[ANTITRUST 2](#_Toc342506122)

Fall 2012

Harry First – Antitrust – Attack Outline

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# ANTITRUST

## GENERALLY

### Goals of Antitrust

* + 1. Prevent concentration of economic power
    2. Lowering entry barriers
    3. Providing consumer choice
    4. Promote efficient economic behavior

### Statutes

#### Sherman Antitrust Act

* + - 1. §1 – “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal”
      2. §2 – “Every person who shall monopolize, or attempt to monopolize, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations…”

#### Federal Trade Commission Act

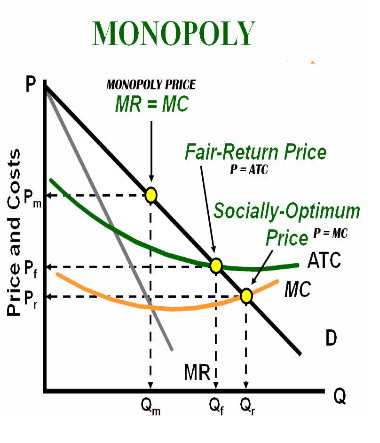
* + - 1. §5(a)(1) – “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful”
      2. §5(b) – commission can issue complaint with charges, as well as cease and desist order
    1. Clayton Act – Anyone harmed under antitrust law can sue and get 3x damages
       1. §3 – Exclusive dealing and tying
       2. §4a – Private rights of action
       3. §7 – Mergers and acquisitions
    2. Enforcement – FTC/DOJ, state government, private individuals directly harmed

## ECONOMICS

### Efficiency

* + 1. Allocative Efficiency – Best allocation of resources – Producing best “set” of goods
    2. Productive Efficiency – Producing with lowest cost inputs – Cheaply as possible
    3. Innovative Efficiency – Optimizing rate that improved products/processes are discovered and diffused into the economy
       1. Innovation lowers production cost/monopoly price, increases consumer surplus/deadweight
       2. ΔWelfare = ΔEfficiency – Δ(Consumer Surplus + Deadweight)

### Monopoly Price

* + 1. Consumer Surplus – Value of a product to consumers that is above what is paid for it
    2. Deadweight – Value of goods monopolist doesn’t product that consumers want
       1. Poor allocative efficiency
    3. MR = Marginal Revenue, MC = Marginal Cost, ATC = Average Total Cost

### Policy

* + 1. Unchallenged power deadens initiative, discourages thrift and depresses energy
       1. Monopoly is a narcotic and rivalry is a stimulant to innovation (*Alcoa*)
    2. Preference for a system of small producers
    3. Concerns about concentrations of power
    4. Allocative inefficiency – Restricts output (deadweight)
    5. Productively inefficient – Waste resources through rent seeking, use resources to maintain monopoly in socially wasteful manner
    6. Innovatively inefficient – Incentive is to manage innovation and spread it over time

# MONOPOLY – SHERMAN ACT § 2

## STATUTE

* 1. Sherman Act § 2 – “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony.”

## STEP 0: Elements of Monopoly (*United States v. Grinnel Corp.*)

* 1. Possession of monopoly power in the relevant market AND
  2. Willful acquisition or maintenance of that power
  3. **Notes**
     1. This excludes growth/development as a consequence of superior product, business acumen, or historic accident (*Alcoa*)
     2. Specific intent is not required (*Alcoa*/*Microsoft*), even showing specific intent without harmful conduct is not sufficient (*Brown and Williamson*)

## STEP 1: Define Product Market (*Alcoa*) – “any part of trade or commerce”

* 1. **NOTE:** Define **both** product market **and** geographic market
  2. **Elasticity** – Inelastic = rise in price 🡪 rise in demand, elastic = rise in price 🡪 change in demand – either switch to new product or forego using that product

### Tests

* + 1. Cross-Price Elasticity of Demand (Demand-side substitutability, *Du Pont*)
       1. Reasonably interchangeable in use – include products customers will switch to given a fluctuation in price (*Kodak* *v. Image Technical* – Single brand can be market if not interchangeable)
       2. Cellophane Fallacy – If the product is already @ monopoly price, cross-price elasticity may be a symptom of that price point which is not there at lower price point (*Du Pont* – cellophane interchangeable with paper/alum foil/etc.)
    2. Supply-Side Substitutability (*Telex*) 🡪 Consider submarkets!
       1. Close competitors’ ability to make rapid product changes and enter the market
       2. *Telex* – Competitors can quickly Δ plug to offer compatible product
       3. *Microsoft* – Could browsers compete w/ OS in *reasonably foreseeable* future?
    3. Hypothetical Monopolist/SSNIP (DOJ Merger Guidelines)
       1. Can HM impose small but significant non-transitory increase in price (~5%) and still remain profitable? (NOTE: Can still be below marginal cost)
       2. If another seller could constrain price 🡪 include that product and re-test
       3. Spot the issue: Any numerical indication of what customers will do in response to price change in the facts
    4. Submarket Test (*Brown Shoe*) – FACTORS!
       1. Industry/public recognition of submarket as separate economic entity
       2. Product’s peculiar characteristics and uses
       3. Unique production facilities
       4. Distinct customers
       5. Distinct prices
       6. Sensitivity to price changes
       7. Specialized vendors
    5. Secondary Markets – Secondary products with monopolized inputs are not included due to price inelasticity – rise in input price = rise in secondary (*Alcoa*)
  1. **Must also define** Geographic Market (*Otter Tail*)
     1. Demonstrate Δ can raise prices in the geographic area and wouldn’t lose business
  2. **Cases**
     1. *United States v. Du Pont*
        1. Cellophane wrappers
        2. Holding: Market includes flexible wrapping material like paper, wax paper, and aluminum foil due to cross-elasticity of demand 🡪 reasonably interchangeable in use
        3. Origin of cellophane fallacy – There is artificially greater cross-price elasticity of demand at the monopoly price than competitive price
     2. *Telex Corp. v. I.B.M. Corp.*
        1. Holding: Market includes all peripherals, not just compatible with I.B.M. computers 🡪 competitors could easily change the plug to enter the market

## STEP 2: Market Power

### Direct Demonstration of Market Power

* + 1. Evidence of specific bad acts (*Microsoft*)
    2. Structural – Are substitutes able to constrain ability to raise short term prices?
    3. Does firm set prices without consideration of competitor prices? (*Microsoft*)
    4. Is this a natural monopoly? (*Alcoa*)
  1. Market Share Proxy **– Proving Power through Circumstantial Evidence**
     1. *Alcoa* – 90% definitely, 64% unclear, 33% no monopoly power
     2. *Otter Tail* – 91% definitely
     3. *Berkey* – 82% in film, 60% in camera

### Entry Barriers

* + 1. Things that all competitors face in getting into the market
    2. Network effects (*Microsoft*) – Strong NE = natural monopoly (*Otter Tail*)
    3. Especially things incumbents did not face, but new entrants do face
    4. Predatory conduct of Δ as an entry barrier
    5. Secondary markets – Monopoly of inputs, etc.

## STEP 3: Conduct

### Generally – Rule of Reason (*Microsoft*)

* + 1. “Exclusionary acts… reduce social welfare, and competitive acts… increase it”
    2. “To be condemned as exclusionary, a monopolist’s acts must have an ‘anticompetitive effect’”
       1. “Must harm the competitive *process* and thereby harm consumers”
       2. “Harm to one or more *competitors* will not suffice”
    3. Π “must demonstrate that [Δ’s] conduct indeed has the requisite anticompetitive effect”
    4. Δ can then “proffer a ‘procompetitive justification’ for its conduct”
    5. Π can rebut the justification
    6. If not, “the [Π] must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit”
       1. “[F]ocus is upon the effect of that conduct, not upon the intent behind it”

### Refusal to Deal

* + 1. **Standard:** “Use of monopoly power ‘to destroy threatened competition’ is a violation of the ‘attempt to monopolize’ clause of § 2 of the Sherman Act” (*Otter Tail*)
       1. Can’t: Foreclose competition, gain competitive advantage, destroy competitor
       2. Must: Compete on merits (superior service, lower price, more efficient)
    2. **Analysis:** “If a firm has been ‘attempting to exclude rivals on some basis other than efficiency,’ it is fair to characterize its behavior as predatory” (*Aspen citing Bork*)
       1. Firms have no requirement to assist their rivals (*Trinko*)
          1. Insufficient assistance isn’t a cognizable refusal to deal claim
       2. Focus on harm to consumers
       3. Profit sacrifice – Conduct that is economically irrational
          1. *Aspen* notes this, *Trinko* requires it
       4. Refusal to deal after prior course of dealing
          1. *Aspen* notes this, *Trinko* requires it
    3. **Institutional Factors** (*Trinko*)
       1. Regulatory Structure – More structure, less antitrust concern
          1. Even with a savings clause
       2. Adequate Legal Remedy – Will court have to police quality of service?
       3. Concerns About False Positives
          1. Procompetitive reasons for behavior of Δ? High error costs?
    4. **Essential Facilities Doctrine** (*MCI V. AT&T* – access to switch to connect LD calls)
       1. Control of essential facility by monopolist
       2. Competitor’s inability practically or reasonably to duplicate the facility
       3. Denial of the use of the facility to a competitor
       4. Feasibility of providing the facility
          1. NOTE: Has not been recognized by SC-USA (*Trinko*)
    5. **Cases – Refusal to Deal**
       1. *Otter Tail Power Co. v. United States*
          1. OT is vertically integrated: Generates, transports, and sells power @ retail
          2. Market

Each town can have only 1 distribution system 🡪 natural monopoly

Aggregate of towns = geographic market 🡪 OT serves 465/510 towns

* + - * 1. Claims

Refuse to sell wholesale power to systems where it previously sold retail

Refused to “wheel” power from other generating facilities

Litigation to delay establishment of municipal retail systems

K’s w/ generators to bar use of OT transmission lines

* + - * 1. OT transmission is essential facility 🡪 impracticable for each town to dupe.
        2. Rejects argument that wheeling will have negative financial impact on OT

“Promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct”

* + - 1. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*
         1. ASC had purchased 2/3 of ski resorts in the area, and started a 4th one
         2. Historically an “All-Aspen” pass had been offered, w/ profit shared through usage statistics
         3. ASC first made AHSC swallow 15% of profit solid, then terminates the deal

ASC refused to sell AHSC retail lift tickets to ASC mountains

Refused to honor an AHSC voucher that would compensate retail value

* + - * 1. Test: Can’t exclude on basis other than efficiency, must compete on merits

Important that ASC both sacrificed profit and changed a historical course of dealing with AHSC

* + - * 1. “Thus, ‘exclusionary’ comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way” (*Aspen quoting Areeda*)
      1. *Verizon Communications, Inc. v. Trinko LLP*
         1. V has local service monopoly, competitive long distance market
         2. V sued by customers to get ATT service – V not providing operational support for QA required by Telecom Act (requires interconnection/complex monitoring regime, savings clause for antitrust)
         3. No violation of § 2

Institutional factors, no prior course of dealing/profit sacrifice, concern about false-positives, legal remedy requiring judicial monitoring

No requirement that companies must assist their rivals

* + - 1. *Kodak v. Image Tech. Svcs.*
         1. ISOs service and repair Kodak equipment, lower price, some higher quality
         2. Kodak Δ policy to only sell parts to buyers that use Kodak service freezing out ISOs
         3. Market: One brand can be market if not interchangeable 🡪 companies that service
         4. Valid business reasons: Promote inter-brand equipment competition, improve asset management by reducing inventory cost, prevent ISOs from free-riding on Kodak investment in equipment, parts and services

### Price Squeeze

* + 1. Vertically integrated monopolist sells monopoly input to rivals at high price, then competes against them downstream at a low price (*Alcoa*)
       1. *Linkline* – A firm with no duty to deal in wholesale has no obligation to deal under favorable terms to its competitors (*See Trinko*) (Analytical disaggregation)
       2. *Berkey* – Price squeeze between photofinishing chemicals/film/service
    2. **Leveraging** – Using power in one market to monopolize another (*Microsoft*)
       1. *Trinko* – Requires Δ will be able to get a monopoly in leveraged market
    3. **Defense** – **One Monopoly Price** – If a monopolist has a monopoly at one level of a vertically integrated market, expanding into another level of that market won’t allow it to extract more than the monopoly profit they get from the original level
       1. Look for input and final product that are made in lock-step 🡪 aluminum and fabricated aluminum products (*Alcoa*) (*See also Microsoft* – OS/Browser)
       2. See Predatory pricing 🡪 can’t recover lost profit from undercutting

### Predatory Pricing

* + 1. **Test** (*Matsushita* (*Citing Bork*) & *Brown and Williamson*)
       1. The Δ must have priced goods below some measure of cost
          1. Marginal is most accurate, but not administrable
          2. *Brown and Williamson* – Average Variable Cost



* + - 1. Future flow of profits, appropriately discounted, will exceed present size of losses
         1. Later monopoly profits offset predatory pricing losses
         2. Competitor had a reasonable prospect, or dangerous probability of recouping its investment in below-cost prices (*Brown and Williamson*)
    1. **Factors** (*Matsushita*)
       1. Time of conspiracy
       2. Incentives to cheat in the conspiracy
          1. “Because success is speculative and depends on a willingness to endure losses for an indefinite period, each conspirator has a strong incentive to cheat”
       3. Requires later agreement to raise prices – Might lead to liability
          1. High prices will lower entry barriers and create more incentives to cheat
       4. Predatory reputation as new entry barrier
    2. **Institutional Factors** (*Matsushita*/*Brown and Williamson*)
       1. Concerns about false-positives (*Matsushita*)
          1. Chill conduct law should protect 🡪 low prices
          2. Predatory conspiracy << likely than single predators 🡪 Cheating incentive
       2. Tacit Collusion (*Brown and Williamson*) – Considered least likely
          1. Problem of cheating/discipline.
          2. Loss falls on predator, but everyone gains (including victim)

### Cases – Predatory Pricing and Price Squeeze

* + 1. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*
       1. Argument that Japanese companies were charging supracompetitive prices in Japan and prices below market level in US to freeze out US companies
       2. Test: Inference must be more likely than not that they were predatorily pricing, and in drawing the inference it must make economic sense
       3. Therefore – Need to invest money in predatory campaign but must also be able to recoup the investment + interest on the back end
    2. *Brooke Group Ltd. v. Brown and Williamson Tobacco Corporation*
       1. 6 company cigarette oligopoly
       2. BG introduces generic cigarettes, BW responds with generics
       3. BW undercuts BG at wholesalers
       4. Π alleges Δ selling below AVC pressuring Π to raise prices closer to branded
    3. *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*
       1. Π sued Δ for engaging in price squeeze by selling DSL transport services to Π @ high price while selling DSL internet to consumers at low price
       2. Firm with no duty to deal in wholesale has no obligation to deal under terms/conditions favorable to its competitors – Δ could have stopped giving transport all-together and not violated the law
       3. **Analytical Disaggregation** – **SEE POLICY SECTION**
          1. Selling @ wholesale – Price irrelevant w/out duty to deal (*Trinko*)
          2. Low price to customer irrelevant if not predatory (*Brown and Williamson*)
          3. Courts are very wary of course of conduct especially if individual acts are not illegal in and of themselves
       4. Policy
          1. High price is irrelevant assuming low entry barriers 🡪 market correction
          2. Need for clear rules/analytical framework in antitrust – note First considers these two separate things!!
          3. Consider economic developments, *Trinko*/*Brown and Williamson* > *Alcoa*

### Design Predation

* + 1. Monopolist redesigns product so it is incompatible with competitors’ up or downstream products
    2. **Analysis**
       1. There is no duty to disclose a new, innovative design as a matter of law (*Berkey*)
          1. “This is not to say… that new product introductions are *ipso* facto immune from antitrust scrutiny… however, it is not the new product introduction itself, but some associated conduct, that supplies the violation” (*Berkey*)
       2. When the monopolist’s product must interface with the competitor’s product, technological choices can be anticompetitive (*Microsoft*)
          1. Δ may then have to provide a business justification showing that it improved product quality or made the product cheaper (*Microsoft*)
          2. I.e. Cannot change product only to foo bar competitors
    3. **Case**
       1. *Berkey Photo, Inc. v. Eastman Kodak Co.*
          1. Π sells photofinishing service, claims that Δ made new kind of film

Intentionally incompatible with previous film processing so they are forced to buy film chemicals from Kodak rather than bulk generic

Intentionally smaller format so it won’t fit in Π’s cameras

* + - * 1. Π wants to enforce obligation to pre-disclose new film design allowing Π to design a compatible camera

*Otter Tail* – Essential facilities argument

*Trinko* – No requirement to give information to competitors

*Aspen* – Prior conduct/profit sacrifice

Kodak had checkered pattern of pre-disclosing

No profit sacrifice – Kodak makes its own cameras and has its own photofinishing stores

* + - * 1. Holding: No duty to disclose, Head start is reward for innovation

Clear rule results in lower transaction costs and less litigation

* + - * 1. Photofinishing price squeeze hypothetical

Take price given, find the quantity (Q) they will sell from demand curve

Using quantity, calculate total revenue: TR = (Price x Q) – (Cost x Q)

### Attempted Monopolization (*Spectrum Sports*)

* + 1. Δ has **engaged in** predatory or anticompetitive **conduct** WITH
    2. **Specific intent** to monopolize AND
    3. Has a **dangerous probability** of achieving monopoly power
       1. Consider: Relevant market, Δ’s ability to lessen/destroy competition
    4. NOTE: This is a matter of proximity and degree

### Defenses to Monopoly

* + 1. Single producer is sole survivor based on skill, foresight, and industry (*Alcoa*)
    2. Monopolist posits valid business reasons (*Aspen*)
       1. Justification explains how the conduct helps Δ compete as to price/quality
          1. Specific and substantiated 🡪 beyond generalities (*Microsoft*)
       2. “We don’t work with competitors” is insufficient (*Aspen*)
       3. Consider: *Trinko*/*Berkey*/*Linkline* 🡪 No duty to deal w/ competitors, pre-disclose, provide competitive pricing
       4. Valid business reasons: Promote inter-brand equipment competition, improve asset management by reducing inventory cost, prevent ISOs from free-riding on Kodak investment in equipment, parts and services (*Kodak v. ITS*)
       5. *Trinko*
          1. “To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct”
          2. “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”
       6. *But See Berkey* – Simply because the monopolist innovates doesn’t mean they are innovating at the rate that the free market would sustain
    3. Burden then shifts to Π to rebut, or to show anticompetitive harm outweighs procompetitive benefit

1. REMEDIES – Compulsory licensing, injunctions, damages – Courts favor if a remedy is not unwieldy to implement – Will the court have to monitor the remedy? Will there be lots of subsequent litigation? Etc.

## POLICY CONSIDERATIONS

* 1. What is bad about monopoly?
     1. “Unchallenged economic power deadens initiative, discourages thrift and depresses energy; immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone” (*Alcoa*)
     2. “The mere fact that a producer, having command of the domestic market, has not been able to make more than a ‘fair’ profit, is no evidence that a ‘fair’ profit could not have been made at lower prices” (*Alcoa*)
  2. Efficiency – Allocative, Productive, Innovative
     1. Want to make the best “set” of goods, at the lowest cost, while driving innovation
  3. Innovation
     1. Monopolist may innovate to increase consumer surplus they collect
     2. Innovation may lower entry barriers
     3. Competitors may innovate to remove the monopoly power
     4. Compare to competitive market – Do we get more innovation in competitive market?
  4. Essential facilities – Compulsory EFs licensing may dis-incentivize investing in EFs
  5. Predatory pricing – Any price above “an appropriate measure” of costs are either competition on the merits or are beyond the practical ability of a judicial tribunal to control without chilling legitimate price cutting (*Brown and Williamson*)
     1. Concern is consumer welfare 🡪 require recoupment in predatory pricing
     2. We don’t care unless predator can maintain supracompetitive pricing later
        1. BUT
           1. Predatory pricing as an entry barrier, less competition, less innovation, etc.
     3. AVC is a good measure because the only people that are excluded are less efficient
        1. BUT this excludes a new entrant that might become *more* efficient later
  6. *Linkline*
     1. Sales @ high price are not antitrust violations 🡪 market correction
     2. Need for clear rules in antitrust – vs. clear analytical framework?
  7. **NOTE** – Analytical disaggregation – Courts are very wary of course of conduct especially if individual acts are not illegal in and of themselves

## CASES!

* 1. *United States v. Alcoa*
     1. Market – Alcoa aluminum fabricated and sold, plus the aluminum imported
        1. Secondary market not included because Δ control over virgin (only input) gives control over price of secondary as time increases
     2. Claims
        1. Alcoa monopolized market of virgin aluminum ingot
        2. Δ guilty of unlawful practices related to establishing this monopoly
        3. Whether Limited and Δ were in an unlawful conspiracy
     3. The foreign producer cartel with Limited
        1. Agreement in writing to limit exports to the US
           1. Binds the participants, communicates the terms clearly
           2. Reduces incentives to cheat the agreement, ability to detect cheaters
           3. Provides enforcement mechanism
        2. Limiting exports has the effect of controlling price while not producing a surplus of goods (Supply curve 🡪 increased price will spur more production)
     4. No good trust/bad trust distinction
     5. Monopoly is bad policy because
        1. Deadweight loss
        2. Monopoly is a narcotic and process of rivalry is a stimulant to innovation
     6. Allocative inefficiency – Less goods we like, resources are not used as well
     7. Productive inefficiency – Desire is maximize profit, waste resources through rent seeking, use resources to maintain monopoly in socially wasteful way
     8. Innovative inefficiency – Incentive is to spread out innovation & elongate the process
     9. Defense: “The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market”
        1. Superior skill, foresight, and industry
  2. *United States v. Microsoft Corp.*
     1. Claim: Attempted monopolization of browser market, leveraging browser market to maintain monopoly in OS market
     2. Market: Intel compatible computers
        1. SSNIP – Manufacturers (OEMs) won’t switch to another OS given price increase
        2. Not reasonably interchangeable (*Du Pont*)
        3. Only consider products suitable in reasonably foreseeable future
        4. NOTE: Apple does not license OS to manufacturers
     3. Market power
        1. Market share proxy: 95% OS market, 80% if Mac included
        2. Entry Barriers: Network effects – Product more valuable with more users
           1. Consumers want OS w/ lots of apps, developers want OS w/ lots of consumers
        3. Direct: Substitutes can’t constrain ability to raise price. Firm sets price w/out considering competitor prices
     4. Conduct
        1. Rule of Reason
           1. Exclusionary acts reduce social welfare, competitive increase
           2. Conduct must have an **anticompetitive effect**

Harms consumers, not just harms competitors

* + - * 1. Δ can give procompetitive justification
        2. Π can rebut or show anticompetitive harm outweighs justification

Focus on conduct, not intent

* + - 1. Analysis
         1. Restrictive licensing terms to OEM – Icons, Boot sequence, GUI
         2. Integration of IE and Windows

Add/remove – anticompetitive 🡪 discourages installing new browser

Default override – OK 🡪 for providing seamless experience in help menu

Comingling routines

Integration (Default override – ok) vs. binding (comingling – not ok)

* + - * 1. Agreements with internet providers – IE free or negative, IE access kit, agreement to put ISP icons on desktop
        2. JVM incompatible with Sun’s JAVA – “Kill cross-platform java by growing the polluted java market” 🡪 note the Microsoft JVM *was* faster
        3. Emails expressing various anticompetitive intent – NOTE not dispositive
      1. NOTE: Courts are way of course of performance arguments (see policy section) and dominant firm design arguments (see design predation)
      2. Predatory? 🡪 AVC 🡪 marginal cost of copying software is near zero once developed – only cost is medium transferred on
    1. Defenses
       1. Middleware was going to make software programming OS independent eliminating the natural barrier to entry in the software market
          1. First, this is a prediction of the future, not reasonably foreseeable at this point
          2. Second, this represents a future *increase* in competition
       2. One monopoly profit – So long as Δ can raise the price of the OS, everything else necessarily associated with it can be “free”
          1. Must be used in fixed proportions
    2. Remedy
       1. Problem of what the appropriate remedy is when the harmed companies are now out of business 🡪 speed of technology vs. speed of litigation
       2. Put IE into add/remove 🡪 removes from view, doesn’t remove program
  1. *European Microsoft Case*
     1. Sun servers needed to be able to interconnect with Microsoft servers
     2. Microsoft refused to provide necessary information for interconnection
     3. Π brought under a leverage theory – US courts are very hostile to leverage theories of antitrust 🡪 better to bring in front of a US court
     4. Remedy – require sharing of interconnection information
     5. Counter-argument to one monopoly profit – Even when product A and B exist in fixed proportions, no defense when keeping a firm in market B in check reinforces the dominant undertaking’s dominant position in market A – erecting barriers against actual or potential competitive threat in that market

# MERGERS

## STATUTE

* 1. Clayton Act § 7 – “No person engaged in commerce… shall acquire… where **in any line of commerce**, **in any section of the country**, the effect of such an acquisition may be to **substantially to lessen competition**”

## GENERALLY

* 1. Clayton act designed to “arrest[] mergers at a time when the trend to a lessening of competition in a line of commerce [is] still in its incipiency” (*Brown Shoe*)
  2. Civil enforcement only – No criminal penalties
  3. A merger enhances market power if it is likely to encourage 1+ firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished constraints or incentives (Merger Guidelines § 1)
  4. Merger which produces firm controlling undue percentage share of relevant market, and results in significant increase in concentration is so inherently likely to lessen competition that is must be enjoined absent clear evidence to the contrary (*PNB*)

## STEP 1: Market Definition Tests – “any line of commerce”

* 1. Cross-Price Elasticity of Demand (Demand-side substitutability, *Du Pont*)
     1. Reasonably interchangeable in use – include products customers will switch to given a fluctuation in price (*Kodak* *v. Image Technical* – Single brand can be market if not interchangeable)
     2. Cellophane Fallacy – If the product is already @ monopoly price, cross-price elasticity may be a symptom of that price point which is not there at lower price point (*Du Pont* – cellophane interchangeable with paper/alum foil/etc.)
  2. Hypothetical Monopolist/SSNIP (DOJ Merger Guidelines § 4.1.1)
     1. Can HM impose small but significant non-transitory increase in price (~5%) and still remain profitable? (NOTE: Can still be below marginal cost)
     2. If another seller could constrain price 🡪 include that product and re-test
     3. Spot the issue: Any numerical consumer response to price change in facts!
     4. CAREFUL! – Applies poorly to “cluster markets”
  3. Submarket Test (*Brown Shoe*) – FACTORS!
     1. Industry/public recognition of submarket as separate economic entity
     2. Product’s peculiar characteristics and uses
     3. Unique production facilities
     4. Distinct customers
     5. Distinct prices
     6. Sensitivity to price changes
     7. Specialized vendors
  4. Supply-Side Substitutability (*Kraft Foods*) 🡪 Consider submarkets!
     1. Close competitors’ ability to make rapid product changes and enter the market
     2. *Kraft Foods* – Suppliers able to rapidly shift products to match market demand
     3. *Telex* – Competitors can quickly Δ plug to offer compatible product
     4. *Microsoft* – Could browsers compete w/ OS in *reasonably foreseeable* future?

### Consider

* + 1. *Philadelphia National Bank* – “Cluster market” of products/services
    2. Start broad – Encompass all companies, etc.
       1. Chip away by analyzing each break point
       2. Concern about over-narrowing – puts merging firms in separate markets
       3. Indicate all tests – If one fails for lack of data, say so
       4. Consider *potential market participants* – Must have rapid entry capability

## STEP 2: Geographic Market Definition

* 1. *PNB* – Area of effective competition where buyers can practically turn for supplies
  2. Hypothetical Monopolist (SSNIP) – See above
     1. NOTE: “Olympic Ring” Phenomenon from draw zone hypothetical
        1. Three areas have overlapping competition in a chain, when areas 2/3 compete, area 1 must compete as well even though no direct competition between 1/3
  3. Geographic market based on locations of suppliers (Merger Guidelines § 4.2.1)
     1. Competitors are firms with production/sales/service facilities in that region

## STEP 3: Market Power

### Market Concentration Proxy

* + 1. *PNB* – Creates firm w/ undue share of market & significant increase in concentration
       1. Change in percentage of top X-firms
       2. Argument for *prima facie* line at 20% increase in top 2 firm %
          1. i.e. T2 44% 🡪 59% = 33% increase
    2. HHI – Sum of the squares of the market shares (Merger Guidelines § 5.3)
       1. Look at post-merger HHI and the change-in HHI
          1. Unconcentrated (<1500) – Changes resulting in unconcentrated are unlikely to have adverse competitive effects
          2. Moderately Concentrated (1500 – 2500)

Change over 100 resulting in moderate = Potentially raises significant competitive concerns and warrants scrutiny

* + - * 1. Highly Concentrated (>2500)

100-200pts = Potentially raises significant competitive concerns and warrants scrutiny

200pts+ = Rebuttable presumption that its likely to enhance market power

* + - * 1. Changes < 100pts are unlikely to have adverse competitive effects
    1. CAREFUL – Market Share Proxy can over/under state problem due to recent technological/market changes that will readily differentiate firms in the future
    2. CAREFUL – When including other market firms, remember to discount percentages appropriately, consider assumptions about market share of small competitors
    3. *General Dynamics* – Formalistic reliance on numbers is not always sufficient
       1. Must also look to structure, history, and probably future of the market
    4. HHI can screen out mergers where concerns are low but does not “screen in” mergers

### Entry Barriers (Merger Guidelines § 9)

* + 1. Low entry barriers undercut concerns about unilateral (vertical integration) and coordinated effects
    2. Elements
       1. Timeliness – Must have rapid entry
       2. Likelihood – Consider:
          1. Output level entrant can/must obtain
          2. Price entrant will charge
          3. Cost per unit entrant will incur
       3. Sufficiency – Products must be close substitutes

## HORIZONTAL MERGERS

### Empirical Evidence of Competitive Effects (Merger Guidelines)

* + 1. Market concentration (§§ 2.1.3, 5.3)
    2. Head-to-Head Competition (§ 2.1.4) – Merging firms going to become competitors?
    3. Disruptive role of merging party (§ 2.1.5) – Eliminating a maverick?
    4. Post-merger firm has new ability to price discriminate? (§ 3)

### Unilateral Effects (Merger Guidelines § 6)

* + 1. **Generally** – 2 companies having reasonably interchangeable products such that a rise in price of 1 results in significant recapture of lost customers switching to the other
       1. Concern is that firm can raise price in a way they couldn’t do but-for merger
    2. **Consider**
       1. Profitability of Product B (Price/Cost ratio)
       2. Elasticity of Product A (Own price elasticity)
       3. Recapture ratio (Critical, A.K.A. Diversion ratio)
          1. Effect is magnified when products are closer substitutes
          2. Products must be close substitutes (*Kraft* – first/second choice is best)
       4. Repositioning of competitors (Supply-side substitutability)
    3. **Conclusion** – To the extent the merger allows the new firm to raise prices (~10%) without considering the rest of the market 🡪 unilateral effects (*Kraft*)

### Coordinated Effects (Merger Guidelines § 7)

* + 1. **Threshold** – Express collusion between firms is illegal (Sherman Act § 1)
    2. **Test** – Agencies will challenge a merger if all three of:
       1. Merger would significantly increase concentration and lead to a moderate/highly concentrated market – Reasoning that it is easier to coordinate with fewer firms
       2. Market shows signs of vulnerability to coordinated conduct
          1. *Kraft* – Cartel Theory (Tacit Collusion)

Communicate and agree on price/output

Price leadership by top 1 or 2 firms

Monitor members of the group (market participants)

How many sales? Easy to get data?

Punish cheaters (mavericks)

* + - * 1. CRITICAL – Consider **maverick** firms – Is there one? Is it being eliminated?
        2. Empirical – Competition amongst firms on aspects other than price (*Kraft*)
      1. Agencies have a credible basis that the merger will enhance that vulnerability

### Defenses

#### Pro-competitive Justifications

* + - 1. Can’t trade off lower competition in one market to compete in another (*PNB*)
         1. Justification must be within the market

#### Institutional Factors

* + - 1. Lack of federal agency action does not indicate agency approval (*Kraft*)
         1. Pre-merger notification only goes to feds, not state/private citizens
      2. Implied repeal of antitrust laws is heavily disfavored (*PNB*)
         1. However, regulation in an industry *might* still be a consideration

#### Efficiencies (Merger Guidelines § 10)

* + - 1. Only credit efficiencies that will be accomplished *only if there is a merger*
      2. Never can be used to justify monopoly

#### Failure and Exiting Assets (Merger Guidelines § 11)

* + - 1. Merger won’t enhance market power if imminent failure of one of merging would cause the assets of that firm to exit the market
      2. Elements
         1. Failing firm won’t be able to meet financial obligations in near future
         2. Won’t be able to reorganize under Chapter 11
         3. It has made unsuccessful, good-faith efforts to elicit reasonable alternate offers that would keep its tangible/intangible assets in the market and pose a less severe danger to competition than the proposed merger

### Remedies

* + 1. Block the merger – Injunction
    2. Agreement to hold down prices
    3. Always consider costs/ability to police any agreement

### Cases

* + 1. *United States v. Philadelphia National Bank* (*PNB*)
       1. Merger of 2nd and 3rd largest commercial banks in PA
       2. Bank Merger Act – Bank mergers inspected by bank regulatory agencies
          1. Review for competitive effects, DOJ publishes opinion
          2. Congress didn’t explicitly over-rule antitrust laws – Implied repeal of antitrust is heavily disfavored
       3. Product Market – Cluster of bank products and services
       4. Geographic Market – Area in which seller operates and purchasers can practicably turn for supplies
    2. *New York v. Kraft General Foods, Inc.*
       1. NY state suing on behalf of customers
       2. Kraft purchase of Nabisco RTE cereals
       3. Post-merger HHI = 2215, Δ = 66
          1. Trend of declining concentration (2955 🡪 2215 from 1970-1992)
       4. Geographic market – All US
       5. Unilateral Effects
          1. Products must be very close substitutes
          2. The recapture ratio was not exceptionally high (Expert testimony)
          3. Supply-side repositioning undercut unilateral effects

If product A is popular, competitors can reposition easily and undercut prices on the product

* + - 1. Coordinated Effects

Communication – Pricing in industry is fluid and relies on coupons, etc.

Monitoring – Difficult, heavy reliance on marketing and special deals

* + - * 1. Punishment

No mechanism, lots of supply-side repositioning, competition on non-price product factors

* + - * 1. Court discounts government argument that Nabisco would reduce prices by 20% as a maverick firm

## VERTICAL MERGERS

### Merger Guidelines

* + 1. Elements
       1. Degree of vertical integration is so extensive that entrant to primary market would also have to enter the secondary market simultaneously (New entry barrier)
       2. Entry requirement at 2nd level makes entry at 1st level much less likely
       3. Structure/other market characteristics are so conducive to non-competitive performance that increased difficulty of entry is likely to affect its performance
    2. Unlikely to challenge unless HHI > 1800
    3. Collusion – Multiple vertically integrated firms can collude on price more easily, especially in highly transparent retail markets
    4. Raising Rival’s Costs – Ability to usurp inputs
  1. Considerations **(*Brown Shoe*)**
     1. Look at industry trends – When there are vertical integrations within the industry, to primary companies force their products onto the secondary ones? Exclusively? Etc.

### Problems – “Dead letter”

* + 1. Foreclosure argument is weak – Vertical integration often leads to efficiencies (reduced transaction costs) and a very small foreclosure of market
       1. There is no elimination of a competitor
  1. ***Brown Show v. United States***
     1. Brown Shoe merger with Kinney
     2. Theory – Foreclosing suppliers from retail outlets, or retail outlets from suppliers
     3. Analysis
        1. Consider market share foreclosed, however this is rarely decisive
           1. Approaches monopoly 🡪 Violation, *De minimis* 🡪 Not decisive
        2. Examine economic and historical factors (trends)
           1. Nature and purpose of the arrangement
           2. Trend toward concentration
     4. Conclusions
        1. This was a “tying-type” arrangement
        2. Large market foreclosure (one of the largest suppliers and retailers)
        3. Large trends toward concentration in the industry

# HORIZONTAL RESTRAINTS

## STATUTE

* 1. Sherman Act § 1 – Contract, combination or conspiracy in restraint of trade
     1. This is interpreted as forbidding *unreasonable* restraints of trade (*Standard Oil*)

## ANALYSIS

### Generally

* + 1. Joint action – Was there characterizable joint action between parties?
    2. Decisional rule (*Per se*, Rule of Reason or sliding scale)
       1. Characterize the restraint – Joint venture/sales agreement, boycott, price fixing, output constraint, geographic allocation
       2. Defense justification – Distressed industry, reasonable price (*Trenton Potteries* rejects), lowers price, professional industry, lack of judicial experience, procompetitive efficiency justifications
       3. Court rationale for choosing one over the other
    3. If Rule of Reason 🡪 Apply

### Summary

* + 1. Any agreement among 2+ legally distinct entities is subject to § 1
    2. Characterizations resulting in *per se* analysis
       1. Horizontal price fixing (*Trenton Potteries*)
       2. Output restraints
       3. Horizontal market allocation
       4. Boycotts/refusal to deal

#### Justifications resulting in quick look or rule of reason

* + - 1. Cases where “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have en anticompetitive effect on customers and markets” (*California Dental Assn.* 🡪 RoR)
      2. New Product Defense (*BMI* 🡪 RoR)
      3. Agreements that are otherwise *per se*, but under the circumstances, the court lacks confidence that it is invariably harmful (*NCAA* – “restraints on competition are essential if the product is to be made available at all” 🡪 Quick look)
      4. Agreements to limit advertising, particularly prices (*California Dental*)
      5. Agreements not to negotiate price/limit price negotiation (*Professional Engineers*)
      6. Agreement to refrain from doing something rational competitors would do under free competition (*Indiana Federation of Dentists* – x-ray to insurance)
      7. Some likelihood of anticompetitive effects, but no need to show market power

#### Rule of Reason

* + - 1. Π must show the conduct would cause price to go up/output to go down assuming Δ has market power and
      2. Either Δ has market power or direct proof of anticompetitive effects
      3. *See also Board of Trade of Chicago* Factors

#### Rationales

* + - 1. Policy – Must be administrable 🡪 Justifications like “fair price,” “competition is bad” are invalid because changed circumstances easily change the outcome
      2. *Indiana Federation of Dentists* – “Proof of actual detrimental effects, such as a reduction in output, can obviate the need for an inquiry into market power”
      3. *Maricopa County Medical* – Still consider justification despite *per se* price-fixing
      4. *Appalachian Coal* – Industry distress sufficient justification for otherwise *per se* output restraint
      5. *Sacony Vacuum* – *Per se* unlawful output restraint
      6. *Superior Court Trial Lawyers* – Social utility of the restraint is irrelevant

### Cases

* + 1. *Addison Pipe*
       1. Illegal cartel of pipe manufacturers that set prices and bids
       2. Allowable restraints
          1. Seller of business to not compete (increases value of sale price)
          2. Retiring partner non-compete
          3. Partner pending partnership agreement to not interfere with firm
          4. Buyer non-compete with business retained by seller
          5. Assistant/servant/agent non-compete after service
       3. Court must find they are necessary to
          1. Enjoyment of property buyer bought, legitimate ends of the business, prevent undercutting the consideration of what is paid for, etc.
    2. *Chicago Board of Trade* – Rule of Reason, price restraint on grain
       1. All agreements restrain competition
       2. Test: Whether restraint merely regulates and perhaps promotes competition or whether it may suppress or destroy competition
       3. Factors
          1. Facts peculiar to the business
          2. Condition of the business before/after the restraint
          3. Nature of the restraint and its effect – actual/probable
          4. History of the restraint and evil that existed
          5. Reason for adopting the restraint 🡪 purpose sought
    3. *Trenton Potteries* – *Per se* price fixing on toilets
       1. Unlawful to agree on “reasonable” prices
          1. Reasonable can become unreasonable very easily through changed conditions
          2. Would be bad policy

## CHARACTERIZATIONS

### Generally

* + 1. Must determine “whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more rather than less competitive” (*BMI*)
    2. NOTE: “[T]his court… presumptively applies rule of reason analysis, under which antitrust Π must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found illegal” (*Texaco*)
  1. Result of Per Se Analysis (*Socony Vacuum*)
     1. No need to show market power/ability to cause harm
     2. No need to show intent
     3. No need for overt act in carrying out the conspiracy
     4. Size of conspiracy is irrelevant, there is no *de minimis* exception

### Horizontal price fixing

* + 1. **Definition** – Agreement between head-to-head competitive sellers of the same product/service as to the price they will sell at
    2. **Generally**
       1. “Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*” (*Socony Vacuum*)
          1. “Whatever economic justification 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” (*Socony Vacuum*)
    3. **Spot the Issue**
       1. Agreements to share revenues of sales – remove incentive to compete on price
       2. Agreement to take action that will affect price (output restraint)
       3. Joint sales/licensing agreement **IF** it only distributes the independent goods at a uniform price (*but see Texaco*)
    4. **Cases**
       1. *Appalachian Coal*
          1. Cartel of 137 coal producers formed during the depression to sell all coal from the companies, company established standard coal classifications and fixed $
          2. Reasoning: If the industry won’t be alive but-for the aggregation, the court will not find a *per se* violation
          3. As between Δs competition would be eliminated, but court looks to competition between them and rest of the market
          4. Conclusion: Intent is benign, most coal is sold outside this region, no attempt to monopolize, court retains ability to enjoin later
       2. *Socony Vacuum Oil Co.*
          1. Δ oil companies refine oil, sell to

Jobbers (wholesale truckers) at spot price

Retailers at spot + $0.02

Consumers at spot + $0.055

* + - * 1. Glut of oil production 🡪 agreement to buy up distressed oil (output restraint)
      1. *Arizona v. Maricopa County Medical Society*
         1. 70% physicians in area made foundation, set max fees they would charge
         2. Also review medical necessity/appropriateness of treatment provided by members, and authorized to draw checks on insurance co. accnts. to pay docs
         3. Characterization

Π – horizontal maximum price fixing

Δ – joint venture to contain costs

* + - * 1. Reasoning: Court’s experience with kinds of price restraint can rebut presumption of rule of reason
        2. Justifications: Save patients $, professionals, lack of judicial experience in industry, procompetitive agreement, new product (*a la BMI*)
        3. Conclusion: Stifles innovation, uniform pricing patients can’t tell quality of doctor, no exception for professionals, want insurance companies (buyers) to be making the decisions then compete for customers, not integrated product

### Horizontal market allocation

* + 1. **Definition** – Any agreement not to compete in one another’s territories is unlawful on its face
    2. *Topco Assoc’s Inc.*
       1. Co-op making private label goods enabling member supermarkets to compete against major chains
       2. Agreement prevented members from selling Topco brand products within each other’s territories
       3. Reasoning: Antitrust laws are the “Magna Carta” of free enterprise, per se = clear notice, antitrust laws preserve economic freedom to compete
       4. CANNOT trade competition amongst members with competition between members and national chains

### Boycotts – Concerted Refusal to Deal

* + 1. **Definition** – Agreement among competitors or market participants that they will refuse to do business with a third party who is also involved in the market
    2. **Spot the Issue**: Set standards that exclude a product
    3. *Superior Ct. Trial Lawyers* – Illegal boycott to get higher fees – illegal because sole purpose was to coerce an increase in price for the conspirators’ services
       1. Court will not consider the social utility of the boycott
       2. Sherman act cannot inquire into whether competition is good or bad

## JUSTIFICATIONS

### Generally

* + 1. “[T]ere is often no bright line separating *per se* from Rule of Reason analysis, since considerable inquiry into market conditions may be required before the application of any so-called ‘*per se*’ condemnation is justified” (*NCAA*)
    2. “The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one” (*California Dental Assn.*)
    3. “Reasonableness” of a fixed price is irrelevant (*Socony Vacuum*)
       1. “The reasonableness of prices has no constancy due to the dynamic quality of the business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions.”
       2. Administrative – Definition of “reasonable” changes over time
       3. Economic – Markets should determine price, signals to others how to make decisions – would threaten the “nervous system of the economy”
    4. Social value is never a justification (*Trial Lawyers*), can’t argue competition is bad (*Professional Engineers*)
  1. ***BMI* *v. CBS* –** Agreement that creates a new product
     1. BMI/ASCAP non-profits that license copyrighted music
     2. Δ sold “blanked licenses” to get full access to all music in repertory
        1. Also sold “per program” so single show can play any music in repertory
     3. Π wants license for individual songs
     4. Reasoning
        1. Must determine “whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more rather than less competitive”
        2. Result will be increased efficiency, decreased transaction costs, increased market output, decreased policing and enforcement costs
     5. Conclusion: Requires greater reasoning than *per se* condemnation
     6. Distinguish later *Maricopa* case
        1. Maricopa did not create new product (like an HMO), just fixed max price
  2. Doctrine of Ancillary Restraints **(*Addison Pipe*)**
     1. A restraint that is reasonably related to a beneficial arrangement and is reasonably necessary for its purposes – Non-compete after selling business (raises value of the business)
     2. NOTE: There must be some arrangement that it is ancillary to, not always clear

## ANALYSIS OF QUICK LOOK

* 1. **Definition** – Quick-look restraint is a naked restraint among horizontal competitors that poses a plausible likelihood of increased price/output reduction, but is more than simple price/output restraint
  2. **Spot the Issue**
     1. Δ members of a profession and restraint is for self-regulation
     2. Agreement is explicit horizontal agreement on price/output, but some economic feature of the product casts doubt on competitive effects of the restraint
        1. Sports leagues require some minimum horizontal restraints (*NCAA*)
     3. Agreement is *not* an explicit horizontal agreement on price or output, but relates to the “output” of something that is not “the relevant output for antitrust purposes” (*California Dental Assn.*)
  3. **Analysis (*Polygram Holding*)**
     1. Π makes *prima facie* case showing restraint is “inherently suspect”
     2. Δ gives *plausible*, *legally cognizable* theoretical justification
        1. Must show efficiency gain, promotion of competition, increase in quality or information, or reduces costs
     3. Π shows justification is inadequate & restraint is likely to harm customers
        1. Δ must show evidence that justification is adequate
     4. If Π fails (3) 🡪 Rule of Reason
  4. **Cases**
     1. *NCAA v. Board of Regents of the University of Oklahoma*
        1. 850 colleges, severely limited TV rights/licensing for football teams
        2. Characterization – Boycott/output restraint
        3. “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 members institutions seek to market is to be preserved” (*NCAA*)
        4. “The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose” (*NCAA*)
        5. No proof of market power is required 🡪 Quick look enough to kill agreement
        6. Distinguish *BMI* – no restrictions on artists doing individual licensing
     2. *California Dental Association v. FTC*
        1. CDA – 19,000 dentists (~70%, 90% in some areas)
        2. Code of ethics forbids false/misleading ads – leads to ban on price/quality ads
        3. Characterization – Boycott (expulsion for violation), price/output restraint
        4. Justification – Protecting customers in the fact of information asymmetries
        5. Result – Requires more than quick look, possible large pro-competitive justifications, can’t simply condemn as antitcompetitive
     3. *FTC v. Indiana Federation of Dentists*
        1. Boycott – refuse to send x-rays to insurance companies
        2. Quick look sufficient to find against Δ
        3. “An agreement limiting consumer choice by impeding the ‘ordinary give and take of the market place,’ cannot be sustained under the Rule of Reason”
        4. “Proof of actual detrimental effects, such as a reduction in output, can obviate the need for an inquiry into market power”

## JOINT ACTION

* 1. **Analysis (*American Needle, Inc. v. NFL*)**
     1. Are there separate actors?
     2. Was there agreement between the actors?
     3. Functional approach
        1. Is the market being deprived of independent decision makers?
        2. “A nut and bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to § 1 analysis”
  2. **Cases**
     1. *Polygram Holding, Inc. v. FTC*
        1. Warner/Polygram agree to jointly distribute 3rd “Three Tenors” concert
        2. Each had one of the two prior, agreed not to advertise earlier ones in order to help the release of the third
        3. FTC uses “inherently suspect” burden shifting – adopted by the court
     2. *American Needle Inc. v. National Football League*
        1. Facts
           1. NFL is 32 teams, all license apparel through NFLP
           2. American Needle had nonexclusive license to make apparel
           3. NFLP signed exclusive deal with Reebok
           4. Π sues
        2. Issue – Is this concerted action under § 1?
        3. Analysis
           1. “The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to § 1 analysis”
           2. “When restrains on competition are essential if the product is to be available at all, per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.”
           3. Functional consideration – Depriving the market of separate decision makers?
           4. These teams had power to individually license (*Compare NCAA*)
           5. But-for the NFLP, the teams would compete WRT apparel licensing
     3. *Texaco v. Dagher*
        1. Two oil co. agree to distribute everything through intermediary company that does refining and retail, but everything is sold under individual brand names
        2. Uniform price between the two brands
        3. Agreement was approved by consent decree of government agencies
        4. Holding – Not *per se* illegal – When persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit, such joint ventures are regarded as a single firm competing with other sellers in the market (*Maricopa*)

## OLIGOPOLY PRICING

* 1. **Generally**
     1. Courts focus on “meeting of the minds” and “offer and acceptance” concepts from contracts doctrine
     2. Argument is that a price leader will publicly raise prices as an offer, then smaller players raise prices in kind when they accept
  2. ***Williamson Oil Co. v. Philip Morris USA***
     1. Facts
        1. Class of cigarette wholesalers allege manufacturers conspiring to fix prices
        2. No direct evidence, theory based on tacit collusion and circumstantial data
     2. **Analysis**
        1. Court determines whether Π has established parallel behavior
        2. Π must demonstrate 1 or more “Plus Factors”
           1. Signaling – Look for facilitating devices (Early announcing of prices, etc.)
           2. Actions against manufacturers economic interests
           3. History and structure of the industry
        3. Δ can rebut the inference of collusion
           1. If it is possible that it is either agreement or unilateral conduct, the court will find unilateral conduct 🡪 there must be some indication that tends to exclude concerted action
  3. *Theater Enterprises v. Paramount Film Distributing Corp.* – Insufficient that all film distributors denied first-run movies to suburban movie theater at the same time for the same reasons – Still merely parallel behavior

### DOJ Memo

* + 1. **Evidentiary Elements**
       1. Parallel conduct WRT adoption/adherence to a business practice that can be used as a facilitating mechanism
       2. Awareness by each firm that rivals are following parallel course
       3. Anticompetitive benefit derived by each firm
       4. Action contradictory to independent self-interest of each firm – action that would not be adopted unless major rivals also adopted it

# DISTRIBUTION RESTRAINTS

## GENERALLY

### Basic Distinction

* + 1. Vertical restraints that benefit upstream interests 🡪 tend to enhance competition at the retail level
    2. Vertical restraints that benefit downstream interests 🡪 will often result in less retail competition and higher prices to consumers

### Historical Development

* + 1. Enforcement of a Retail Price Maintenance – Fixed minimum retail price – is *per se* unlawful (*Dr. Miles Medical*)
    2. However, manufacturer is free to announce the terms on which it is willing to sell its products, and can stop doing business with any distributor, even if reason is refusal to meet MSRP (*Colgate*)
    3. If manufacturer never parts with title to the items (consignment), the manufacturer can mandate the price that the items are sold at (*Schwinn*)
    4. Non-price vertical restraints were *per se* illegal (*Schwinn*, *rev’d*, *Continental*)

1. ***PER SE*** HISTORICAL RULE
   1. *Dr. Miles Medical*
      1. *Per se* illegal Retail Price Maintenance (RPM) agreement – Manufacturer enforces price restraint on retailers
      2. Agreement with wholesalers/retailers not to sell less than MSRP
      3. Concern that price cutting would hurt reputation
      4. Sued distributor that was cutting prices
      5. Reasoning – Dr. Miles can’t do any better than if the retailers had agreed amongst themselves
   2. *Colgate Doctrine*
      1. Refusal to deal with retailers that would not sell at MSRP
      2. In the absence of any purpose to create or maintain a monopoly, the act doesn’t restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And of course, he may announce in advance the terms
   3. *United States v. Arnold, Schwinn & Co.*, *rev’d*, *Continental Television* (See below)
      1. Schwinn plan – Wholesalers assigned territories, can only sell within territory
      2. No selling to unauthorized retailers
      3. *Per se* illegal non-price vertical restraint
      4. Reasoning – Once manufacturer has parted with title, no right to impose territorial restraints 🡪 Lack of economic rationale for the refusal after exhaustion of rights
         1. Rule of reason would be applied for goods on consignment

## MODERN VERTICAL RESTRAINTS STANDARDS

* 1. *Continental Television v. GTE Sylvania* (Non-Price Vertical Restraints)
     1. Sylvania is 1-2% of market, engages in plan and rises to 5%
     2. Plan was geographic distribution restraint – franchisee only allowed to sell products from location that they got franchise at
     3. Sylvania cuts off Continental when they violate the franchise agreement
     4. **Step 0**
        1. Distinguish *Topco* as horizontal territorial restraint – This is vertical
        2. Distinguish *Dr. Miles* as price restraint – This is non-price territory restriction
     5. **Analysis**
        1. Vertical restraints
           1. Reduced intra-brand competition by limiting # of sellers of a product competing for business of a group of customers
           2. Increased inter-brand competition by allowing manufacturer to achieve efficient product distribution
        2. Free Rider Problem
           1. Some outlets might invest in advertising/customer education
           2. Discount vendors disincentivize this by stealing customers with lower prices
        3. Trade-Off
           1. Educates some customers that would otherwise not buy the product
           2. Raises prices for customers that didn’t need the information/prefer lower price
           3. May lose some customers that can’t afford the higher price
  2. *Monsanto Co. v. Spray Rite Svc. Corp.*
     1. Issue of whether agreement can be inferred on the basis of termination of distributorship due to complaints from another distributor
        1. How far can manufacturer go to protect more expensive distribution model?
     2. **Rule** – There must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently
     3. **Analysis**
        1. Direct/circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective
        2. Requires a “meeting of the minds”
        3. Otherwise non-price vertical restraints are acceptable
  3. *Toys R Us* – TRU Approaches Mattel asking them to sell different toys to warehouse stores than to normal retailers – Mattel won’t do it unless other manufacturers also do
     1. Reasoning: Unlawful since manufacturer/consumer interests are aligned, only benefit is to retailers
  4. *Sharp* – *Per se* illegality is only for price restraints
  5. *State Oil v. Kahn* – Maximum price restraints are ok 🡪 can be pro-competitive 🡪 RoR
  6. *Leegin Creative Leather Products v. PSKS* (Price-based Vertical Restraints)
     1. Leegin manufactures leather apparel, refuses to sell to discount retailers arguing customers get better service/support for their purchases at non-discount outlets
     2. Justifications
        1. Stimulating inter-brand competition by reducing intra-brand competition
        2. Free Rider problem – encourage high end retail investment
        3. Facilitate market entry – Allows the new brand to invest in marketing
        4. Brand reputation – Reputation for selling high quality goods
        5. Gives consumers more options (high end goods as well as discount)
     3. Reasoning (anti-competitive effects)
        1. Facilitate manufacturer cartels
        2. Discourage price cutting to benefit lower price consumers
        3. Can organize retail cartels
        4. Can be abused by manufacturer/retailer with market power
           1. Can stymie innovation that would lower costs, etc.
        5. Potential abuse of resale price maintenance for anticompetitive purposes is unlikely unless relevant entity has market power
     4. Holding
        1. Default is the RoR analysis (*Citing Maricopa*)
        2. Horizontal agreements remain *per se* unlawful under *Sacony-Vacuum*
        3. RoR analysis factors
           1. # of manufacturers using the practice

Facilitates cartel because retail price is transparent 🡪 good communication

* + - * 1. The source of the restraint
        2. Manufacturer’s market power
      1. Indication that over time courts can develop presumptions 🡪 *Polygram*-type burden-shifting framework
      2. *Per se* is only appropriate after courts have experience with the type of restraint at issue and only if they can predict with confidence that it would be invalidated in all or almost all instances under RoR analysis

## TYING AND EXCLUSIVE DEALING

### Generally

* + 1. Clayton Act § 3 – It is unlawful for any person “engaged in commerce” “to lease or make a sale or K for sale” of “goods, wares, merchandise… or other commodities, whether patented or unpatented” or “fix a price charged” or “discount from, or rebate upon such price” on condition that the lessee or purchaser will not “use or deal in the goods, wares, merchandise… or other commodities of a competitor or competitors of the lessor or seller” where the effect “may be to substantially lessen competition or tend to create a monopoly in any line of commerce.”
    2. Applies to both tying and exclusive dealing
    3. Almost all tying cases are also tried under § 1
    4. Sales **must** involve 2 or more states to fall under Clayton § 3
    5. **Cases** – Doctrinal development
       1. *Motion Picture Patents v. Universal Film* – Illegal tying between patented projector and film to use in projector
       2. *Morton Salt v. G.S. Suppiger* – Illegal tying between salt machine and salt
       3. *International Salt v. U.S.* – Illegal tying lease of patented caning machine and salt – analyzed as *per se* illegal under § 1 🡪 stricter than Clayton because no need to demonstrate likelihood of lessening competition

### Exclusive Dealing

* + 1. *Standard Oil v. U.S.* – Illegal franchise indicating franchisees can only buy Standard
    2. *Tampa Electric v. Nashville Coal* – Illegal 20y exclusive dealing K under § 3 RoR
       1. Weigh effect of the K on the relevant area
       2. Take into account relative strength of the parties
       3. Proportionate volume of commerce involved related to total commerce in the area
       4. Probable immediate/future effects which pre-emption of that market share might have on effective competition
       5. Simple monetary value of the K is insufficient

### Tying

* + 1. *Jefferson Parish v. Hyde*
       1. Hospital tying surgery services to the anesthesiologists from a single company
       2. Sherman Act § 1 case seeking *per se* illegality of the tying arrangement
       3. Elements of *per se* tying arrangement
          1. There were 2 different products

“Turns not on the functional relation between the[] [products], but rather on the character of the demand for the[m]”

They are separate only if there is “sufficient consumer demand so that it is efficient for a firm to provide [them] separately” (*Eastman Kodak*)

Products are “separate” if they can be marketed separately – applies even if you’d never use one without the other

* + - * 1. The Π was required to buy both to get the one it wanted
        2. The Δ had some “power” in the tying product market

Power to raise price and restrict output (*Eastman Kodak*)

* + - * 1. The arrangement affected a “substantial” amount of commerce

Most ties meet this threshold if you can get through the other ones

* + - 1. Δ can then rebut with business justifications
      2. **Rule** – “The essential thing in tying is the seller’s exploitation of its control over the tying product to force the buyer into purchase of a tied product that the buyer either didn’t want at all, or might have preferred to purchase elsewhere on different terms; when such “forcing” is present, competition on the merits in the market for the tied item is restrained and the Sherman act is violated”
      3. Policy
         1. Significant market foreclosure 🡪 forecloses competition in “B” market
         2. Restricts consumer choice
         3. Congressional judgment
         4. Facilitates price discrimination
         5. Creates entry barriers
         6. Insulates an inferior product from competition
      4. Defenses
         1. One monopoly rent
         2. “Metering” to create price discrimination 🡪 more efficient resource allocation
         3. Quality control
         4. Brand protection