.”).

<sup>514</sup> *Merger Guidelines* § 4.2.

<sup>515</sup> See *St. Alphonsus Med. Ctr. v. St. Luke’s Health Sys.*, 778 F.3d 775, 784 (9<sup>th</sup> Cir. 2015) (“A common method to determine the relevant geographic market . . . is to find whether a hypothetical monopolist could impose a ‘small but significant nontransitory increase in price’ (SSNIP) in the proposed market. . . . If enough consumers would respond to a SSNIP by purchasing the product from outside the proposed geographic market, making the SSNIP unprofitable, the proposed market definition is too narrow.”).

relevant geographic market just to that point at which a hypothetical price increase would be profitable because too few additional customers would switch to yet more-distant sellers.<sup>516</sup>

(c) In sum, the relevant geographic market, under the *Merger Guidelines*, is “the smallest region in which a hypothetical monopolist . . . located in that region could profitable implement a ‘small but significant and non-transitory’ increase in price.”<sup>517</sup>

(2) Importantly, as the *Evanston Northwestern Healthcare* decision shows, if the merged firm is able (or would be able) to raise prices unilaterally as a result of the merger, the relevant market includes *only* the merging firms, not *all* more distant firms to which customers of the merged firm might switch to avoid the merged firm’s price increase.

c. Step 3—Identify competitors or “market participants” in the relevant market.

(1) Market definition is not an end in itself. Its purpose is to identify those competitors of the merged firm that would prevent that firm from exercising market power by raising price as a result of the merger.<sup>518</sup>

(2) But firms other than those “in” the relevant market will usually exert some competitive influence in the market, even though their competition would not constrain the market power of the merging firms. The *Merger Guidelines* refer to these additional firms as “market participants” and to the extent possible, their market shares in the relevant market are counted in computing market shares and market concentration.<sup>519</sup> Market participants include:

(a) “All firms that currently earn revenues in the relevant market”;

(b) “Firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future”; and

(c) Firms not currently selling the relevant product in the relevant geographic market but that, in response to a price increase by firms in the relevant market, would quickly begin selling in that market without having to incur significant sunk costs.<sup>520</sup>

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<sup>516</sup> *Id.* § 4.2.1.

<sup>517</sup> *Polypore Int’l, Inc.*, 149 F.T.C. 486 (2010), *aff’d* 686 F.3d 1208 (11<sup>th</sup> Cir. 2012)..

<sup>518</sup> *See, e.g., Evanston Nw. Healthcare Corp., supra*, 2007-2 Trade Cas. (CCH) at 108,601 (explaining that “market definition is not an end in itself but rather an indirect means of assisting in determining the presence or likelihood of the exercise of market power”).

<sup>519</sup> *Merger Guidelines* § 5.1.

<sup>520</sup> *Id.*; *see also Polypore Int’l, supra* (listing the above as market participants and explaining that “[w]here a firm is actively attempting to sell its products to customers in the relevant market and those efforts impact the behavior of existing sellers, that firm may be treated as an actual competitor”).

(3) For example, suppose firms A, B, and C are the only firms in the relevant market (because those firms, together, could raise price anticompetitively). Suppose also that firms D, E, and F also sell the relevant product to customers located in the relevant geographic market. The latter three firms are “market participants,” even though they are not firms “in” the relevant market; thus each will have a market share in that market.

(4) Firms accounted for under (c) above reflect “supply substitutability,” i.e., firms not currently participating in the relevant market that would switch production to, or otherwise enter, the relevant market to take advantage of a price increase by firms in the relevant market. Numerous federal court decisions hold that supply substitutability, as well as demand substitutability, is important in defining relevant product and relevant geographic markets.<sup>521</sup>

d. Step 4—Compute the market shares of market participants. Typically, market shares are calculated in terms of sales revenues, physical units produced, and physical capacity. The *Merger Guidelines* indicate that the agencies will most often use actual or projected revenues in calculating market shares.<sup>522</sup>

e. Step 5—Calculate the merging firms’ post-merger market share, the post-merger level of relevant-market concentration, and the extent to which the merger would increase these figures. In calculating the post-merger level of market concentration, use the Herfindahl-Hirschman Index (HHI) as the measure—i.e., add the merging firms’ market shares, square the market share of each market participant, and sum the squares. To calculate the amount by which the merger would increase the HHI, multiply the shares of the merging firms by each other, and multiply that product by 2 (or subtract the pre-merger HHI from the post-merger HHI).<sup>523</sup> In computing post-merger market concentration, be sure to add the shares of the merging firms and square that sum, not the shares of the individual merging firms.

f. Step 6—Determine the potential competitive concern from the merger—either (i) coordinated effects, (ii) unilateral effects, or (iii) both, and compare the Step 5 statistics to the *Merger Guidelines* benchmarks.

(1) If *coordinated effects* are the potential concern, the most important variables are the level of post-merger market concentration and the amount by which the merger increases the level of concentration.

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<sup>521</sup> E.g., *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); *Gulf States Reorg. Group v. Nucor Corp.*, 721 F.3d 1281 (11<sup>th</sup> Cir. 2013); *Geneva Pharms.*, *supra*, 386 F.3d at 499 (“A manufacturer’s ability to raise prices . . . is not only constrained by current substitutes but also by actual or potential competitors capable of providing new competition quickly with little sunk costs.”); *Blue Cross & Blue Shield v. Marshfield Clinic*, 65 F.3d 1406 (7<sup>th</sup> Cir. 1995).

<sup>522</sup> *Merger Guidelines* § 5.2.

<sup>523</sup> *See id.* § 5.3 & nn.9, 10.



(a) Compare the post-merger HHI and its increase from the merger with the concentration-level benchmarks of *Merger Guidelines* § 5.3. The *Guidelines* provide that mergers resulting in:

(i) HHIs of less than 1,500 (unconcentrated post-merger markets) raise no problem;

(ii) HHIs of between 1,500 and 2,500 (moderately concentrated markets) raise no problem unless the increase in the HHI is 100 or more, in which case the merger warrants consideration of additional variables (discussed below); and

(iii) HHIs of 2,500 or above (a highly concentrated market) still raise no problem if the increase in the HHI is less than 100. But more analysis is necessary if the increase is between 100 and 200, and the merger is rebuttably presumed anticompetitive (and thus unlawful) if the increase exceeds 200. A merger of firms each with a 10% market share increases the HHI by 200.<sup>524</sup>

(iv) These benchmarks, however, are only guidelines, and, based on a richer analysis including other variables, the agencies have chosen not to challenge numerous mergers with HHIs significantly above 2,500.

(b) Note that there is a de facto safe harbor for mergers resulting in a post-merger HHI under 1,500, and mergers increasing the HHI by less than 100, regardless of the post-merger HHI.

(2) If *unilateral effects*—i.e., the loss of direct competition between the merging firms and the ability of the merged firm, by itself, to increase price—are the potential concern, the most important variables depend on whether the products of the merging firms are “undifferentiated” or homogeneous, or “differentiated” or heterogeneous. Undifferentiated products are identical or almost identical—“commodity products”; consumers have little, if any, preference among them, basing their purchasing decisions only on price. Differentiated products are products not so different as to be in separate relevant product markets but sufficiently different that consumers have clear preferences among them and thus are willing to pay at least somewhat more for one than the other. Differentiation can be based on product or geographic characteristics. The firms may differ as to location, distance, quality, amenities, reputation, etc. The services of health-care providers, such as hospitals and physicians, are differentiated products.<sup>525</sup>

(a) In the case of *undifferentiated products*, the most important variable is the merged firm’s post-merger market share. The larger that market share, the more difficult it is for

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<sup>524</sup> See, e.g., *St. Alphonsus Med. Ctr. v. St. Luke’s Health Sys.*, 778 F.3d 775 (9<sup>th</sup> Cir. 2015) (applying the presumption when the merger increased the HHI by 1,607 to 6,219).

<sup>525</sup> See *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 569 (6<sup>th</sup> Cir. 2014); *Evanston Nw. Healthcare Corp.*, 2007-2 Trade Cas. (CCH) ¶ 75,814 (FTC 2007).

incumbent firms and new entrants to replace the merged firm's reduced output undertaken to raise price.<sup>526</sup> There is no magic market share resulting in unlawfulness because so many other factors are important in determining a firm's market power, but a very rough rule of thumb is that, all else equal, concern begins to arise at post-merger market shares greater than 35 percent.

(b) In the case of *differentiated products*, the most important variable is the “closeness” of the merging firms—i.e., the directness or strength of the direct competition between them as compared to that between them and other area firms. The closer they are or the stronger the competition between them compared to the strength of competition between them and other firms, the more likely it is that the merger will result in unilateral effects and provide the merged firm with the ability to increase prices. This is because the more direct the competition between them, the more likely that they are the first and second choices of consumers. Thus, if after the merger, the merged firm increases the price of one of the products, much of the business it loses as a result of that price increase will divert to its other product rather than to more distant substitutes. As a result, the loss of business resulting from the price increase is “internalized” within the merged firm and, depending on other factors (primarily the number of customers for whom the products of the merging firms are their first and second choices and the merging firms' contribution margins on the products), the price increase may be profitable.<sup>527</sup>

(c) In general, the antitrust enforcement agencies are likely to take a close look at most horizontal mergers resulting in a combined post-merger market share above 40% and take the position that the merger is rebuttably presumed unlawful.

(d) In the case of a consummated merger, where the evidence shows that the merged firm actually did increase price post-merger and there is no explanation for the price increase other than market power resulting from the merger, this is “strong evidence of anticompetitive unilateral effects.”<sup>528</sup>

g. Step 7—Determine whether the merger is *prima facie*, or rebuttably presumed, unlawful. If the quantitative benchmarks relating to post-merger concentration and market share,

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<sup>526</sup> See Herbert Hovenkamp, *Federal Antitrust Policy* § 3.1b at 109-10 (5th ed. 2016) (positing a hypothetical where if Firm A has a 10% market share and reduces its output by X%, other firms can easily replace A's lower output. But if A has a 90% share and reduces its output from 90 to 80 units to increase price, each of A's competitors might need to double its output to reduce market price to the previous level); see generally William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981).

<sup>527</sup> See generally 4 Phillip Areeda, et al., *Antitrust Law* ¶ 914 at 73-88 (3d ed. 2009); Carl Shapiro, *Mergers with Differentiated Products*, Antitrust, Spring 1996, at 23; *ProMedica FTC Decision*, Slip Op. at 47; *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011); *Evanston Nw. Healthcare, supra*; *Chicago Bridge & Iron, N.V.*, 138 F.T.C. 1024 (2004), *petition for review denied*, 534 F.3d 410 (5th Cir. 2008).

<sup>528</sup> *Polypore Int'l, Inc.*, 149 F.T.C. 486 (2010) (“In a consummated merger, post-acquisition evidence of actual anticompetitive effects may in some cases be sufficient to establish Section 7 liability.”), *aff'd*, 686 F.3d 1208 (11<sup>th</sup> Cir. 2012); see also *Evanston Nw. Healthcare Corp, supra* (finding the merger unlawful, in large part because of econometric evidence showing significant post-merger price increases resulting from the merger).

above, are met, a rebuttable presumption arises that the merger is anticompetitive, shifting the burden of going forward to the merging parties to provide evidence of other factors indicating that the merger likely will not substantially lessen competition.<sup>529</sup> But the ultimate burden of persuasion always rests with the plaintiff.

h. Step 8—Consider defendants’ rebuttal evidence: “A defendant can make the required [rebuttal] showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government’s favor.”<sup>530</sup> But the stronger the plaintiff’s *prima facie* case (i.e., the higher the post-merger market share or market concentration), the stronger the defendants’ rebuttal evidence must be.<sup>531</sup> Defendants’ rebuttal evidence may consider numerous variables, but the most common and important are the following:

(1) Low entry and expansion barriers.

(a) The *Merger Guidelines* explain that “[a] merger is not likely to create or enhance market power if entry into the market is so easy so that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger.”<sup>532</sup> Thus, if new entry (or output expansion by incumbent firms) would replace the decrease in output resulting from the merged firm’s attempt to exercise market power by

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<sup>529</sup> See generally *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); see also *Chicago Iron & Bridge, supra*, 515 F.3d at 458 (“Typically, the Government establishes a *prima facie* case by showing that the transaction will significantly increase concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition. . . . Once the Government establishes the *prima facie* case, the respondent may rebut it by producing evidence to cast doubt on the accuracy of the Government’s evidence as predictive of future anticompetitive effects.”); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1075 (N.D. Ill. 2012) (explaining that a sufficiently high post-merger market share or market concentration results in a *prima facie* case and presumption that the merger is unlawful that defendant may then rebut based on non-statistical evidence or unique circumstances that undercut the predictive value of the government’s statistics); *Polypore Int’l.*, *supra*, 2010-2 Trade Cas. (CCH) at 119,025; *FTC v. CCC Holdings*, 605 F. Supp. 2d 26 (D.D.C. 2009); see also *Merger Guidelines* §5.3 (“The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.”).

<sup>530</sup> *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990).

<sup>531</sup> E.g., *Polypore Int’l, Inc.*, *supra* (“The stronger the plaintiff’s *prima facie* case, the greater the defendant’s burden of production on rebuttal.”)

<sup>532</sup> *Merger Guidelines* § 9; see also *Chicago Iron & Bridge, N.V. v. FTC*, 515 F.3d 447 (5th Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 987 (1990) (“In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time.”); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984) (“[E]ntry into the relevant . . . market by new firms . . . is so easy that any anticompetitive impact of the merger . . . would be eliminated more quickly by . . . such competition than by litigation”); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 73 (D.D.C. 2011) (“Courts have held that likely entry or expansion by other competitors can counteract anticompetitive effects that would otherwise be expected.”); *Polypore Int’l.*, *supra*, 2010-2 Trade Cas. (CCH) at 119,037 (“Even mergers in concentrated markets are unlikely to harm competition where entry is timely, likely and sufficient to alleviate the otherwise anticompetitive effects.”).

increasing price, the merger should have no anticompetitive effects, even if it would result in very high concentration or in a firm with a very high market share.

(b) But to rebut plaintiff's prima facie case, entry must be (i) *likely*, (ii) *timely*, and (iii) *sufficient*.<sup>533</sup>

(i) Likely entry—For entry to be likely, it must be profitable for new entrants based on *premerger* prices.<sup>534</sup> And whether firms have previously entered the relevant market is an important consideration: “The history of entry in the relevant markets ‘is a central factor in assessing the likelihood of entry in the future.’”<sup>535</sup>

(ii) Timely entry—The *Merger Guidelines* provide no time period by which entry must occur, although some courts appear to use two years from the time of the merger as a rough rule of thumb.<sup>536</sup> The *Guidelines* provide simply that “entry must be rapid enough to make unprofitable overall the actions causing [anticompetitive] effects and thus leading to entry, even though those actions would be profitable until entry takes effect.”<sup>537</sup>

(iii) Sufficient entry—The output from new entry must be sufficient to counteract the anticompetitive effect of the merger—i.e., it must increase output to at least its premerger level.<sup>538</sup> The *Merger Guidelines* provide that “[e]ntry by a single firm that will replicate at least the scale and strength of one of the merging firms is sufficient.”<sup>539</sup> Entry must be sufficient “to *replace* the competition that existed prior to the merger.”<sup>540</sup>

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<sup>533</sup> *Merger Guidelines* § 9.

<sup>534</sup> *Id.* § 9.2; see also *Chicago Iron & Bridge*, *supra*.

<sup>535</sup> *Polypore Int’l*, *supra* (quoting *FTC v. Cardinal Health*, 12 F. Supp .2d 34 (D.D.C. 1998)).

<sup>536</sup> E.g., *ProMedica Federal Court Decision*, *supra*, 2011-1 Trade Cas. (CCH) ¶ 77,395 (N.D. Ohio 2011).

<sup>537</sup> *Merger Guidelines* § 9.1.

<sup>538</sup> *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1, 42 (D.D.C. 2007) (“For entry to be sufficient, it must replace the competition that existed prior to the merger), *rev’d and remanded on other grounds*, 548 F.3d 1028 (D.C. Cir. 2008); *Chicago Iron & Bridge Co.*, 138 F.T.C. 1024 (2004) (“entry must restore the competition lost from the merger”), *petition for review denied*, 515 F.3d 447 (5th Cir. 2008); *Polypore Int’l*, 2010-2 Trade Cas. (CCH) at 119,037 (“For entry to constrain the likely harm from a merger . . . , the scale must be large enough to constrain prices post-acquisition.”), *aff’d*, 686 F.3d 1208 (11<sup>th</sup> Cir. 2012).

<sup>539</sup> *Merger Guidelines* § 9.3.

<sup>540</sup> *ProMedica Federal Court Decision*, *supra*, 2011-1 Trade Cas. (CCH) at 120,099 (emphasis in original).

(2) Substantial efficiencies from the merger.

(a) Most horizontal mergers generate procompetitive efficiencies that must be balanced against the merger's anticompetitive effects.<sup>541</sup>

(b) In some situations, efficiencies from a merger may be sufficient to offset its likely market-power effects by lowering the merged firm's marginal cost so that its profit-maximizing price is no greater than the premerger price.<sup>542</sup> Thus, "[t]he Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential harm to consumers . . . , e.g., by preventing price increases in the market."<sup>543</sup>

(c) But to be considered, the *Merger Guidelines* mandate that efficiency claims meet certain stringent requirements.<sup>544</sup>

(i) The defendants must prove that the efficiencies are "*merger specific*"—i.e., they must be efficiencies that would not be achieved but for the merger.<sup>545</sup>

(ii) The efficiencies must be "*net*"—i.e., the costs of achieving the efficiencies must be subtracted from the amount of the efficiencies resulting from the merger.

(iii) The claimed efficiencies must be "*verifiable*"—i.e., "[i]t is incumbent upon the merging firms to substantiate efficiency claims so that the Agency can verify by

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<sup>541</sup> See *Merger Guidelines* § 10 (explaining that "a primary benefit of mergers . . . is their potential to generate efficiencies and thus enhance the merged firm's ability and incentive to compete"); *H.J. Heinz Co.*, *supra*, 246 F.3d at 708, (explaining that "a merger's primary benefit . . . is to generate efficiencies"); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1088 (N.D. Ill. 2012) ("Although the Supreme court has not sanctioned the use of an efficiencies defense in a Section 7 case, most lower courts recognize the defense."); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

<sup>542</sup> See *Merger Guidelines* § 10 ("In a coordinated interaction context . . . , incremental cost reductions may make coordinated interaction less likely or effective."; "In a unilateral effects context . . . , incremental cost reductions may reduce or reverse any increases in the merged firm's incentive to raise prices.").

<sup>543</sup> *Id.*; see generally Oliver Williamson, *Economies as an Antitrust Defense: The Welfare Trade-Offs*, 58 Am. Econ. Rev. 18 (1968) (discussing the circumstances in which efficiency effects offset market-power effects of mergers).

<sup>544</sup> *Merger Guidelines* § 10.

<sup>545</sup> E.g., *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 790 (9<sup>th</sup> Cir. 2015) ("The defendant must . . . demonstrate that the claimed efficiencies are 'merger specific' . . . which is to say that the efficiencies cannot be readily 'achieved without the concomitant loss of a competitor.'"); *FTC v. Sysco Corp.*, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 3958568 at \*55 (D.D.C. June 23, 2015) ("Defendants bear the burden of demonstrating that their claimed efficiencies are merger specific[.]"); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 90 (D.D.C. 2011) ("If a company could achieve certain cost-savings without any merger at all, then those stand-alone cost savings cannot be credited as merger-specific efficiencies.").

reasonable means the *likelihood* and *magnitude* of each asserted efficiency, *how* and *when* each would be achieved (and any costs of doing so), and *how* each would enhance the merged firm's ability and incentive to compete, and *why* each would be *merger-specific*.”<sup>546</sup>

(iv) In sum, the efficiencies must be “*cognizable*”—i.e., they must be net, verifiable, merger-specific efficiencies that “do not arise from anticompetitive reductions in output or service.”<sup>547</sup>

(d) Many courts require, for the efficiencies to count in favor of the merger, that the merged firm pass on the benefits of the efficiencies to consumers in the form of, e.g., lower prices.<sup>548</sup>

(e) In assessing the effect of efficiencies on the lawfulness of the transaction, the *Merger Guidelines* apply a sliding scale: the greater the potential anticompetitive effects from the merger, the greater the efficiencies must be.<sup>549</sup> The *Guidelines* state explicitly that “[e]fficiencies almost never justify a merger to monopoly or near monopoly.”<sup>550</sup> Thus, so-called “2-to-1” and “3-to-2” mergers are very difficult to justify on efficiency grounds.

(f) The agencies and courts are extremely skeptical of efficiencies claims,<sup>551</sup> and several have stated that efficiencies from the transaction by themselves have never saved a merger rebuttably presumed unlawful.<sup>552</sup>

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<sup>546</sup> *Merger Guidelines* § 10 (emphasis added); see generally *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012); *ProMedica Federal Court Decision*, *supra*, 2011-1 Trade Cas. (CCH) ¶ 75,395 (N.D. Ohio 2011).

<sup>547</sup> *Id.* § 10.

<sup>548</sup> E.g., *FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991); *Sysco Corp.*, *supra*, \_\_\_ F. Supp. 3d at \_\_\_, 2015 WL 3958568 at \*55 *OSF Health Sys.*, *supra*, 852 F. Supp. 2d at 1093 n.20 (noting that even if the court could credit defendants' efficiencies, it “would still find that defendants failed to rebut the FTC's prima facie case as there is no definitive evidence that these savings would be passed on to the consumer”); *United States v. Long Is. Jewish Med. Ctr.*, 983 F. Supp. 121 (E.D.N.Y. 1997).

<sup>549</sup> E.g., *Sysco Corp.*, *supra*, \_\_\_ F. Supp. 3d at \_\_\_, 2015 WL 3958568 at 56 (D.D.C. June 23, 2015) (“Where . . . the court finds high market concentration levels, defendants must present ‘proof of extraordinary efficiencies’ to rebut the government's prima facie case.”).

<sup>550</sup> *Merger Guidelines* § 10; see *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.C. Cir. 2011) (“High market concentration levels require ‘proof of extraordinary efficiencies,’ and courts ‘generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case.’”).

<sup>551</sup> See, e.g., *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 790 (9<sup>th</sup> Cir. 2015) (“We remain skeptical about the efficiencies defense in general and about its scope in particular. It is difficult enough in § 7 cases to predict whether a merger will have future anticompetitive effects without also adding to the judicial balance a prediction of future efficiencies.”).

<sup>552</sup> *Id.* at 789 (“However, none of the reported appellate decisions have actually held that a § 7 defendant had rebutted a prima facie case with an efficiencies defense”); *Sysco Corp.*, *supra*, \_\_\_ F. Supp. 3d at \_\_\_, 2015 WL 3958568 at \*56 (D.D.C. June 23, 2015) (“The court is not aware of any case, and Defendants have cited none, where the merging parties have successfully rebutted the government's *prima facie* case based on the strength of efficiencies”).

(3) *Weakness of the acquired firm*—Either of two defensive doctrines may apply when the acquired firm’s prospects for remaining competitively viable are dim:

(a) The “*failing firm*” defense—If one of the firms is, as a technical matter, a “failing firm,” the merger is lawful—period. This defense is a dispositive affirmative defense, regardless of the merged firm’s post-merger market share or the post-merger level of market concentration. But requirements to sustain the defense are very strict. The merging parties bear the burden of persuasion to show that:

(i) Business failure is imminent (i.e., that the firm is insolvent);

(ii) The firm could not successfully reorganize under the Bankruptcy Act;  
and

(iii) The failing firm made a good-faith effort to find a different acquiring firm whose acquisition of it would have a less anticompetitive effect than that of the acquiring firm. The *Merger Guidelines* and some courts require proof that, but for the merger, the failing firm’s assets would exit the market.<sup>553</sup>

(b) The “*flailing firm*” or “weakened competitor” defense.

(i) Situations arise where the acquired firm is not “failing” in the technical sense above but is sufficiently weak that it is unlikely to continue as a strong competitor in the future. Its current market share overstates its future competitive significance. In this situation, the firm’s weakened financial status and future competitive strength are factors (just as efficiencies are) that the court considers in balancing the likely effect of the merger on competition.<sup>554</sup>

(ii) Unlike the failing-firm defense, the firm’s competitive weakness is not a determinative affirmative defense but rather only one factor to consider in predicting the merger’s effect on competition.<sup>555</sup>

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<sup>553</sup> *Merger Guidelines* § 11; *Gulf States Reorg. Group v. Nucor Corp.*, 466 F.3d 961 (11th Cir. 2006); *see generally United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549 (1971); *Cal. v. Sutter Health Sys.*, 130 F. Supp. 2d 1109 (N.D. Cal. 2001).

<sup>554</sup> *Id.* § 5.2 (explaining that “recent or ongoing changes in market conditions may indicate that the current market share of a particular firm either overstates or understates the firm’s future competitive significance”).

<sup>555</sup> *See Univ. Health, supra*; *Evanston Nw. Healthcare Corp.*, 2007-2 Trade Cas. (CCH) ¶ 75,814 (FTC 2007); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 153 (D.D.C. 2004) (explaining that “several courts have relied on the weak and worsening position of the proposed acquired firm as a significant factor in declining to enjoin a proposed merger”); *see generally United States v. General Dynamics Corp.*, 415 U.S. 486, 506 (1974) (the seminal decision holding that a merging firm’s future competitive strength is relevant notwithstanding its current market share) (explaining that the acquired firm in that case “was not merely disinclined but unable to compete effectively for future contracts. Such evidence went directly to the question of whether future lessening of competition was probable, and the District Court was fully justified in [considering] it”).

(iii) The burden to show that a merging firm's financial weakness rebuts the presumption of unlawfulness is heavy, including proof that its financial weakness would reduce the merged firm's market share and the level of market concentration below those resulting in the presumption.<sup>556</sup> Several courts have said that the "flailing firm" argument is perhaps the weakest argument in support of a problematic merger.<sup>557</sup>

(iv) And as the *Merger Guidelines* state, a firm's current market share may *understate*, as well as overstate, its future competitive strength.<sup>558</sup>

(4) Other factors—When the potential concern is coordinated effects, market characteristics affecting the ease, success, and profitability of coordinated interaction—i.e., interdependent competitor decision making or tacit collusion—are important in assessing a merger's effect on competition. Factors to consider include:

(a) Product homogeneity—The more homogeneous the products of the competitors, the easier coordinated interaction or collusion is.<sup>559</sup> Thus, the standardization of products, by, for example, a standard-setting body, facilitates coordinated interaction.

(b) The firms' cost structures—The more similar the firms' costs are, the easier collusion is.<sup>560</sup>

(c) Buyer size and sophistication—The smaller and less sophisticated the buyers are, the more likely is successful coordinated interaction.<sup>561</sup> Conversely, large, sophisticated purchasers may be able to exercise "countervailing power" to protect themselves from price increases. But while some large buyers may be able to protect themselves from price

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<sup>556</sup> *E.g., ProMedica FTC Decision*, Slip Op. at 28 (explaining that "evidence of an acquired firm's anticipated competitive weakness may, in certain cases, be sufficient to rebut the government's *prima facie* case. However, it is also clear that the courts have imposed an extremely heavy burden on defendants seeking to rebut the structural presumption on this ground. . . . [F]inancial difficulties . . . are relevant only where they indicate that market shares would decline in the future, and by enough to bring the merger below the threshold of presumptive illegality." (internal quotation marks omitted.)

<sup>557</sup> *See ProMedica Health Sys., supra*, 749 F.3d at 572 (referring to the defense as "the Hail Mary pass of presumptively doomed mergers—in this case thrown from [defendant's] own end zone"); *Kaiser Aluminum & Chem. Co. v. FTC*, 652 F.2d 1324, 1339 (7<sup>th</sup> Cir. 1981) ("Financial weakness, while perhaps relevant in some cases, is perhaps the weakest ground of all for justifying a merger").

<sup>558</sup> *Merger Guidelines* § 10.

<sup>559</sup> *E.g., United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1989); *Evanston Nw. Healthcare Corp.*, 2007-2 Trade Cas. (CCH) ¶ 75,814, at 108,585 (FTC 2007) ("Generally, coordination is more likely in markets with homogeneous products because it is easier for competitors to reach agreements on terms of coordination and to detect or punish deviations from those terms.").

<sup>560</sup> *E.g., United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400 (S.D. Iowa 1991).

<sup>561</sup> *Merger Guidelines* § 7.2; *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998).



increases, smaller buyers may not if the merged firm can price discriminate between its large and small customers.<sup>562</sup>

(d) Competitor availability of information about one another—The more information firms have about the prices, competitive actions, and competitive reactions of their competitors, the greater the likelihood of coordinated interaction.<sup>563</sup> This is why competitor agreements to exchange competitively sensitive information such as prices can facilitate collusion and sometimes violate Section 1. The more detailed, the more firm-specific, and the more transaction-specific the information is, the more likely that coordinated interaction will result<sup>564</sup> because the easier it is for firms to detect a competitor’s “cheating” on the coordinated conduct by, e.g., lowering price, and punishing the cheater.

(e) The size and frequency of transactions—The smaller and more frequent the transactions are, the more likely coordinated interaction is.<sup>565</sup> On the other hand, the larger and more the infrequent transactions, the more incentive firms have to try to cheat on their rivals because of the importance of obtaining the business.

(f) Level of industry technology—Collusion is less likely in high-tech industries than in low-tech industries because products change so quickly in the former, making coordinated interaction more difficult.

(g) Ability of competitors to quickly respond to competitors’ actions—The ability of competitors to quickly and strongly respond to their competitors actions serves as a deterrent to firms cheating on their coordinated interaction by, e.g., lowering price. They know that if they cheat and are quickly discovered, they will garner little new business before their competitors follow suit or, perhaps, undercut them to punish them for attempting to cheat.<sup>566</sup>

(h) Percentage of firms in the market participating in the coordinated interaction—If the percentage of firms in the market participating in the coordinated interaction is small, the group, in the aggregate, may lack market power because consumers have sufficient alternative sellers to which they can turn to avoid the group’s supracompetitive prices.<sup>567</sup>

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<sup>562</sup> *Merger Guidelines* § 8 (“[E]ven if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers.”); *Polypore Int’l, Inc.*, 2010-2 Trade Cas. (CCH) ¶ 77,257 (FTC 2010), *aff’d*, 686 F.3d 1208 (11<sup>th</sup> Cir. 2012).

<sup>563</sup> *Merger Guidelines* § 7.2 (noting that coordination is more likely “if each competitively important firm’s significant competitive initiatives can be promptly and confidently observed by that firm’s rivals”). *See also United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

<sup>564</sup> *E.g., Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001).

<sup>565</sup> *E.g., Merger Guidelines* § 7.2; *B.F. Goodrich Co.*, 110 F.TC. 207 (1988).

<sup>566</sup> *Merger Guidelines* § 7.2 (explaining that markets are more vulnerable to coordinated interaction “the stronger and faster are the responses the firm anticipates from its rivals”).

<sup>567</sup> *Id.* (explaining that “significant harm normally is likely only if a substantial part of the market is subject to such conduct”).

(i) Profitability of the coordinated interaction—The more profitable the tacit collusion is, the greater the incentive to participate in it. The fewer alternatives that customers have (i.e., the more price-inelastic the demand for the group’s products), the more profitable coordinated interaction is.<sup>568</sup> Elasticity of demand is important because the lower the elasticity of demand, the fewer the sales that those engaging in the coordination lose from a given price increase.

(j) History of collusion among the firms in question or in the relevant market<sup>569</sup>—That firms have colluded in the past suggests that coordinated interaction is feasible and profitable.

(k) Importance of price as opposed to non-price variables in buyer purchasing decisions—Interdependent decision making or coordinated interaction is more difficult when non-price variables (e.g., quality and service) are important because (i) the coordinated interaction must include variables in addition to price, and (ii) cheating is easier because competitors can vary quality or service rather than price and detection is more difficult than when the only salient competitive variable is price.<sup>570</sup>

(l) In general, any factor that inhibits the competitors from “cheating” on the tacit agreement by, for example, lowering their price, tends to facilitate interdependent, coordinated interaction. The more likely a competitor will be caught cheating on the interdependently arrived at decision and punished, the less likely it is to deviate from the coordinated action. The incentive of individual competitors to cheat is great if they can avoid detection, and the ability to do so completely destabilizes coordinated interaction.

(m) In sum, any factor relating to the ease, feasibility, profitability, and secrecy of coordinated interaction is relevant.

#### **D. Premerger Notification Requirements.**

1. Section 7A of the Clayton Act<sup>571</sup> requires that parties to certain large acquisition transactions notify both the FTC and Antitrust Division of the transaction on forms prescribed by the agencies, and then wait at least 30 days before consummating the transaction to provide one of the agencies the opportunity to investigate it.

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<sup>568</sup> *See id.* (coordinated interaction is “more likely, the more the participants stand to gain from successful coordination. Coordination is generally more profitable, the lower is the market elasticity of demand”).

<sup>569</sup> *See id.*

<sup>570</sup> *E.g., N.Y. v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995).

<sup>571</sup> 15 U.S.C. § 18a.

2. By the end of this 30-day waiting period, the agency must either “clear” the transaction or issue a request for additional information (called a “second-request letter”) to the parties, seeking more information about the transaction. If the agency issues a second-request letter, the parties cannot consummate the transaction until 30 days after they produce the requested information to the agency.

a. The agency’s “clearing” the transaction by not issuing a second-request letter (or issuing a second-request letter but ultimately not challenging the transaction) is not an agency opinion or decision that the transaction is lawful and does not prevent the agency from later challenging the transaction. Indeed, the agencies have challenged acquisitions that they had previously cleared under the premerger-notification process.

3. Whether a transaction is reportable depends on the size or value of the transaction, the size of the parties, and, in some cases, on the structure of the transaction. The reporting thresholds change from year to year because they are indexed to yearly percentage changes the U.S. Gross Domestic Product. At present, the parties must report the transaction if:

a. The transaction would result in the acquiring party’s holding a total of the acquired party’s assets or voting securities of more than \$312.6 million; *or*

b. The acquiring party would hold a total of the acquired party’s assets or voting securities of more than \$78.2 million but less than \$312.6 million; *and*

(1) A party with total assets or total annual sales of \$156.3 million or more would hold the assets or voting securities of a party with assets or annual sales of \$15.6 million or more; *or*

(2) A party with total assets or annual sales of \$15.6 million or more would hold the voting securities or assets of a party with assets or annual sales of \$156.3 million or more.

c. The FTC has issued relatively complicated regulations implementing the premerger notification requirements.<sup>572</sup>

4. Civil penalties for failing to comply with the premerger reporting requirements, including failure to file the required notification and “gun jumping” (i.e., beginning to implement the transaction or to transfer control prior to clearance) can be substantial.<sup>573</sup>

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<sup>572</sup> 15 C.F.R. §§ 801-03 (2015).

<sup>573</sup> See, e.g., *United States v. Flakebord Am. Ltd.*, 2015-1 Trade Cas. (CCH) ¶ 79,045 (N.D. Cal. 2015) (consent decree) (\$3.8 million civil penalty); *United States v. MacAndrews & Forbes Holdings, Inc.*, 2013-1 Trade Cas. (CCH) ¶ 78,443 (D.D.C. 2013) (consent decree) (\$720,000 civil penalty); *United States v. Smithfield Foods, Inc.*, 2010-1 Trade Cas. (CCH) ¶ 76,880 (D.D.C. 2010) (consent decree) (\$900,000 civil penalty for acquiring firm taking control of acquired firm during premerger waiting period); *United States v. Malone*, 2009-1 Trade Cas. (CCH) ¶ 76,659 (D.D.C. 2009) (consent decree) (\$1.4 million civil penalty); *United States v. Gemstar-TV Guide Int’l, Inc.*, 2003-2 Trade Cas. (CCH) ¶ 75,082 (D.D.C. 2003) (consent decree) (\$5.7 million civil penalty for gun jumping).

a. Somewhat related, whether notification is required or not, the merging parties remain separate entities prior to the merger's closing, so pre-merger agreements between them—such as discontinuing competition—may raise serious questions under Section 1 of the Sherman Act. Similarly, due-diligence exchanges of documents can also raise concern if the parties exchange highly competitively sensitive information (e.g., their prices) too early in the merger process or fail to limit the persons with access to the information.<sup>574</sup>

## VII. ANTITRUST-LAW COVERAGE AND ANTITRUST EXEMPTIONS.

**A. In General**—There are a number of persons, actions, and situations to which the antitrust laws simply do not apply: They are “exempt” or “immune” from antitrust liability or damages.

1. Exemptions from antitrust coverage can be “express” (i.e., explicit in a federal statute) or “implied” (i.e., created by judicial decision).

2. Because of this nation's strong commitment to competition as a national economic policy, the courts have stated that “repeal by implication” or judicially created exemptions from antitrust coverage are disfavored and strictly construed.<sup>575</sup>

**B. Specific Exemptions or Lack of Coverage**—The more important antitrust exemptions are the following:

1. Non-commercial activity—Because the antitrust laws, by their own literal terms, apply only to “trade or commerce,” they do not apply to non-commercial activity because it does not constitute trade or commerce.<sup>576</sup> But they do apply to the commercial activities of nonprofit

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<sup>574</sup> See *Flakebord, supra* (\$1.15 mission disgorgement for violation of § 1 for market-allocation agreement entered into before transaction was ultimately abandoned); see generally *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697 (7th Cir. 2011); see also Michael C. Naughton, *Gun-Jumping and Premerger Information Exchange: Counseling the Harder Questions*, Antitrust, Summer 2006, at 66; William Blumenthal, General Counsel, FTC, “The Rhetoric of Gun Jumping,” Prepared Remarks Before the Association of Corporate Counsel Annual Antitrust Seminar (Nov. 10, 2005), reprinted in 6 John J. Miles, *Health Care & Antitrust Law* App. E138 (Supp. 2013); William Blumenthal, *The Scope of Permissible Coordination Between Merging Entities Prior to Consummation*, 63 Antitrust L.J. 1 (1994); Remarks of Mary Lou Steptoe, Acting Director, Bureau of Competition, FTC, on Premerger Collaboration (Apr. 7, 1994), reprinted in 5 John J. Miles, *Health Care & Antitrust Law* App. E40 (Supp. 2013).

For a more in-depth discussion of the premerger notification requirements, see ABA Section of Antitrust Law, *Antitrust Law Developments* 394-401 (7th ed. 2012).

<sup>575</sup> *FTC v. Phoebe Putney Health Sys.*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1003, 1010 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

<sup>576</sup> See generally *Bassett v. NCAA*, 528 F.3d 426 (6th Cir. 2008); *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), vacated in part on other grounds, 525 U.S. 459 (1999).

entities,<sup>577</sup> and it can be difficult in some situations to distinguish commercial from non-commercial activity.<sup>578</sup>

2. Federal governmental immunity—The antitrust laws do not apply to the federal government, its agencies, or its agents.<sup>579</sup> The immunity can apply to private parties working in conjunction with the federal government.<sup>580</sup>

3. Implied repeal—Where an industry is heavily regulated under a federal regulatory scheme (e.g., the securities industry) and an irreconcilable conflict exists between the antitrust laws and that regulatory scheme, the federal antitrust laws are “impliedly repealed,” but only to the minimum extent necessary to permit the federal regulatory scheme to work as Congress intended.<sup>581</sup>

4. State action.

a. The state-action exemption is one of the two most important antitrust exemptions. It emanates from the Supreme Court’s 1943 *Parker v. Brown* decision, in which the Court explained that there is “nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . The Sherman Act was not intended to restrain state actions or official action directed by a state.”<sup>582</sup>

b. The state-action exemption is based not only on statutory interpretation of the Sherman Act—that it was not intended to apply to the anticompetitive acts of state—but also on principles of federalism. From *Parker* has evolved an antitrust exemption with different

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<sup>577</sup> E.g., *NCAA v. Bd. of Regents*, 468 U.S. 85 (1985); *Eleven Line, Inc. v. N. Tex. Soccer Ass’n, Inc.*, 213 F.3d 198 (5th Cir. 2000); *Minn. Made Hockey, Inc. v. Minn. Hockey, Inc.*, 2011-1 Trade Cas. (CCH) ¶ 77,453 (D. Minn. 2011).

<sup>578</sup> See, e.g., *Agnew v. NCAA*, 683 F.3d 328, 338 (7<sup>th</sup> Cir. 2012) (“There is no clear line as to what constitutes a ‘commercial transaction,’ but one leading commentator has suggested that ‘today the term “commerce” is much broader than it was [in the past] . . . , including almost every activity from which [an] actor anticipates economic gain.’”).

<sup>579</sup> See, e.g., *United States Postal Serv. v. Flamingo Indus. (USA)*, 540 U.S. 736, 745 (2004) (explaining that “the United States is not an antitrust ‘person,’ in particular, not a person who can be an antitrust defendant”).

<sup>580</sup> *Byers v. Intuit, Inc.*, 600 F.3d 286, 295 (3d Cir. 2010) (explaining that “[s]uch immunity is provided to a private party acting anti-competitively pursuant to an agreement with a government agency when: (1) the government agency is acting pursuant to a clearly defined policy or program; and (2) the private party is acting at the direction or consent of the government agency”); see also *McCarthy v. Middle Tenn. Membership Corp.*, 466 F.3d 399 (6th Cir. 2006); *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000).

<sup>581</sup> E.g., *Credit Suisse Secs. (USA) v. Billing*, 551 U.S. 264 (2007); *Nat’l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378 (1981).

<sup>582</sup> *Parker v. Brown*, 317 U.S. 341, 350-51 (1943); see also *Tritent Int’l Corp. v. Ky.*, 467 F.3d 547, 554 (6th Cir. 2006) (explaining that “[t]he rationale behind *Parker* immunity is that Congress, in enacting the Sherman Act, evidenced no intent to restrain state behavior”).

requirements based on the status of the parties undertaking action that would otherwise violate the antitrust laws:

(1) *Sovereign branches of state governments*—Actions of the sovereign branches of state governments (the legislature, executive, and judiciary) are absolutely immune under the doctrine without any further analysis.<sup>583</sup>

(2) *Private parties*—At the other end of the spectrum, the state-action exemption applies to the conduct of private parties if their challenged conduct meets two requirements: “First, the challenged restraint must be one ‘clearly articulated and affirmative expressed as state policy’; second, the policy must be actively supervised by the state.”<sup>584</sup> The two requirements are often referred to as the first and second “*Midcal* prongs”—the “clearly articulated” prong and the “active supervision” prong.

(a) The “‘clearly articulated and affirmative expressed as state policy’” requirement—To meet this requirement, the first prong of the *Midcal* test, the state need not mandate or require that the private parties engage in the challenged conduct or identify specific conduct. Rather, in general, the state must (i) must intend to replace competition with regulation; (ii) generally authorize the conduct in question; and (iii) foresee or contemplate that anticompetitive effects might result from its authorization.<sup>585</sup>

(b) The “active state supervision” requirement—The purpose for the active-state-supervision requirement is to ensure that the private parties’ activities actually reflect and promote the state’s policies rather than merely the private parties’ own economic interests.<sup>586</sup> To

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<sup>583</sup> *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Costco Wholesale Corp. v. Maleng*, 514 F.3d 915 (9th Cir. 2008); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 442 (4th Cir. 2006) (“First, if that party is the ‘state itself’—*i.e.*, the state legislature or the courts—its actions *ipso facto* are exempt from operation of the antitrust laws.”); *Jackson Hosp. Corp. v. W. Tenn. Hosp. Co.*, 414 F.3d 608 (6th Cir. 2005).

<sup>584</sup> *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum Co.*, 445 U.S. 97, 105 (1980) (stating the general principle).

<sup>585</sup> *FTC v. Phoebe Putney Health Sys.*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1003 (2013) (holding that general grants of power by the state to private parties are insufficient); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *Town of Hallie City of Eau Claire*, 471 U.S. 34 (1985); *S. Motors Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48 (1985); *Kay Elec. Cooperataive v. City of Newkirk*, 647 F.3d 1039 (10<sup>th</sup> Cir. 2011); *Active Disposal, Inc. v. City of Darien*, 635 F.3d 883, 888 (7<sup>th</sup> Cir. 2011) (“We look to the [state] statute and ask two questions: first, whether it authorizes the challenged conduct; second, whether the anti-competitive effects are a foreseeable result of the authorization.”); *Danner Constr. Co. v. Hillsborough County*, 608 F.3d 809, 813 (11<sup>th</sup> Cir. 2010) (“Explicit statements by the state legislature that it anticipated anticompetitive effects are not required.”); *Shames v. Cal. Travel & Tourism Comm’n*, 626 F.3d 1079, 1083 (9<sup>th</sup> Cir. 2010) (noting that “the Supreme Court has not required express authorization of particular anticompetitive acts and has applied state action immunity when the actions were a foreseeable result of a broad statutory authorization”); *Lafaro v. N.Y. Cardiothoracic Group, PLLC*, 570 F.3d 471 (2d Cir. 2009).

<sup>586</sup> *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *Cal. Travel & Tourism Comm’n*, *supra*, 607 F.3d at 618 (noting with regard to the active-supervision requirement that “[t]he [Supreme] Court was primarily concerned that without adequate state supervision, private parties would act to further their own interests as opposed to the interests of the state”).

sustain the requirement, the state must have and exercise the power to review and approve or disapprove the private parties' challenged conduct.<sup>587</sup>

(c) If the government entity's conduct is exempt, then private-party conduct taken in conjunction with that conduct is usually also exempt. Otherwise, plaintiffs could thwart the state's program by suing the private parties but not the state.<sup>588</sup>

(3) State agencies and local governments—Between the state as sovereign and private parties are subordinate state actors (e.g., state agencies) and local governmental entities (e.g., cities and counties). The state-action exemption applies to the actions of these entities if their actions are clearly articulated and affirmatively expressed by a sovereign branch of the state as state policy—the first *Midcal* prong—but the state need not also supervise their activities, as it must the activities of private parties, for the exemption to apply.<sup>589</sup> Active state supervision is not required<sup>590</sup>—unless the state agency is comprised of actively practicing competitors such as many state professional regulatory boards.<sup>591</sup>

(4) Although exemptions from the antitrust laws are generally disfavored, “the case law has interpreted [state-action] protection hospitably”<sup>592</sup>—at least until recently.<sup>593</sup>

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<sup>587</sup> *Patrick v. Burget*, 486 U.S. 94 (1988); see also *Ticor*, *supra*; *Trigon Okla. City Energy Corp. v. Okla. Gas & Elec. Co.*, 244 F.3d 1220 (10th Cir. 2001).

<sup>588</sup> E.g., *N.Y. Cardiothoracic Group*, *supra*; *Elec. Inspectors, Inc. v. Village of E. Hills*, 320 F.3d 110 (2d Cir. 2003); *Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033 (5th Cir. 1998).

<sup>589</sup> *Phoebe Putney Health Sys.*, *supra*; *Town of Hallie*, *supra*; *City of Columbia*, *supra*; *United Nat'l Main., Inc. v. San Diego Convention Ctr.*, 749 F.3d 869 (9th Cir. 2014); *Kay Elec. Coop.*, *supra*, 647 F.3d at 1042 (“Put simply, at the end of the day, a municipality shares the state’s ‘immunity’ but only when it is implementing anticompetitive policies authorized by the state.”); *Straitienko v. Chattanooga-Hamilton County Hosp. Auth.*, 402 Fed. App’x 990 (6th Cir. 2010); *N.Y. Cardiothoracic Group*, *supra*; *FTC v. Hosp. Bd.*, 38 F.3d 1184, (11th Cir. 1994) (“To obtain state action immunity, an entity such as [a local governmental entity] must show the following: (1) that it is a political subdivision of the state; (2) that through statutes, the state generally authorizes the political subdivision to perform the challenged action; and (3) that, through the statutes, the state has a clearly articulated a state policy authorizing anticompetitive conduct.”).

<sup>590</sup> But see *N.C. State Bd. of Dental Examiners v. FTC*, 717 F.3d 359 (4th Cir. 2013) (affirming FTC decision that a state agency regulatory board comprised of professionals who compete in the market and are elected to the board by the professionals they regulate are treated as private parties and thus that the board’s actions must be actively supervised by the state for the exemption to apply).

<sup>591</sup> See *N.C. State Bd. of Dental Examiners v. FTC*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1101 (2015) (holding that state-action exemption did not apply to the board’s anticompetitive actions because, as an agency comprised of practicing dentists, active state supervision of its activities was required); *Teledoc, Inc. v. Tex. Med. Bd.*, 2015 WL 8773509 (W.D. Tex. 2015).

<sup>592</sup> *Rectrix Aerodome Ctrs., Inc. v. Barnstable Mun. Airport Comm’n*, 610 F.3d 8, 13 (1st Cir. 2010).

<sup>593</sup> See, e.g., *Phoebe Putney Health Sys.*, *supra*; *N.C. State Bd. of Dental Examiners*, *supra* (affirming the FTC’s decision refusing to apply the exemption to the actions of a state-agency regulatory board).

5. Sherman Act preemption of anticompetitive state regulation.

a. States cannot merely grant private parties permission to engage in conduct that violates the antitrust laws. Indeed, where state regulation mandates that private parties engage in conduct that, in all circumstances, results in a per se violation of Section 1, the Sherman Act preempts the state regulation.<sup>594</sup>

(1) State regulation may be preempted on its face or as applied in particular situations.<sup>595</sup>

(2) Even where the Sherman Act preempts state regulation, the defendants may still be protected from liability by the state-action exemption.<sup>596</sup>

6. Soliciting anticompetitive governmental action—the “*Noerr-Pennington*” exemption.

a. Perhaps the broadest and most important of the antitrust exemptions is that provided to parties petitioning the government to take anticompetitive action, commonly called the “*Noerr-Pennington*” or “*Noerr*” exemption after the two seminal Supreme Court decisions establishing the exemption.<sup>597</sup> Succinctly stated, the antitrust laws do not apply to private parties’ petitioning the government for anticompetitive action.

(1) Thus, as one court explained, in determining liability, “we must first identify any conduct that is immunized [by *Noerr*]. After we do so, we consider the evidence of the

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<sup>594</sup> *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982); *see also Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Yakima Valley Mem’l Hosp. v. Wash. Dep’t of Health*, 654 F.3d 919 (9<sup>th</sup> Cir. 2011); *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 49-50 (2d Cir. 2010) (explaining that “the party asserting preemption must demonstrate an ‘irreconcilable conflict’ between the challenged [state] statute and the Sherman Act. . . . Such a conflict will be found only ‘when the conduct contemplated by the statute is in all cases a *per se* violation’ of the antitrust laws”); *Flying J, Inc. v. Van Hollen*, 621 F.3d 658 (7<sup>th</sup> Cir. 2010); *Sanders v. Brown*, 504 F.3d 903, 910 (9<sup>th</sup> Cir. 2007) (“The only way such a conflict can exist, according to the Supreme Court, is if the state ‘mandates or authorizes conduct that necessarily constitutes a violation . . . in all cases, or if it places irresistible pressure on a private party’ to violate those laws.”).

<sup>595</sup> *E.g., Danner Constr. Co., supra* (Martin, J., concurring).

<sup>596</sup> *E.g., Danner Constr. Co., supra*, 608 F.3d at 815 (explaining that “even if the Sherman Act preempts a state law or municipal ordinance, the court must still conduct the *Parker/Midcal* inquiry to determine if the defendant is entitled to immunity”); *see also Freedom Holding, supra; Flying J, supra*.

<sup>597</sup> *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *UMW v. Pennington*, 381 U.S. 657 (1965); *see also Kaiser Found. Health Plan v. Abbott Labs.*, 552 F.3d 1033, 1044 (9<sup>th</sup> Cir. 2009) (“The *Noerr-Pennington* doctrine allows private citizens to exercise their First Amendment rights to petition the government without fear of antitrust liability.”); *Andrx Pharms., Inc. v. Elan Corp.*, 421 F.3d 1227, 1233 (11<sup>th</sup> Cir. 2005) (“A defendant is immune from Sherman Act liability for concerted efforts to petition the government to pass legislation which has the effect of restraining or monopolizing trade in favor of the defendant.”).



remaining challenged conduct in the aggregate to see if it is sufficient to support antitrust liability.”<sup>598</sup>

(2) The doctrine rests on both First Amendment considerations protecting governmental petitioning activities and on statutory interpretation—that Congress did not intend the antitrust laws to apply to political activity.<sup>599</sup>

(3) Because of its First Amendment foundation, most courts hold that the exemption applies to most types of federal and state legal claims, not just to federal antitrust claims.<sup>600</sup>

b. The exemption applies to petitioning of all levels of local, state, and federal governments.<sup>601</sup>

c. The exemption applies whether the petitioning results from concerted activity or from unilateral action.

d. The exemption applies regardless of the petitioners’ anticompetitive intent.<sup>602</sup>

e. In general, the exemption applies if the petitioners are genuinely seeking governmental action (legislative, judicial, or executive) and the anticompetitive effect results from that governmental action, unless the conduct is “incidental” to the petitioning. The exemption does not apply if the restraint results from the petitioning activity itself rather than from the governmental action sought.<sup>603</sup>

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<sup>598</sup> *Mercatus Group, LLC v. Lake Forest Hosp.*, 641 F.3d 834, 839 (7th Cir. 2011).

<sup>599</sup> *Id.* at 846 (“*Noerr-Pennington* was crafted to protect the freedom to petition guaranteed under the First Amendment.”); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006); *Armstrong Surgical Ctr. v. Armstrong County Mem’l Hosp.*, 185 F.3d 154 (3d Cir. 1999).

<sup>600</sup> *E.g.*, *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) (applying the exemption in the labor-law context); *Mercatus Group*, *supra*, 641 F.3d at 847 (explaining that “*Noerr-Pennington* has been extended beyond the antitrust laws, where it originated, and is today understood as an application of the first amendment’s speech and petitioning clauses.”); *Campbell v. PMI Food Equip. Group, Inc.*, 509 F.3d 776 (6th Cir. 2007) (explaining that the exemption applies to tortious-interference and federal civil-rights claims); *Sanders v. Brown*, 504 F.3d 903 (9th Cir. 2007) (explaining that the exemption applies to state antitrust claims); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999) (explaining that the exemption applies to state tortious-interference and unfair-competition claims).

<sup>601</sup> *See BE&K Constr. Co.*, *supra*; *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Mercatus Group*, *supra*; *Andrx Pharms.*, *supra*; *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2001); *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056 (9th Cir. 1998).

<sup>602</sup> *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 377-78 (1991) (noting that the fact that a petitioner’s selfish motives are irrelevant); *Sanders v. Brown*, 504 F.3d 903, 912 (9th Cir. 2007) (explaining that “it is inappropriate to base liability on whether a petitioner has an anticompetitive motive, because that would unduly chill speech”); *Tal v. Hogan*, 453 F.3d 1244, 1259 (10th Cir. 2006) (“The actual intent of the parties petitioning the government or of the government agent involved is irrelevant.”).

<sup>603</sup> *City of Columbia*, *supra*; *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006); *Sandy River Nursing Care v. Aetna Cas.*, 985 F.2d 1138 (1st Cir. 1993).

f. The exemption also applies to conduct that is “incidental” to the actual government petitioning—not part of the petitioning activity itself—that adversely affects competition.<sup>604</sup>

g. The exemption does not apply to efforts to coerce the government to act through, e.g., boycotts.<sup>605</sup>

h. The major exception to *Noerr-Pennington* immunity is the so-called “sham exception.” The Supreme Court has explained generally that “sham” petitioning results where “persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon”<sup>606</sup>; i.e., where the petitioners’ action is not genuinely intended to obtain favorable action from the government but to harm their competitors directly by their petitioning activity. Precisely what activities constitute sham petitioning is not clear, but courts have condemned the following as sham:

(1) Fraud on the patent office in obtaining a patent and subsequent attempted enforcement of the patent in infringement litigation.<sup>607</sup>

(2) Bribery of public officials.<sup>608</sup>

(3) Misrepresentations or fraud in the petitioning process. Whether, or under what circumstances, misrepresentations or fraud in petitioning constitute a sham that destroys the exemption is somewhat unclear. The Supreme Court has explicitly left these questions open.<sup>609</sup>

(a) A number of courts have held that misrepresentations in the petitioning

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<sup>604</sup> *E.g.*, *Noerr*, 365 U.S. at 143 (“It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, . . . that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed.”); *Mercatus Group*, *supra*, 641 F.3d at 849 (explaining that defendant “Hospital’s public relations campaign does not lose its protection even if it caused Mercatus injury unrelated to the [governmental action that defendant sought]”); *see also* *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180 (9th Cir. 2005).

<sup>605</sup> *E.g.*, *Allied Tube & Conduit*, *supra*; *Superior Court Trial Lawyers Ass’n*, 107 F.T.C. 510 (1986); *Mich. State Med. Soc’y*, 101 F.T.C. 191 (1983).

<sup>606</sup> *City of Columbia*, *supra*, 499 U.S. at 380; *see also* *Kaiser Found. Health Plan v. Abbott Labs., Inc.*, 552 F.3d 1033 (9th Cir. 2009); *Knology, Inc. v. Insight Commc’ns Co.*, 393 F.3d 656 (6th Cir. 2004).

<sup>607</sup> *In re Independent Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000); *Glass Equip. Dev., Inc. v. Besten, Inc.*, 174 F.3d 1337 (Fed. Cir. 1999); *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998); *Ritz Camera & Image, LLC v. Sandisk Corp.*, 772 F. Supp. 2d 1100 (N.D. Cal. 2011).

<sup>608</sup> *Cal. Motor Transp.*, *supra*; *Armstrong Surgical Ctr.*, *supra*.

<sup>609</sup> *See Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 62 n.6 (1993).

process are tolerated in the legislative context, but not in adjudicatory contexts (judicial or administrative).<sup>610</sup>

(b) Other decisions indicate that misrepresentations are protected in adjudicatory contexts, at least where the petitioners' actual intent is to obtain governmental action.<sup>611</sup> Some courts, taking somewhat of a middle ground, hold that the answer depends on factors such as whether the misrepresentation is so serious that it deprives the adjudication of its legitimacy.<sup>612</sup>

(i) While "there is little doubt that fraudulent misrepresentations may render purported petitioning activity a sham . . . [n]ot every fraudulent misrepresentation during an adjudicative or administrative proceeding can give rise to antitrust liability."<sup>613</sup> For example, "neither inadvertent misrepresentations, nor misrepresentations lacking any ascertainable effect on the proceedings . . . are within the fraud exception's ambit." Thus, "a misrepresentation renders an adjudicative proceeding a sham only if the misrepresentation (1) was intentionally made, with knowledge of its falsity; and (2) was material, in the sense that it actually altered the outcome of the proceeding."<sup>614</sup>

(c) And the fraud exception does not apply in contexts other than adjudicative proceedings, although determining whether an administrative proceeding is legislative or adjudicatory is not always simple.<sup>615</sup>

(4) Enforcement of a patent that plaintiff knows is invalid because, for example, it was obtained by fraud on the patent office.<sup>616</sup>

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<sup>610</sup> E.g., *Cal. Motor Transp., supra*; *Mercatus Group, supra* (extended discussion of the "fraud branch" of the sham exception); *A Fisherman's Best, Inc. v. Recreational Fishing Alliance*, 310 F.3d 183 (4th Cir. 2002); *Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568 (6th Cir. 1986); *St. Joseph's Hosp. v. Hosp. Corp. of Am.*, 795 F.2d 948 (11th Cir. 1986).

<sup>611</sup> E.g., *Armstrong Surgical Ctr., supra*.

<sup>612</sup> *Freeman v. Lasky, Hass & Cohler, supra*; *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999); *Kottle, supra*; *Union Oil Co.*, 138 F.T.C. 1 (2004) (providing an extended discussion of the FTC's view about the scope of the exemption).

<sup>613</sup> *Mercatus Group, supra*, 641 F.3d at 842.

<sup>614</sup> *Id.* at 843; see also *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 402 (4th Cir. 2001) (misrepresentations must be material and be "the type of fraud that deprives the litigation of its legitimacy"); *Kottle, supra*.

<sup>615</sup> See *Mercatus Group, supra*.

<sup>616</sup> *Walker Process Equip. Co. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); *Nobelpharma, supra*; *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 691 (2d Cir. 2009).

(5) Sham litigation—The filing of suits, even if for an anticompetitive purpose, is usually protected by the exemption.<sup>617</sup>

(a) There is, however, a narrow “sham litigation” exception. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, the Supreme Court established a two-part test for identifying sham litigation:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively baseless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals “an attempt to interfere *directly* with the business relationships of a competitor.”<sup>618</sup>

(b) Several courts have held that litigation cannot be a sham if the plaintiff in that litigation (or parties in conducting other forms of petitioning the government) prevailed.<sup>619</sup>

(c) Several courts have applied the *Professional Real Estate Investors* test to forms of government petitioning other than the filing of litigation.<sup>620</sup>

7. *Petitioning of non-governmental parties for political or social goals*—Typically, the *Noerr-Pennington* doctrine does not protect the actions of parties petitioning non-governmental entities, such as private standard-setting organizations, to take anticompetitive action.<sup>621</sup> The antitrust laws, however, do not apply to petitioning activities such as political or social boycotts of private parties, where the boycotts’ objective is to achieve political or social goals rather direct

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<sup>617</sup> *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 63 (1993) (explaining that “a showing of malice alone will [not] entitle the plaintiff to prevail”).

<sup>618</sup> *Id.*, 508 U.S. at 60 (1993) (emphasis in original). See also *Tyco Healthcare Group; LP v. Mut. Pharm. Co.*, 762 F.3d 1338 (Fed. Cir. 2014); *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966 (8<sup>th</sup> Cir. 2011); *Andrx Pharms., Inc. v. Elan Corp.*, 421 F.3d 1227 (11<sup>th</sup> Cir. 2005); *Golan v. Pingel Enter., Inc.*, 310 F.3d 1360 (Fed. Cir. 2002); *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852 (5<sup>th</sup> Cir. 2000).

<sup>619</sup> E.g., *A Fisherman’s Best*, *supra*, 310 F.3d at 191 (noting that “[a] successful effort to influence governmental action ‘certainly cannot be characterized as a sham’”).

<sup>620</sup> E.g., *Armstrong Surgical Ctr.*, *supra*; *Bayou Fleet*, *supra*; *Bath Petrol. Storage, Inc. v. Market Hub Ptrs., L.P.*, 229 F.3d 1135 (2d Cir. 2000) (Table) (per curiam unpublished opinion reprinted at 2000-2 Trade Cas. (CCH) ¶ 73,061); *In re Wellbutrin XL Antitrust Litig.*, 2012 WL 1657734 at \*4 (E.D. Pa. May 11, 2012) (“The sham exception is applicable, not only to lawsuits, but also to administrative petitions.”).

<sup>621</sup> *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

economic or competitive benefits for the boycotting parties.<sup>622</sup> These activities are protected by the First Amendment.

8. Labor exemptions.

a. Labor unions are essentially cartels of employees that fix the price of the labor they sell. Normally, a union's agreeing on the wages its members are paid and negotiating wages on their behalf would constitute a per se violation of Section 1, and several early cases so held.<sup>623</sup> As a technical matter, employers participating in the collective-bargaining process would constitute co-conspirators. Because, however, of the strong national policy favoring collective bargaining, Congress enacted several statutes resulting in a broad antitrust exemption for labor-union and collective-bargaining activities.

b. Federal courts lack subject-matter jurisdiction to issue injunctions related to "labor disputes."<sup>624</sup>

c. The labor exemptions arise from Sections 6 and 20 of the Clayton Act, Sections 1, 4, 5, and 13 of the Norris-LaGuardia Act, and judicial decision making.

d. There is both a "statutory" labor exemption and a "non-statutory" labor exemption:

(1) The statutory exemption is narrow and applies only to agreements between labor unions and the employees they represent and only to activities where the union acts in its own self-interest.<sup>625</sup> It does not apply to union agreements with employers, and thus does not exempt collective-bargaining agreements between unions and employers from the antitrust laws.<sup>626</sup>

(2) As a result, courts created the non-statutory labor exemption, which exempts collective-bargaining agreements between employers and unions from the antitrust laws.<sup>627</sup> The

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<sup>622</sup> See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (boycott of white merchants by African-Americans to effect social change); *Mo. v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980) (boycott of convention facilities in a state to induce it to pass the Equal Rights Amendment); *Nat'l Org. for Women, Inc. v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd on other grounds*, 510 U.S. 249 (1994).

<sup>623</sup> E.g., *Loewe v. Lawlor*, 208 U.S. 274 (1908).

<sup>624</sup> Section 20 of the Clayton Act, 29 U.S.C. § 52. For an extended discussion, see *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011).

<sup>625</sup> *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704 (1981); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union 100*, 421 U.S. 616 (1975).

<sup>626</sup> E.g., *Cal. v. Safeway, Inc.*, 651 F.3d 1118, 1124 (9<sup>th</sup> Cir. 2011) (en banc) (explaining that "the statutory exemption does 'not exempt concerted action or agreements among unions and nonlabor parties'").

<sup>627</sup> See generally *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *Connell Constr. supra.*; *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005); *Clarett v. NFL*, 369 F.3d 124 (2d

non-statutory labor exemption applies where (1) the effect on competition from the agreement is primarily on the parties to the agreement (i.e., unions and employers) and not third parties (e.g., competitors of employers bargaining with the union); (2) the agreement encompasses mandatory subjects of collective bargaining—wages, hours, and other terms and conditions of employment; and (3) the agreement results from bona fide, arms’ length negotiations between unions and employers.<sup>628</sup>

(a) As suggested above, the exemption does not apply to agreements and schemes between unions and employers to competitively disadvantage competitors of the employers with which the union is bargaining—where the primary effect on competition is in the market for the employer’s product or service rather than in the labor market.<sup>629</sup>

(b) The exemption protects multi-employer collective bargaining (i.e., joint employer collective-bargaining negotiations with unions), as well as collective bargaining between unions and individual employers.<sup>630</sup>

(c) For the exemption to apply, there must be an employer-employee relationship between the parties participating in the collectively bargaining. The exemption does not apply to collective bargaining between firms and independent contractors.<sup>631</sup> So, for example, the exemption does not apply to collective bargaining by competing physician practices and health insurers over rates the health plans will pay the physicians for treating health-plan members.

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Cir. 2004) (Sotomayor, J.); *Brady v. NFL*, 779 F. Supp. 2d 1043 (D. Minn.) (granting preliminary injunction), *order stayed*, 640 F.3d 785 (8<sup>th</sup> Cir. 2011), *injunction dissolved*, 644 F.3d 661 (8<sup>th</sup> Cir. Jul. 2011).

<sup>628</sup> *American Steel Erectors, Inc. v. Local Union No. 7, Int’l Ass’n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers*, \_\_\_ F.3d \_\_\_, 2016 WL 759835 (1<sup>st</sup> Cir. Feb. 25, 2016); *Clarett v. NFL*, *supra*, 369 F.3d at 142-43 (also noting that the exemption “extends as far as necessary to ensure the successful operation of the collective bargaining process”) (emphasis in original); *Cal. v. Safeway, Inc.*, 651 F.3d 1118 (9<sup>th</sup> Cir. 2011) (exemption inapplicable because the challenged agreement among employers played no significant role in collective bargaining, was not necessary for collective bargaining to occur, and did not relate to any core subject matter of bargaining, such as wages, hours, or working conditions); *Sheet Metal, Roofing & Air Conditioning Contractors Ass’n, Inc. v. Local 38, Sheet Workers Int’l Ass’n*, 208 F.3d 18 (2<sup>d</sup> Cir. 2000).

<sup>629</sup> *UMW v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Local Union No. 3, Int’l Bhd. of Elec. Workers*, 325 U.S. 797 (1945); *Cal. v. Safeway*, *supra*; *Am. Steel Erectors, Inc. v. Local Union No. 7*, 536 F.3d 68 (1<sup>st</sup> Cir. 2008); *Clarett v. NFL*, *supra*. It also does not apply to parties not part of the collective-bargaining process. *E.g.*, *Cal. v. Safeway, Inc.*, 371 F. Supp. 2d 1179 (C.D. Cal. 2005), *aff’d*, 615 F.3d 1171 (9<sup>th</sup> Cir 2010), *aff’d in part, rev’d in part, and remanded en banc*, 651 F.3d 1118 (9<sup>th</sup> Cir. 2011).

<sup>630</sup> *Brown v. Pro Football*, *supra*; *Clarett v. NFL*, *supra*.

<sup>631</sup> *Los Angeles Meat & Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94 (1962); *Spence v. Se. Alaska Pilots Ass’n*, 789 F. Supp. 1007 (D. Alas. 1990).

9. Business of insurance.

a. The McCarran-Ferguson Act<sup>632</sup> provides a limited exemption for the “business of insurance.”

b. The exemption applies to the “business of insurance,” not “insurance companies.”<sup>633</sup> Accordingly, not all activities of insurance companies are exempt, and the exemption can apply to the activities of non-insurance companies to the extent that their activities constitute the “business of insurance.”

c. For the exemption to apply:

(1) *First*, the challenged conduct must constitute, or be part of, the “business of insurance.” Conduct constitutes the “business of insurance” if:

(a) It spreads or transfers risk;

(b) It is an integral part of the relationship between the insurer and its insureds; and

(c) It involves only firms within the insurance industry.<sup>634</sup>

(2) *Second*, the business of insurance must be regulated by the state.<sup>635</sup> Even the most general state regulation of insurance seems sufficient, however, and it need not even be enforced.<sup>636</sup>

(3) *Third*, the conduct must not constitute “any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.”<sup>637</sup> For purposes of the McCarran Act, these terms mean a refusal to deal seeking “to ‘coerce the target of the boycott into acceding to certain demands by means of a refusal to deal with the target in collateral, unrelated

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<sup>632</sup> 15 U.S.C. §§ 1011-15.

<sup>633</sup> *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010); *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993); *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56 (1st Cir. 2005).

<sup>634</sup> See generally *Union Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); *Katz v. Fid. Nat’l Title Ins. Co.*, 685 F.3d 588 (6<sup>th</sup> Cir. 2012); *Ins. Brokerage Antitrust Litig.*, *supra*; *Arroyo-Melecio*, *supra*; *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327 (11th Cir. 2004).

<sup>635</sup> See, e.g., *FTC v. Travelers Health Ass’n*, 362 U.S. 293 (1960).

<sup>636</sup> *FTC v. Nat’l Cas. Co.*, 357 U.S. 560 (1958); *Arroyo-Melecio*, *supra*; *Ocean State Physicians Health Plan v. Blue Cross & Blue Shield*, 883 F.2d 1101 (1st Cir. 1989).

<sup>637</sup> 15 U.S.C. § 1013(b).

transactions.”<sup>638</sup> Thus, the definition of “boycott” for purposes of the McCarran Act is narrower than that of “group boycott” for purposes of Section 1 of the Sherman Act.

10. Local Government Antitrust Act.

a. The Local Government Antitrust Act,<sup>639</sup> provides an antitrust exemption, but only from damages (not liability), for all local-governmental units.

b. “[L]ocal government” is defined broadly to include all general function and special-function governmental units established by state law, including cities; towns; counties; and water, sanitary, school, and hospital districts.<sup>640</sup>

c. In addition to the local governmental unit itself, the exemption from damages applies to individuals (whether or not employees of the local government) where the challenge is to their conduct based on official action directed by a local government. It also applies to any official or employee of the local government acting in his or her official capacity.<sup>641</sup> An individual’s actions are directed by the local government if they were authorized and supervised by that government.<sup>642</sup> State authorization—a requirement for state-action exemption protection—is unnecessary.<sup>643</sup>

d. The defendants’ motives are immaterial.<sup>644</sup>

e. The Act does not preclude plaintiffs from obtaining declaratory judgments or injunctions.<sup>645</sup>

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<sup>638</sup> *Arroyo-Melecio, supra*, 398 F.3d at 70; see also *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993); *Gilchrist, supra*, 390 F.3d at 1335 (explaining that the terms encompass a “refusal to deal in a collateral transaction as a means to coerce terms respecting a primary transaction”); *Slagle v. ITT Hartford*, 102 F.3d 494 (11th Cir. 1996).

<sup>639</sup> 15 U.S.C. §§ 34-36.

<sup>640</sup> *Id.* § 34(1).

<sup>641</sup> *Id.* § 36(a).

<sup>642</sup> *Wee Care Child Center, Inc. v. Lumpkin*, 680 F.3d 841 (6<sup>th</sup> Cir. 2012); *GF Gaming Corp. v. City of Black Hawk*, 405 F.3d 876 (10<sup>th</sup> Cir. 2005); *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139 (4<sup>th</sup> Cir. 1988) (Powell, J.).

<sup>643</sup> *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91 (2d Cir. 1986).

<sup>644</sup> *Wee Care Child Center, supra*; *GF Gaming, supra*; *Cohn v. Bond*, 953 F.2d 154 (4<sup>th</sup> Cir. 1991).

<sup>645</sup> E.g., *Swarz Ambulance Serv., Inc. v. Genesee County*, 666 F. Supp. 2d 721 (E.D. Mich. 2009); *Bean v. Norman*, 2010-2 Trade Cas. (CCH) ¶ 76,887 (D. Kan. 2010).



11. Health Care Quality Improvement Act.

a. In the health-care sector, another exemption from damages, but not liability, is the Health Care Quality Improvement Act (HCQIA),<sup>646</sup> which applies primarily (but not solely) to the decisions of hospitals in peer-review proceedings affecting the hospital staff privileges of physicians.

b. In the late 1970s and 1980s, a large number of physicians filed antitrust actions against hospitals and their medical staffs when the hospital adversely affected their hospital staff privileges, either by denying their application for privileges to practice at the hospital or by revoking, suspending, or terminating those privileges through the hospital/medical-staff peer-review credentialing process.<sup>647</sup> In *Patrick v. Burget*,<sup>648</sup> the Supreme Court held that the state-action exemption did not protect a private hospital and its medical staff when engaging in peer review from antitrust liability or damages because the state did not actively supervise hospital credentialing decisions. As a result of this decision, Congress enacted the HCQIA.<sup>649</sup> Although the HCQIA is aimed at providing protection from damages primarily in the context of hospital/medical-staff credentialing, it applies to physician exclusions from other relationships as well.

c. The HCQIA applies only to adverse actions relating to physicians, not to those effecting other types of health-care providers (e.g., allied health practitioners, such as nurse anesthetists).

d. The HCQIA applies only to adverse actions based on the physician's professional competence or conduct.<sup>650</sup> Hence, it would not apply to a hospital's decision not to grant a physician privileges because of an exclusive contract with another physician to provide the relevant services.

e. The HCQIA's exemption from damages applies to all types of federal and state legal challenges (not just antitrust challenges), regardless of the type of claim or legal theory, except for civil-rights cases and cases brought by the federal government or state attorneys general.<sup>651</sup>

f. The exemption from damages applies to the "professional review actions" of "professional review bodies" in the course of "professional review activities" taken with respect

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<sup>646</sup> 42 U.S.C. §§ 11101-52.

<sup>647</sup> See generally 2 John J. Miles, *Health Care & Antitrust Law*, Ch. 10 (2015).

<sup>648</sup> 486 U.S. 94 (1988).

<sup>649</sup> See, e.g., *Liu v. Bd. of Trustees*, 330 Fed. App'x 775 (11th Cir. 2009) (explaining the purpose for the HCQIA).

<sup>650</sup> 42 U.S.C. § 11151(9).

<sup>651</sup> *Id.* § 11111(a)(1).

to “physicians,” as those terms are defined in the HCQIA.<sup>652</sup> The exemption applies to the professional review body, its staff, persons under contract with it, and persons assisting it in the professional review action.

- g. The exemption applies if the professional review action was taken:
  - (1) With the reasonable belief that it would further quality health care;
  - (2) After a reasonable effort to obtain the relevant facts;
  - (3) After adequate notice and hearing procedures for the affected physician; and
  - (4) With the reasonable belief that the action was warranted by the known facts.<sup>653</sup>
- h. In determining whether the professional review action meets these requirements, the court applies a purely objective standard.<sup>654</sup> Accordingly, the reviewers’ motives, feelings toward the subject of the review, and biases are irrelevant.<sup>655</sup>
- i. The reviewers’ conclusion about the affected physician’s professional competence or conduct need not be correct for the exemption to apply.<sup>656</sup>
- j. The HCQIA establishes a rebuttable presumption that the professional review action met the four requirements above.<sup>657</sup> Accordingly, the adversely affected physician bears the burden of persuasion to rebut the presumption by a preponderance of the evidence.<sup>658</sup>

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<sup>652</sup> See *id.* § 11151; *Cohlmi v. St. John’s Med. Ctr.*, 693 F.3d 1269 (10<sup>th</sup> Cir. 2012); *Moore v. Williamsburg Reg’l Hosp.*, 560 F.3d 166 (4th Cir. 2009).

<sup>653</sup> 42 U.S.C § 11112(a).

<sup>654</sup> See, e.g., *Cohlmi, supra*; *Wahi v. Charleston Area Med. Ctr.*, 562 F.3d 599 (4th Cir. 2009).

<sup>655</sup> *Poliner v. Tex. Health Sys.*, 537 F.3d 368, 379 (5th Cir. 2008) (holding that plaintiff’s “urging of purported bad motives or evil intent or that some hospital officials did not like him provides no succor”); *Lee v. Trinity Lutheran Hosp.*, 408 F.3d 1064 (8th Cir. 2005).

<sup>656</sup> *Poliner, supra*, 537 F.3d at 378 (the HCQIA “does [not] require that the conclusions reached by the reviewers were in fact correct”); *Brader v. Allegheny Gen. Hosp.*, 167 F.3d 840 (3d Cir. 1999).

<sup>657</sup> 42 U.S.C. § 11112(a); *Cohlmi, supra*.

<sup>658</sup> E.g., *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 202 (3d Cir. 2005) (explaining that “[t]he HCQIA places a high burden on physicians to demonstrate that a professional review action should not be afforded immunity,” creating “an unusual burden on summary judgment . . . , as the plaintiff bears the burden of proving that the professional review process was not reasonable and thus did not meet the standard for immunity”); see also *Johnson v. Christus Spohn*, 334 Fed. App’x 673 (10th Cir. 2009) (per curiam); *Poliner, supra*; *Myers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461 (6th Cir. 2003).

k. Most courts hold that the exemption's applicability is a question of law for the court to decide, usually on summary judgment.<sup>659</sup>

l. If the professional review action meets the standards listed above, if the defendants substantially prevailed in the adversely affected physician's subsequent suit, and if the suit was "frivolous, unreasonable, without foundation, or in bad faith," the HCQIA provides that the court "shall" award defendants their attorneys fees and costs.<sup>660</sup> But courts seem reluctant to award defendants their attorneys' fees.<sup>661</sup>

m. The HCQIA is purely an exemption statute. There is no private right of action for damages for failure of a professional review action to comply with the statute's requirements.<sup>662</sup>

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<sup>659</sup> E.g., *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318 (11th Cir. 1994).

<sup>660</sup> 42 U.S.C. § 11113.

<sup>661</sup> See *Stratienko v. Chattanooga-Hamilton County Hosp. Auth.*, 2009 WL 2168717 (E.D. Tenn., Jul., 16, 2009); *Gordon v. Lewistown Hosp.*, 2006-2 Trade Cas. (CCH) ¶ 75,454 (M.D. Pa. 2006). But cf. *Cohlmia v. St. John Med. Ctr.*, 906 F. Supp. 2d 1188 (N.D.Okla. 2012) (awarding defendants \$732, 558 in attorneys fees).

<sup>662</sup> See *Rowell v. Valleycare Health Sys.*, 2010 WL 4236797 (N.D. Cal. 2010) (citing cases); *Stratienko*, *supra*; *Gordon v. Lewistown Hosp.*, 2006-2 Trade Cas. (CCH) ¶ 75,454 (M.D. Pa. 2006).

## **FEDERAL AGENCY ANTITRUST GUIDANCE MATERIALS**

### A. Health-care antitrust guidance:

1. Federal Trade Comm'n & U.S. Dep't of Justice, *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (2011), available at <http://www.ftc.gov/os/fedreg/2011/10/111020aco.pdf>.
2. U.S. Dep't of Justice & Federal Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* (1996), available at <http://www.justice.gov/atr/statements-antitrust-enforcement-policy-health-care>.
3. Federal Trade Comm'n & U.S. Dep't of Justice, *Improving Health Care: A Dose of Competition* (2004), available at <http://www.justice.gov/atr/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice>.
4. Numerous FTC Staff Advisory Opinions, available at <http://www.ftc.gov/policy/advisory-opinions>
5. Numerous Antitrust Division Business Review Letters, available at <http://www.justice.gov/atr/public/busrev/letters.html#page=page-1>
6. Numerous speeches by FTC and Antitrust Division representatives, available at 5 & 6 John J. Miles, *Health Care & Antitrust Law* (2013)

### B. Other more general helpful federal antitrust agency antitrust guidance:

1. U.S. Dep't of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (2010), available at <http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.
2. Federal Trade Comm'n & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000), available at <https://www.ftc.gov/public-statements/2000/04/policy-statement-ftc-doj-issue-antitrust-guidelines-collaborations-among>.

## **RECOMMENDED ANTITRUST AND ANTITRUST ECONOMICS RESOURCES**

1. 1-2 American Bar Association Section of Antitrust Law, *Antitrust Law Developments* (7th ed. 2012).
2. 1-14 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (various years of publication).
3. Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* (4th ed. 2011).

4. Roger D. Blair & David L. Kaserman, *Antitrust Economics* (2d ed. 2009).
5. Roger D. Blair & Jeffrey L. Harrison, *Monopsony in Law and Economics* (2010).
6. Robert H. Bork, *The Antitrust Paradox* (1978)
7. Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* (4th ed. 2005).
8. Federal Trade Commission web site—[www.ftc.gov](http://www.ftc.gov).
9. Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* (5th ed. 2016).
10. 1-6 John J. Miles, *Health Care & Antitrust Law*, Vol. 1 (Supp. 2016).
11. Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* (6th ed. 2005)
12. Richard A. Posner, *Antitrust Law* (2d ed. 2001)
11. E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and Its Economic Implications* (6th ed. 2014)
12. United States Department of Justice, Antitrust Division web site—[www.justice.gov/atr](http://www.justice.gov/atr).