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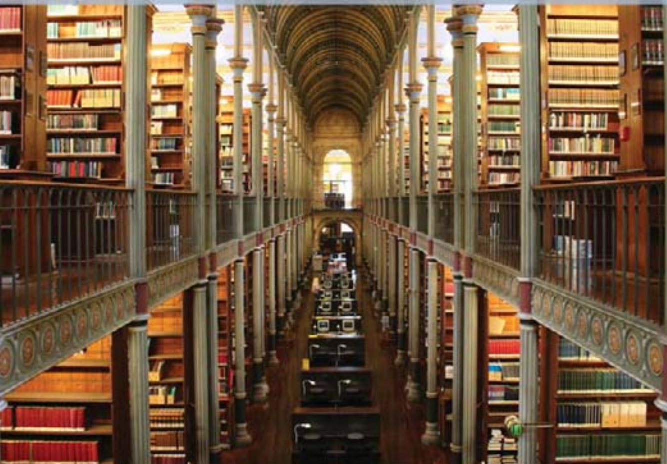

Douglas Broder

U.S. Antitrust Law and Enforcement

A Practice Introduction

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A Practice Introduction

Douglas Broder

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About the Author

Douglas Broder is the co-chair of the global antitrust practice at K&L Gates LLP. He has been practicing antitrust law and commercial and appellate litigation in New York City since 1977. Mr. Broder is the author of two earlier books on antitrust law and practice as well as of numerous book chapters and articles on antitrust and on written advocacy. For the past twenty years, Mr. Broder has served as the U.S. law reporter for the monthly *European Competition Law Review*.

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Foreword

This is the book I wish I'd been given in 1977. A new law school graduate, I had accepted a job at the Wall Street law firm Lord, Day & Lord. Upon arriving I was told I had the good fortune to be assigned to the legendary Gordon Spivack's antitrust team. The problem was I had no idea what that meant. I had not taken a course on antitrust law and had only a dim awareness that there was such a thing. The only economics I knew came from a one-semester mandatory introductory course I had taken as a modestly motivated college freshman ten years earlier. I had never worked at a law firm and had no idea what law practice at a large corporate firm involved, let alone what went into practicing antitrust law.

I soon discovered to my chagrin that there was no single source to guide me through the maze of statutes and regulations that made up the antitrust laws, nothing to show me where to find them, what they meant, or how they were enforced. And there was nothing to introduce me to the new concepts and strange new uses of words I would encounter—*per se* versus rule of reason, horizontal versus vertical, cross-elasticity of demand, supply-side substitutability, monopsony, *nolo contendere*, and on and on. Nor was there anything to introduce me to how antitrust was practiced.

Most readers will probably not be as clueless as I was. Nonetheless, I thought then, and remain convinced, that there was a need for a one-volume book, written in plain English and readable in a sitting (admittedly a fairly long one), that surveys and categorizes the United States antitrust laws and the cases interpreting them, describes how and by whom these laws are enforced, and introduces the reader to the practice of antitrust law.

This book should be useful to law students; new attorneys who, like I was, are just beginning in antitrust practice; more senior lawyers at firms or in corporate legal departments seeking a refresher or quick introduction; non-U.S. competition law attorneys; journalists; and anyone else seeking an introduction to and overview of U.S. antitrust law, enforcement, and practice.

Chapter 1, "Overview and History of U.S. Antitrust Enforcement," contains an introductory overview of the U.S. antitrust laws and a brief review of the history of U.S. antitrust enforcement. This chapter traces the evolution of antitrust doctrine and enforcement decisions. Chapter 2, "Federal Antitrust Statutes," contains summaries of each of the most important federal antitrust and related statutes. These are the primary sources and the foundation upon which antitrust case law and enforcement are built.

Chapters 3 to 7 contain a narrative discussion of the principles of U.S. antitrust law as contained in the statutes, court decisions, and enforcement guidelines. The chapters are organized according to the primary antitrust statutes. Chapter 3, "Agreements in Restraint of Trade—Sherman Act, Section 1," covers Section 1 of the Sherman Act, which outlaws agreements in restraint of trade (or, as referred to in the European Union, anticompetitive agreements and concerted practices). Chapter 4, "Monopolization and Attempted Monopolization—Sherman Act, Section 2," covers Section 2 of the Sherman Act, which outlaws monopolization and attempted monopolization (abuse of a dominant position). Chapter 5, "Mergers, Acquisitions, and Joint Ventures—Clayton Act, Section 7," covers the section of the Clayton Act which outlaws anticompetitive mergers, acquisitions, and joint ventures (mergers and concentrations). Chapter 6, "Premerger Notification—The Hart-Scott-Rodino Act," covers the Hart-Scott-Rodino Act, which regulates the premerger notification and merger clearance processes (prior notification and clearance). Chapter 7, "Mergers, Acquisitions, and Joint Ventures—Clayton Act, Section 7," covers the Robinson-Patman Act, which outlaws price discrimination.

The narrative contained in these five chapters cites and discusses numerous U.S. Supreme Court decisions. It also cites lower court decisions and secondary sources. But it makes no attempt to provide an exhaustive catalogue of lower federal and state court decisions for research purposes. Nor does it delve in depth into all the fine points and legal and economic intricacies that occupy full-time U.S. antitrust lawyers. Instead, its purpose is to convey an understanding of broad principles, statutory mandates, and statements of the regulatory agencies. At the same time, it should provide a running start for those interested in doing further research.

The book's final chapter, Chapter 8, is called "Antitrust Enforcement." It describes and outlines the activities of the four groups that actually enforce the U.S. antitrust laws: (1) the Antitrust Division of the U.S. Department of Justice; (2) the Federal Trade Commission; (3) the attorneys-general of the fifty individual states of the union; and (4) private civil litigants.

The book also contains an "Appendix" designed to provide context for non-U.S. lawyers and others not familiar with the U.S. federal and legal systems and the judicial decision-making process. The "Appendix" describes those systems, traces the progress of a case through the U.S. federal courts, and explains the system of citation used in this book.

In addition to the traditional index and case and authority tables, the book contains a comprehensive "Glossary" that provides short definitions of common and arcane legal and economic terms and concepts. The glossary is cross-referenced to relevant sections of the main text. Used alone, the glossary provides a quick and easy introduction to, or review of, the often counterintuitive vocabulary of antitrust. Used in combination with the index and tables, the glossary will help jump-start research into unfamiliar areas.

CHAPTER 1

Overview and History of U.S. Antitrust Enforcement

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[B] The Early Years: 1890–1955 6

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§1.01 Overview

The antitrust laws are the original—and in many ways most important—component of the United States' federal economic regulatory scheme. The antitrust laws seek to protect free markets and vigorous competition by setting limits on the collusive and predatory conduct and monopolistic abuses that free markets often breed. As the United States Supreme Court has put it:

> Antitrust laws in general and the Sherman Act in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.[1]

The antitrust laws' primary focus is marketplace competition. American antitrust has its roots in the English common-law tort of unfair competition. Indeed, in England and Europe, what America calls antitrust law is commonly referred to as competition law. But modern American antitrust is, at bottom, a creature of statute.

Congress passed the first antitrust law, the Sherman Antitrust Act in 1890 to attack the trusts—oligopolistic cartels that acted collusively rather than competitively—that dominated portions of American commerce during the industrial age. Over the ensuing years, the United States federal government has created a comprehensive series of statutes and regulations aimed at preserving and regulating marketplace competition. These statutes include the Clayton Act (1914), the Federal Trade Commission (FTC) Act (1914), the Robinson-Patman Act (1936), the Cellar-Kefauver Amendments to the Clayton Act (1950), and the Hart-Scott-Rodino Antitrust Improvements (HSR) Act (1976). The states have followed suit by enacting their own antitrust statutes. Most are based on, and some are even stricter than, the Sherman Act and the other federal statutes.

The federal statutes include provisions that outlaw price-fixing, certain tying arrangements, bid-rigging, monopolization, anticompetitive mergers and acquisitions, price discrimination, predatory pricing, and other restraints of trade or unfair methods of competition deemed incompatible with an open and competitive marketplace. To underscore their seriousness, the antitrust laws, have, from the beginning, treated violations as criminal as well as civil offenses. Lengthy prison terms and substantial fines await both individual and corporate violators.

Theoretically, all of the U.S. antitrust laws carry criminal penalties. In practice, however, the U.S. federal antitrust enforcement authorities do not prosecute all antitrust violations as criminal offenses. Instead, they confine

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1. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

criminal prosecutions to hard-core cartel activity, i.e., clear-cut, plainly anticompetitive violations such as price-fixing and bid-rigging.

To further encourage compliance—and to encourage private as well as government enforcement—the antitrust laws permit individuals or companies injured by violations to sue for three times their actual damages (treble damages). And, in a departure from the usual American rule that each party to a litigation is responsible for paying its own court costs and attorneys' fees, the antitrust laws require losing antitrust defendants to pay the plaintiff's court costs and attorneys' fees.

The antitrust laws have spawned a large regulatory and enforcement framework. Two federal agencies, the Department of Justice's (DOJ's) Antitrust Division and the Federal Trade Commission (FTC) are responsible for enforcing of the federal antitrust laws and for creating and implementing of additional rules and regulations. The attorneys general of the fifty individual states enforce their own antitrust laws and can also bring suit on behalf of their constituents under the federal antitrust laws. Private civil plaintiffs, including a group of lawyers who specialize in bringing large antitrust class actions on a contingency fee basis, complete the enforcement apparatus.

The common law—legal principles established not by statute but through court decisions and reliance upon precedent—has also played an important role in developing of antitrust law. The Sherman Act's broad ban on "contracts, combinations and conspiracies in restraint of interstate trade" would, if not narrowed by court interpretation, outlaw every contract or agreement involving commerce that crossed a state boundary within the United States. The other antitrust statutes, though sometimes more specific, also leave ample room for interpretation. Combined with the incentive to litigation provided by treble damages; attorneys fees; and the broad enforcement authority vested in the FTC, the DOJ, and state attorneys general, these statutes have led to the creation of an enormous body of case law interpreting, reinterpreting, and refining the antitrust laws.

Although the basic concepts of antitrust—hostility to monopoly and oligopoly practices and the preservation of competition—have long been clear, the courts' and the regulatory authorities' interpretation of the laws has continuously evolved. Many decisions—even Supreme Court decisions—and statutes once viewed as stating core antitrust principles are now deemed economically and legally unsound, and have either been overruled or are simply ignored.

Certain assumptions underlying the antitrust laws have been widely accepted: Free markets are the most efficient and fairest—or least inefficient and least unfair—form of economic organization; competition on price, terms, service, efficiency, and innovation is indispensable to the proper functioning of a free market; monopoly, oligopoly, and collusion are antithetical to competition; and some form and level of regulation—with both the form and extent of regulation open to debate—is necessary to ensure that the free

markets, and competition, operate fairly and efficiently. As in any competitive enterprise, there must be rules and referees to enforce the rules. There is also, as in any competitive enterprise, constant bickering about the effectiveness of the rules, their meaning, and the fairness of their enforcement.

Antitrust has long been the subject of political controversy in the United States, controversy that has more recently been exported to Europe and, increasingly, the rest of the world. From the passage of the Sherman Act in 1890 to the present, accused monopolists and other subjects of government or private antitrust actions have vilified the antitrust laws or their enforcers as anti-business or as outmoded and lacking relevance to modern business.

The attacks on antitrust have not come only from those on the receiving end of antitrust enforcement and their defenders. A theoretical debate has long raged over what the fundamental goals of the antitrust laws are, what they should be, and how best to achieve them.[2] Issues in the debate include whether big alone is bad; whether the antitrust laws should be enforced vigorously to prevent major accumulations of wealth or productive capacity; whether the antitrust laws should be used to prevent corporations from becoming "too big to fail;" whether monopolies are inherently evil and should be punished or broken up, or whether they are simply evidence of successful business practices; whether monopolies are inherently self-destructive because they have no need to remain competitive and so should be left to the mercy of market forces rather than be the subject of regulatory action; whether antitrust should protect small competitors or simply ensure that consumers get the lowest, most competitive prices and best services; what form antitrust enforcement should take; how many competitors are necessary to guarantee adequate competition in a market; whether there is such a thing as an inherently efficient natural monopoly that should be permitted to exist, and, if so, whether and how it should be regulated; and whether antitrust enforcement is the most efficient means of promoting competition and regulating monopolies, or whether the free market is a more efficient regulator that needs little help except for policing and punishing the most egregious violations of fair competition.

These issues arise from tensions inherent in the free enterprise system. Take monopolies. By definition a monopolist, i.e., one with market dominance, has no, or no effective, competitors. A monopolist thus lacks the spurs provided by competition to low pricing; innovation; and the improvement of productivity, service, and quality. Monopolies also tend to be highly profitable. By definition, a monopolist can price its products with a minimum of concern about competition.

But profits and market dominance are the prizes businessmen play for in free markets. Monopolies can be the product of the rigorous application of those very qualities that antitrust aims to encourage—innovation, efficiency,

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2. *See generally* Robert Bork, *The Antitrust Paradox* (Basic Books 1978).

and low pricing. Thus, one continuing issue is how to retain the incentive of fairly earned monopoly profits, while discouraging, and, when necessary, punishing or otherwise discouraging those who seek or maintain monopolies by unfair or predatory methods or who use monopoly power in one market (however achieved) to obtain similar power in a separate market.

Similarly, there is inherent tension between the antitrust laws, with their hostility to monopoly, and the intellectual property laws, most notably the patent laws. To encourage innovation, the patent laws—and to a lesser degree the copyright and trademark protection laws—award limited monopolies to those who take the trouble and financial risk to create new goods, services, and ideas. The result has been increasingly frequent and important collisions between the antitrust and intellectual property laws.

§1.02 A Brief History of U.S. Antitrust Enforcement

[A] Introduction

One result of the contradictions inherent in antitrust and the evolving political, judicial, social, and academic views of its application and relevance has been what some commentators have likened to a pendulum swing in the amount and nature of antitrust enforcement. In this view, the pendulum has swung from the fervor of the trustbusters at the dawn of the twentieth century to neglect during the Great Depression and World War II. After the war, the pendulum swung slowly back, reaching an extreme in the 1970s with the government structural cases seeking the breakup of IBM and AT&T, only to swing back in reaction to the attacks of the Chicago School of law and economics, whose ideas originated at the University of Chicago, as reflected in the policies of the Reagan and first Bush presidential administrations (1980–1992).

The pendulum swung back toward increased enforcement during the Clinton administration (1992–2000), both as the result of deliberate government policy and in reaction to the unprecedented merger wave that occurred in the last half of the 1990s. Once again, the government was emboldened to take on not just price-fixers—which it prosecuted in record numbers—and those attempting major mergers or acquisitions, but also monopolists, as represented by the government cases against Intel and Microsoft.

George W. Bush's administration (2000–2008) saw the pendulum move back to the right. The administration professed its belief in minimal regulation and free markets, and backed up that position by settling the Microsoft case and cutting back drastically on merger challenges. The DOJ did continue to heavily prosecute international price-fixing cartels—often the result of

companies taking advantage of a leniency policy adopted in the 1990s that rewards the first company in a conspiracy to report its own price-fixing with freedom from criminal liability.

The election of Barack Obama and the global economic meltdown that occurred at the end of 2008 appear to presage a return to more vigorous antitrust enforcement. Newly appointed heads of the FTC and DOJ's Antitrust Division have promised increased vigilance and enforcement activity. Interestingly, certain issues that seemed to have faded from the antitrust debate resurfaced in the wake of the failure of many large institutions—particularly whether antitrust enforcement should be used to prevent companies from becoming "too big to fail," i.e., growing to a point where their failure could not be tolerated by the system.

Not all commentators agree that the pendulum is an appropriate analogy for the changes in antitrust enforcement over the years. Instead, some argue that the process has been more one of evolution and refinement. According to this view, over time, antitrust enforcers' understanding of the economic consequences of their actions has improved, allowing them to minimize their interference with market forces and focus their enforcement resources on truly harmful activities.[3] Moreover, there are certainly correlations between the levels of antitrust enforcement and economic conditions and which political party is in power.[4]

[B] The Early Years: 1890–1955

The U.S. Congress passed the Sherman Act in 1890 in response to a growing fear of the enormous accumulations of capital and resources achieved by trusts during the industrial age. In the twenty-odd years immediately following the passage of the Sherman Act in 1890, the government used its newfound power to break up trusts or cartels in the steel, rail, and petroleum industries.[5] In 1914, Congress passed the Clayton and FTC Acts, giving the government

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3. *See, e.g., Antitrust Magazine*, Spring 2004, Vol. 18, No. 2, the entire issue of which is devoted to exploring the question "Government Antitrust Enforcement—Pendulum or Continuum?" (Published by the Antitrust Law Section of the American Bar Association.) The DOJ has posted on its website a useful pictorial timeline of antitrust enforcement highlights, beginning with the passage of the Sherman Act in 1890. *See* http://www.usdoj.gov/atr/timeline.pdf.
4. Another approach has been to examine and trace the course of the outcomes of antitrust cases in the Supreme Court. *See* Ginsburg and Brannon *Antitrust Decisions of the U.S. Supreme Court, 1967–2007*, www.globalcompetitionpolicy.org (Nov. 5 2007). The authors observed that from 1967–1976 plaintiffs won the majority of cases, from 1976–1996 plaintiffs and defendants split the victories evenly, and since 1996 defendants have won the large majority.
5. *See Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (1898), *aff'd*, 175 U.S. 211 (1899); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

still greater enforcement power and tools, including the power to prevent the creation of—not just attack the existence of—monopolies and cartels.

Shortly thereafter, however, the antitrust laws fell into a period of limited use that lasted through the 1920s, the Great Depression, and World War II. The only development from the period that retains significance today was Congress's passage of the Robinson-Patman Act in 1936. The Robinson-Patman Act sought to protect small businesses by outlawing price discrimination and predatory pricing. Price discrimination is the practice of charging lower prices to larger, more powerful customers than to smaller, weaker customers. Predatory pricing involves charging below-cost prices to drive out competition in the hopes of later recouping losses through monopoly-level pricing.

Even before its passage, the Robinson-Patman Act's partial outlawing of lower prices was criticized as antithetical to the goals of antitrust. Nevertheless, at one time, the government actively enforced the act and the DOJ actually sought criminal sanctions for its violation. Today, however, the federal authorities have effectively withdrawn from enforcing the act. But despite the government's withdrawal and despite continuing attacks, the Robinson-Patman Act remains in force. Because civil treble-damage liability in suits brought by private plaintiffs remains a possibility, antitrust attorneys must still counsel clients about how to comply with the act—an often-difficult challenge given the act's counterintuitive nature and the resulting confusion in the decisional law.

[C] Antitrust Enforcement at its Height: 1955–1980

Antitrust enforcement returned to the fore in the late 1940s and 1950s as American corporations, revived by the war effort and the beginnings of the postwar economic boom, began to increase their power. As they grew in size, they once again came to be seen as threats—potential or actual—to the public welfare. Government antitrust authorities began to increase antitrust prosecutions. In the late 1950s and into the 1960s, the government began to bring and win criminal prosecutions against major corporations for nationwide price-fixing conspiracies and, for the first time, to send corporate executives to jail. During this same period (and into the 1970s), the agencies attacked many mergers and acquisitions using novel and aggressive theories that led to numerous Supreme Court decisions. Some of those decisions remain important landmarks. Others are today viewed as having been far too restrictive and are not given much, if any, credence by the courts or the agencies.

In the late 1960s, as antitrust enforcement increased, the government also once again began to bring—on a scale unmatched since the early years of the century—so-called structural cases, most notably against IBM and AT&T. These prosecutions sought the breakup of what had once been viewed, especially

in the case of AT&T, as natural monopolies. Natural monopolies were those that seemed to arise "naturally" in industries in which it appeared to make sense that there be a single supplier of a uniform product in a network. As a corollary, it was believed that these industries needed to be regulated. Examples included telephone, electric utilities, railroads, airlines, and the post office.[6] In addition, the federal regulators began to take an adversarial approach to mergers and acquisitions deemed likely to harm competition then or in the future. Because the parties were not required to notify the government of their merger plans in advance, merger enforcement involved either last-minute rushes to the courthouse by government lawyers seeking preliminary injunctions against impending transactions or government lawyers' requests that the courts undo already-completed mergers.

The obvious inefficiency of this approach led to the passage, in 1976, of the Hart-Scott-Rodino Antitrust Improvements Act (the Hart-Scott-Rodino or HSR Act). The HSR Act required that parties planning mergers, acquisitions, or joint ventures over a certain dollar size notify the DOJ and the FTC and, typically, wait thirty days before closing. This thirty-day waiting period gave the regulators a chance to screen proposed transactions and demand changes to, or bring court challenges against, those that they believed were likely to harm competition. The act provided a fifteen-day waiting period for certain cash tender offers in recognition of the dynamic nature of many such transactions.

At roughly the same time that government antitrust enforcement was growing rapidly in the late 1950s and early 1960s, a small group of plaintiffs' lawyers came up with the idea of combining the class action with the antitrust laws' treble-damage provisions. This led to massive, often "bet-your-company," lawsuits against offending companies. Frequently, these antitrust class actions were piggyback (or follow-on) cases that used facts developed in DOJ criminal prosecutions of nationwide price-fixing conspiracies. Thus, it was antitrust that gave birth to the massive class actions that are now common in so many other economic areas, from securities, to products liability, environmental and airplane disasters, and insurance. One result was the widespread institution of corporate antitrust compliance programs. These programs are aimed at educating corporate employees—especially those in sensitive areas, such as sales, marketing, and business planning, where collusion tends to breed—about the requirements of the antitrust laws.

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6. Although the notion of natural monopolies would seem to have been discarded with deregulation of these industries, the modern emphasis on "network" effects and calls for uniformity of standards in various areas of the computer and telecommunications industries plainly relates back to that concept.

[D] Antitrust Enforcement Wanes in the Reagan-Bush (1) Era

Antitrust enforcement and civil litigation peaked in the mid-to-late 1970s. The pendulum began to swing away from activist antitrust enforcement—or the refinement of economic and judicial thought accelerated—in part in response to vigorous advocacy from the Chicago School of law and economics. This group of academics, lawyers, economists, and judges argued for the application of economic principles in legal decision making—something they believed was especially critical in antitrust.

Adherents of the Chicago School deplored what they viewed as the economically unsound excesses of many of the government enforcement actions and the Supreme Court antitrust decisions of the previous twenty years, especially in the areas of monopolization and mergers. They preached instead that two principles should control all antitrust enforcement and judicial decisions: (1) The one and only goal of antitrust should be the enhancement of consumer welfare, which they defined primarily as lower prices; and (2) in most cases, the market is better—more efficient, fairer, and wiser—at detecting and punishing anticompetitive behavior than are government regulators or the courts.

The election of Ronald Reagan in 1980 signaled a major change in government antitrust enforcement efforts. President Reagan and his antitrust appointees espoused the Chicago School theories and acted on those beliefs. They quickly reduced the budgets of the antitrust enforcement authorities. Within a short time, the Reagan enforcers had abandoned the IBM case and settled the AT&T case. (In the latter, they did achieve a major breakup of AT&T and its local operating companies, a development that dramatically affected the telecommunications industry both here and abroad.) The Reagan antitrust enforcers never brought another major monopolization case—indeed, federal regulators did not bring another until the late 1990s.

In the area of merger enforcement, the Reagan regulators expressed and practiced the view that it was their job to help companies, not to get in their way. Thus, the agencies no longer took an aggressively hostile attitude toward potentially troublesome mergers and acquisitions. Instead, they sought to work with companies to eliminate troubling aspects by reconfiguring the proposed transactions through divestitures, licensing, or more creative methods.

As part of this cooperative approach, in 1982, the DOJ and FTC jointly published the first *Merger Guidelines*. The *Merger Guidelines* described the analysis that government lawyers and economists undertake when reviewing a proposed merger. The guidelines helped companies and their own lawyers and economists better evaluate the likelihood that the agencies would challenge a proposed transaction. They also allowed deal makers to tailor their transaction to avoid problems, be better prepared to defend it during preliminary discussions with the regulators, and have prepared themselves in advance for likely alteration demands from the regulators. The result of this

combination of circumstances was a dramatic decrease in the percentage of litigated merger cases.

There were similar changes in criminal enforcement. Disdaining major nationwide price-fixing prosecutions, the Reagan DOJ focused instead on smaller, more localized conspiracies. They concentrated especially on bid-rigging in the construction trades and other localized industries. This approach enabled the DOJ to rack up impressive numbers of convictions, fines, and jail sentences.

At the same time, the Reagan administration made a point of seeking out adherents of the Chicago School for judicial appointments. And they provided training in Chicago School economic and antitrust theory for judicial appointees and sitting judges. Merger challenges became much more difficult and the number of litigated merger cases dropped dramatically. As these judges' influence began to spread, judicial opinions began to make it more and more difficult to obtain plaintiffs' verdicts in areas of antitrust outside of the classic, per se illegal price-fixing and bid-rigging.

Antitrust enforcement continued to wane throughout the Reagan administration and the four years of the first Bush administration. Their hands-off approach was in part the result of budget cuts and a tidal wave of Hart-Scott-Rodino premerger filings. But it may also have been attributable to discouragement resulting from a lack of success when they did go to court to challenge a merger and the success of the collaborative process fostered by the Hart-Scott-Rodino Act and the *Merger Guidelines*.

As enforcement waned, so did private civil litigation. With fewer, smaller, prosecutions to use as springboards, the class action plaintiffs' bar began to look elsewhere for cases. Private litigants were also discouraged by what, at times, approached hostility from the bench for antitrust cases. As the end of the Bush administration approached, many believed—some happily—that antitrust had lost all relevance and that the major antitrust suit was dead.

[E] Antitrust Enforcement Under the Clinton Administration

With the election of Bill Clinton, those who complained of a decline in antitrust enforcement were given reason to hope. Clinton and his antitrust appointees promised a return to vigorous enforcement. The promise, however, turned out, at least initially, to be more talk than action. There was no noticeable increase in the number or nature of criminal prosecutions. Nor was there any perceptible change in merger enforcement procedures. The latter stemmed in part from a consensus that, for the most part, the *Merger Guidelines* and the philosophy of cooperation between the merger enforcers and corporate America worked better than the earlier, adversarial, all-or-nothing approach. This consensus was especially strong in the early 1990s as the economy stalled.

The government did attempt one or two high-profile prosecutions, with less than stellar results. These failures set back enforcement efforts significantly. Nevertheless, the regulators continued to talk tough, and they slowly began to amass victories. By the late 1990s, antitrust enforcement had staged a strong comeback, although the amount of antitrust litigation, both government and private, did not approach the level of the late 1970s.

Emboldened by their successes, the DOJ went after Microsoft and Intel in cases that echoed the old IBM and AT&T cases. The FTC had success in challenging mergers, such as the proposed combination of Staples and Office Depot, using aggressive, and even novel, theories. Ironically, at about the same time, the FTC approved—albeit on the condition that the companies divest significant refining and distribution assets—the recombination of Mobil and Exxon, both of which had been parts of the original Standard Oil trust broken up by the government almost ninety years earlier.

[F] Antitrust Enforcement Since 2000

George W. Bush entered office in 2001 seemingly intent on returning to the free-market, anti-enforcement policies of the Reagan and first Bush administrations. To a large degree, that is what happened. Indeed, in 2002, at the administration's urging, Congress passed, as a footnote to Section 1 of the Sherman Act, the Antitrust Modernization Commission Act of 2002 (AMCA). The AMCA created an Antitrust Modernization Commission and directed it "to examine whether the need exists to modernize the antitrust laws . . ." Interestingly, despite the expectation that the AMC would recommend sweeping changes to the antitrust laws, the AMC's report, issued in 2007, saw little need for change in the basic antitrust legal and enforcement apparatus aside from repealing the Robinson-Patman Act.

Despite the Bush administration's seeming hostility to antitrust, there were pockets of antitrust activity. The DOJ, building upon a foundation laid with the institution of its leniency policy in the 1990s, had a major run of successes prosecuting international price-fixing cartels in a wide variety of industries. This success was fueled in part by companies taking advantage of the leniency program and in part by cooperation between the DOJ and foreign antitrust enforcers. President Bush demonstrated his commitment to anti-cartel criminal enforcement by signing into law, in June of 2004, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. The act raised the maximum penalties for individual and corporate antitrust criminal violations and sweetened the incentives for parties to take advantage of the DOJ's leniency program and inform the government about antitrust violations.

On the merger front, the Bush DOJ even went to court to challenge—albeit unsuccessfully—a major proposed acquisition in the software industry, Oracle's bid to acquire PeopleSoft. Overall, however, the Bush DOJ was not

active in seeking to prevent mergers. On the other hand, the FTC, which, as an independent administrative agency, is less subject to administration influence, continued to bring merger cases. Moreover, encouraged by their success against Microsoft, state attorneys general began to exhibit an increasing appetite for antitrust enforcement both in cooperation with the federal authorities and on their own. There were also numerous private class actions piggybacking on the DOJ's criminal cartel cases as well as a record-setting recovery on behalf of a class of retailers that sued Visa and Mastercard over their pricing practices.

The global economic meltdown at the end of 2008 and the election of Barack Obama made a resurgence of antitrust enforcement seem likely. Commentators who blamed a lack of regulatory oversight for the economic failures urged greater enforcement both in preventing mergers from taking place and in attacking already-existing monopolies. Indeed, antitrust was seen, for the first time in thirty years, as a tool to be used to prevent companies from becoming too big to fail or breaking up those that had.

At the time of this writing, it is too soon to tell just how this will play out. Obama's pick for head of the DOJ's Antitrust Division has been making pronouncements that indicate a newly aggressive attitude, especially toward monopolistic practices. Indeed, in one of her first actions, she repudiated a policy statement on the treatment of monopolies issued in 2007 by her Bush-appointed predecessor. That statement had been widely criticized by supporters of enforcement as far too lenient. The new chairman of the FTC has also been vocal about the need for more aggressive enforcement.

A couple of things seem certain. First, not only is antitrust enforcement not going away, it is becoming increasingly international. Much of the rest of the world has adopted the U.S. antitrust laws as a model for their own competition laws. Cooperation between U.S. antitrust enforcers and those around the world is increasing. Indeed, the competition authorities of the European Commission (EC) have been even more aggressive in pursuing their enforcement agenda than have their U.S. counterparts.

Second, despite the wide publicity given to prosecutions of international price-fixing cartels, the impulse to fix prices and rig bids seems to be innate and ineradicable. Though for a time it seemed likely that major national conspiracies had been reduced by increased awareness and better antitrust compliance counseling, price-fixing continues to provide work for the regulators. The increasingly integrated global economy means that American businesspeople will often find themselves involved with foreign businesspeople who operate under less restrictive competition principles and may be unaware of U.S. antitrust strictures and their international reach. Each new generation of businesspeople needs to be educated about antitrust issues, especially about how to avoid price-fixing and other per se illegal activities.

CHAPTER 2

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§2.01 Introduction

This chapter summarizes the United States federal antitrust statutes and related federal statutory provisions most often consulted by U.S. antitrust practitioners.[1] Covered first are the five federal statutes that form the core of U.S. antitrust law: The Sherman Antitrust Act (Sherman Act), the Clayton Act, the Robinson-Patman Act, the Hart-Scott-Rodino Antitrust Improvements Act (the Hart-Scott-Rodino or HSR Act), and the Federal Trade Commission (FTC) Act.[2] Next comes a description of the Antitrust Civil Process Act, which governs Department of Justice (DOJ) investigative procedures.[3]

Two acts of interest to non-U.S. practitioners follow: the Foreign Trade Antitrust Improvements Act (FTAIA) and the International Antitrust Enforcement Assistance Act.[4] Next come sections summarizing acts that cover bank mergers:[5] acts that provide antitrust immunity:[6] and an early, now mostly dormant, antitrust statute, the Wilson Tariff Act.[7] The chapter concludes with a section summarizing several miscellaneous provisions that are often encountered in antitrust practice.[8] Most relevant to non-U.S. practitioners is 28 U.S.C. §1746, which permits the use of unsworn declarations in lieu of notarized affidavits in U.S. court and government proceedings.[9]

§2.02 The Sherman Act

Passed in 1890, the Sherman Antitrust Act is the original antitrust statute. The key provisions of the Sherman Act are contained in Sections 1 and 2,[10] which are, respectively, analogous to Articles 81 and 82 of the European Community (EC) Treaty.[11] Section 1 outlaws "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states."[12]

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1. Most of the fifty states have passed their own antitrust statutes, often modeled on the Sherman Act.
2. *See* §§2.02–2.06, below.
3. *See* §2.07, below.
4. *See* §§2.08–2.09, below.
5. *See* §2.10, below.
6. *See* §2.11, below.
7. *See* §2.12, below.
8. *See* §2.13, below.
9. *See* §2.13[A], below.
10. 15 U.S.C. §§1 and 2. The Sherman Act as a whole consists of 15 U.S.C. §§1–7.
11. Treaty Establishing the European Community, Feb. 7, 1992 [1992] 1 C.M.L.R. 573 (hereinafter "EC Treaty").
12. *See generally*, Chapter 3, below.

The courts have held that certain practices are per se illegal under Section 1.[13] Such practices will be found to violate the law without regard to any possible justifications. Per se illegal practices include price-fixing, bid-rigging, customer and market allocations, group boycotts, and certain tying arrangements. All other restraints are judged under the rule of reason, which requires a balancing to determine whether the practice's pro-competitive aspects outweigh its anticompetitive harm.

Section 2 outlaws monopolization, attempted monopolization, and conspiracies to monopolize.[14] A violation of either Section 1 or 2 is a felony, punishable by fine and/or imprisonment. Fines for a corporation may go as high as $100 million (or more) per violation. Per violation penalties for individuals include fines as high as one million dollars and prison terms of up to ten years.[15]

§2.03 The Clayton Act

The Clayton Act, passed in 1914, and its many subsequent amendments cover a wide territory.[16] Its provisions include those relating to tying, price discrimination (see the Robinson-Patman Act), civil enforcement of the antitrust laws, statute of limitations, mergers and acquisitions, premerger notification (see the Hart-Scott-Rodino Act), and interlocking directorates.

[A] Section 3: Tying Arrangements

Section 3 of the Clayton Act prohibits the sales of goods or commodities on a condition (including tying arrangements) that may result in a lessening of competition or the creation of a monopoly.[17] Section 3 does not cover the tying of services or other intangibles. Such tying is, however, covered by Sections 1 or 2 of the Sherman Act or Section 5 of the FTC Act.

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13. In 2002, Congress passed as a footnote to Section 1 an act entitled the Antitrust Modernization Commission Act of 2002, which created the Antitrust Modernization Commission and directed it "to examine whether the need exists to modernize the antitrust laws . . ." 15 U.S.C. §1, notes §§11051–11060. Congress directed the Commission to report within three years of its first meeting.
14. *See generally*, Chapter 4, below.
15. The Criminal Fine Improvements Act of 1987, which applies to criminal violations generally, allows courts to impose even larger fines than those prescribed by the Sherman Act–up to double the amount gained by the violator or lost by the victim. 18 U.S.C. §§3571–3573.
16. The Clayton Act encompasses 15 U.S.C. §§12–27 and 29 U.S.C. §§52–53.
17. 15 U.S.C. §14.

[B] Sections 4 and 4A: Damage Actions, Treble Damages, and Attorney's Fees

Section 4 is a critical component of the antitrust laws.[18] It provides that anyone harmed by anything forbidden by the antitrust laws may sue in federal court regardless of the amount in controversy.[19] A successful plaintiff is entitled to recover three times his actual damages (treble damages) as well as his costs of suit, "including a reasonable attorney's fee."[20] Section 4 also allows foreign states to sue, but generally only for single damages.[21] Section 4A extends the right to sue for single damages to the U.S. government.[22]

[C] Section 4B: Statute of Limitations

Section 4B imposes a four-year statute of limitations for bringing civil treble-damage actions under the above sections.[23]

[D] Section 4C: *Parens Patriae* Actions

Section 4C empowers the attorney general of any state to bring a civil treble-damage suit as *parens patriae* on behalf of the citizens of the state in federal court.[24]

[E] Section 5: *Prima Facie* Effect for Final Judgments

Section 5 of the Clayton Act gives *prima facie* effect to final judgments entered in civil or criminal proceedings brought by the United States.[25] This section

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18. 15 U.S.C. §15.
19. 15 U.S.C. §15(a). *See* §A.01[C] below for a discussion of the subject matter jurisdiction of the federal courts.
20. *Id.* The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which increased the criminal penalties for violating the antitrust laws also created an important exception to the treble-damage rule. It limited to single damages the civil antitrust liability of those who take advantage of the DOJ's leniency program by informing the government about antitrust violations in which they participated. Those who do not receive amnesty remain liable for treble damages. The leniency program is discussed in Chapter 8, §2[A][3], "Leniency Programs," below.
21. 15 U.S.C. §15(b).
22. 15 U.S.C. §15a.
23. 15 U.S.C. §15b.
24. 15 U.S.C. §§15c–15h.
25. 15 U.S.C. §16(a).

lightens the burden on a plaintiff who has brought a civil antitrust action against a person convicted of violating the antitrust laws. It allows the plaintiff to use the government's judgment against the defendant as *prima facie* evidence that the defendant committed an antitrust violation.

[F] Section 5: Consent Decree Procedures (The Tunney Act)

Section 5 also contains the codification of the Antitrust Procedures and Penalties Act (the Tunney Act). Passed in 1974, this act provides detailed instructions for the entry of consent judgments in civil antitrust actions brought by the government.[26]

[G] Section 6: Labor Exemption

Section 6 exempts labor unions, and agricultural and horticultural cooperatives from the antitrust laws' proscriptions against illegal combinations or conspiracies.[27] Section 20 of the act forbids the issuance of injunctions against labor activity such as strikes, boycotts, and picketing, and declares that such activity shall not be considered "violations of any law of the United States."[28]

[H] Section 7: Mergers and Acquisitions

Clayton Act, Section 7, which is the U.S. analogue to the European Community Merger Regulation,[29] ranks in importance with Sections 1 and 2 of the Sherman Act. It allows the government to regulate proposed mergers, acquisitions, and joint ventures.[30] Section 7 forbids mergers or acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly."[31] (Section 7A of the Clayton Act, which is known as the Hart-Scott-Rodino Antitrust Improvements Act and covers premerger notification, is treated separately below.)

26. 15 U.S.C. §16(b)–(h).
27. 15 U.S.C. §17.
28. 29 U.S.C. §52.
29. Council Regulation (EC) No. 139/2004 of 20 January 2004 on Control of Concentrations Between Undertakings, 2004 O.J. (L24) 1 (hereinafter "EC Merger Regulation").
30. 15 U.S.C. §18; *see generally*, Chapter 5, below.
31. *Id.* The original Section 7 applied only to stock acquisitions. The Cellar-Kefauver Amendments of 1950 extended the application of the act to asset acquisitions.

[I] Section 8: Interlocking Directorates

Clayton Act, Section 8, prohibits anyone from serving as a director or officer (elected or chosen by the board) of two competing corporations under specified circumstances.[32] Specifically, Section 8 applies if the two corporations:

- Are engaged in commerce;
- Are competitors, such that "the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws; and"
- Each "has capital, surplus, and undivided profits aggregating more than $10,000,000" (now $26,161,000 after mandated annual adjustments).[33]

Section 8 exempts companies from its prohibitions if the competitive sales of:

- *Either* company is less than $1 million (now $2,616,100 as adjusted);
- Either is less than 2 percent of its total sales; or
- Each are less than 4 percent of its total sales.[34]

[J] Sections 12 and 13: Venue, Service of Process, and Witness Subpoenas

Section 12 of the Clayton Act allows an antitrust suit to be brought against a corporation wherever it may be found or transacts business and process to be served wherever it may be found or is an inhabitant.[35] Section 13 gives the government nationwide subpoena power to compel the attendance of witnesses.[36] In civil cases, however, good cause must be shown to compel the attendance of witnesses who live more than one hundred miles from the courthouse.[37]

The courts have interpreted this provision to mean that personal jurisdiction over a corporate defendant may be based on its contacts with the

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32. 15 U.S.C. §19. Section 8 also prohibits (with exceptions) any director, officer, or employee of any Federal Reserve member bank from also serving as a director, officer, or employee of any other bank. Although this aspect of the section has not been repealed, interlocking bank directorates are now governed by the Depository Institutions Management Interlocks Act, 12 U.S.C. §§3201–3208. *See generally* §5.07 below.
33. 15 U.S.C. §19(a)(1).
34. 15 U.S.C. §19(a)(2).
35. 15 U.S.C. §22.
36. 15 U.S.C. §23.
37. *Id.*

United States as a whole rather than on its contacts with the state in which it has been sued as is the case for individual antitrust defendants and most non-antitrust defendants, corporate as well as individual.[38]

[K] Section 14: Imputed Liability

Section 14 is a rarely used section. It states that if a corporation is found guilty of a criminal violation of the antitrust laws, the responsible officers or directors may be found guilty of a misdemeanor.[39] (In practice, responsible individuals are, like the corporation, prosecuted under the felony provisions of the Sherman Act.)

[L] Sections 15 and 16: Injunctive Relief

Section 15 of the Clayton Act gives the federal courts jurisdiction to "prevent and restrain violations of this Act."[40] It gives the attorney general (i.e., the DOJ) the authority to seek such injunctions. Section 16 also allows private parties threatened with loss or damage by a violation of the antitrust laws to seek injunctive relief.[41]

§2.04 The Hart-Scott-Rodino Act

Since its passage in 1976, the Hart-Scott-Rodino Act,[42] has become both an important part of federal antitrust enforcement and a major source of work for private antitrust counsel. The act, which is analogous to the merger regulation European Community (EC) Merger Regulation No. 139/2004, authorizes the antitrust regulatory authorities, namely, the FTC and the Antitrust Division of the DOJ, to prescreen mergers and acquisitions for potential antitrust violations. Under the act, individuals or companies with specified minimum assets or annual sales must report proposed acquisitions of assets or voting securities or the formation of joint ventures valued at $50 million ($65.2 million as adjusted in 2009) or more to the FTC and the DOJ and then to wait thirty days before closing. The HSR Act also lists twelve

38. For more on personal jurisdictional over both corporations and individuals, *see* §3.08[B] below.
39. 15 U.S.C. §24.
40. 15 U.S.C. §25.
41. 15 U.S.C. §26.
42. Clayton Act §7A; 15 U.S.C. §18a; *see generally*, Chapter 6, below.

classes of transactions that are exempt from its reporting requirements. Failures to report as required by the act are punishable by fines of up to $11 thousand per day. The FTC has issued an extensive set of rules, the Hart-Scott-Rodino Rules (HSR Rules), that provide necessary definitions and additional exemptions and explain procedures and practices under the HSR Act.[43]

During the thirty-day waiting period, the FTC or the DOJ performs a preliminary investigation. If satisfied that the proposed transaction poses no threat to competition, the regulators may grant early termination of the waiting period or simply allow the waiting period to expire. The parties are free to close upon receipt of early termination or upon expiration of the waiting period. If, on the other hand, the authorities believe the transaction may pose a threat to competition, they may issue the parties a Request for Additional Information, commonly known as a Second Request. The Second Request extends the waiting period until thirty days after the parties have provided all the information requested.

The HSR Act does not give the regulators themselves the power to block a proposed transaction. If, after receipt of the requested information, the regulators decide that the proposed transaction would violate Section 7 of the Clayton Act (or other federal antitrust laws), they may either negotiate alterations to the transaction or they may bring suit in federal court seeking an injunction to stop the parties from proceeding.

§2.05 The Robinson-Patman Act

The Robinson-Patman Act, which was added by amendment to the Clayton Act in 1936, outlaws price discrimination.[44] It forbids sellers from selling identical goods to similarly situated customers on different terms and conditions (such as prices, discounts, rebates, allowances, or advertising assistance) if the differential will result in harm to competition. It forbids the sale of goods at lower prices in one part of the United States than in another for the purpose of destroying competition or eliminating a competitor. And it forbids predatory pricing, i.e., the sale of goods “at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.” The act also provides (no-longer invoked) criminal sanctions for its violation.[45]

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43. 16 C.F.R. §§801–803.
44. The Robinson-Patman Act amended Section 2 of the Clayton Act. The amendments are codified at 15 U.S.C. §§13, 13a, 13b, and 21a. *See generally*, Chapter 7, below.
45. 15 U.S.C. §13a (Clayton Act §2).

The act contains several other strictures: A seller may not pay, or receive from a buyer, certain commissions, brokerage fees, or other compensation (e.g., kickbacks and commercial bribes);[46] a seller may not provide or pay for a product's handling, promotion, or advertising unless he does the same for all similarly situated buyers;[47] and a buyer may not "knowingly" induce or receive an illegally preferential price or other treatment.[48]

If a complaining buyer makes out a *prima facie* case of price discrimination, the act places the burden of proving a defense on the seller.[49] The act provides several defenses:

> *Cost Justification Defense*. A seller may charge different prices to different customers if it can show that the prices are justified by differences in the manufacturing, sales, or delivery costs. Volume discounts fall under this exception only if justified by actual cost savings.[50]
>
> *Changing Conditions Defense*. Price differentials are permitted "in response to changing conditions affecting the market for or the marketability of the goods concerned." Examples include imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court order, or sales in good faith discontinuance of business in the affected goods.[51]
>
> *Meeting Competition Defense*. The Act allows a seller to defend a claim of price discrimination by showing that the lower price (or other preferential treatment) was a good faith attempt to meet an equally low price or similar treatment offered by a competitor.[52]

§2.06 The Federal Trade Commission Act

The FTC's antitrust authority is found in Section 5[53] of the FTC Act.[54] The FTC Act, which was enacted in 1914, broadly outlaws "unfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce. It gives the FTC the power to prevent "persons, partnerships, or

46. 15 U.S.C. §13(c).
47. 15 U.S.C. §§13(d) and (e).
48. 15 U.S.C. §13(f).
49. 15 U.S.C. §13(b).
50. 15 U.S.C. §13(a).
51. *Id.*
52. 15 U.S.C. §13(b).
53. 15 U.S.C. §45.
54. 15 U.S.C. §§41–58.

corporations" (excepting those in certain regulated industries) from using unfair methods of competition or unfair acts or practices.[55]

The act also describes procedures for the filing of a complaint by the FTC, subsequent FTC administrative proceedings, the entry of final cease-and-desist orders, and the appeal of such orders to the courts.[56] Civil penalties of up to $10 thousand are provided for violations of FTC final orders.[57] The U.S. attorney general is empowered to bring civil actions to obtain such penalties.[58]

In addition, the FTC Act empowers the FTC to go to federal court to seek civil penalties for violations of (1) rules it has issued under the FTC Act, (2) cease-and-desist orders, and (3) Section 5(a)(1). Each violation carries a civil penalty of up to $10 thousand dollars.[59] Each day of a continuing failure to comply with a rule or with Section 5(a)(1) may be treated as a separate violation.[60] If the violation is not a violation of a cease-and-desist order, issues of fact will be tried de novo.[61] The FTC Act also provides (rarely invoked) criminal sanctions for its violation.

§2.07 The Antitrust Civil Process Act

The Antitrust Civil Process Act (ACPA) authorizes the DOJ to issue civil investigative demands (CIDs) to assist in the investigation of antitrust violations.[62] The ACPA contains a comprehensive set of procedures for the issuance, enforcement, implementation, and use of, as well as challenges to CIDs. The ACPA also contains provisions requiring the government to maintain the confidentiality of material produced in response to CIDs[63] and exempting such material from disclosure under the Freedom of Information Act (FOIA).[64]

55. 15 U.S.C. §§45(a)(1) and (a)(2).
56. 15 U.S.C. §§45(b)-(k).
57. 15 U.S.C. §45(l).
58. *Id.*
59. 15 U.S.C. §§45(l)-(m).
60. 15 U.S.C. §45(m).
61. *Id.*
62. 15 U.S.C. §§1311–1314.
63. 15 U.S.C. §1313(c).
64. 15 U.S.C. §1314(g). The Freedom of Information Act (FOIA), 5 U.S.C. §552, allows citizens to demand and receive certain documents and information from the federal government.

§2.08 The Foreign Trade Antitrust Improvements Act of 1982

The Foreign Trade Antitrust Improvements Act of 1982, known as the FTAIA, was added to the Sherman Act by Congress to clarify the extraterritorial reach of the Sherman Act, i.e., its ability to reach and punish or penalize actors or conduct located outside the United States. The FTAIA states that the Sherman Act shall not apply to trade or commerce with foreign nations unless the conduct has "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce, U.S. import commerce, or U.S. export commerce, *and* the conduct gives rise to a claim under Sections 1–7 of the Sherman Act.[65]

§2.09 The International Antitrust Enforcement Assistance Act of 1994

The International Antitrust Enforcement Assistance Act of 1994 provides for increased cooperation between the United States and foreign countries for the purposes of improving international antitrust enforcement.[66] It allows, among other things, for the United States to enter mutual assistance agreements with other countries pursuant to which it authorizes the DOJ and the FTC to provide "antitrust evidence to assist the foreign antitrust authority," in determining whether a person has violated, or is about to violate a foreign antitrust law and in enforcing such laws. The act also imposes confidentiality requirements. The United States has reached such agreements with the European Community and with seven separate countries, namely, Australia, Brazil, Canada, Germany, Israel, Japan, and Mexico.[67]

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65. 15 U.S.C. §6a.
66. 15 U.S.C. §§6201–6212.
67. *See* U.S. Department of Justice, Antitrust Division, Antitrust Cooperation Agreements, *available at* http://www.usdoj.gov/atr/public/international/int_arrangements.htm. In addition, the U.S. has, since the 1970s, negotiated a series of bilateral mutual legal assistance treaties (MLATs) calling for reciprocal assistance between the U.S. and over fifty foreign governments regarding criminal matters. *See* §8.02 below.

§2.10 Acts Governing Bank Mergers

Although banks are heavily regulated, bank mergers are subject to antitrust analysis like those in other industries. This analysis is mandated by the Bank Merger Acts of 1960 and 1966 and the Bank Holding Company Act of 1956.

[A] The Bank Merger Act of 1960[68]

The Bank Merger Act of 1960 requires that the banking regulatory authorities consider potential competitive effects when determining whether to approve a bank merger.[69]

[B] The Bank Merger Act of 1966[70]

The Bank Merger Act of 1966 provides that the attorney general is entitled to a preliminary injunction against any bank merger if the challenge is brought within thirty days of approval. It also provides that the merger will thereafter be immune from antitrust challenge except under Section 2 of the Sherman Act (outlawing monopolization). The act states that courts and agencies reviewing a proposed bank merger must disapprove the merger if it would violate Section 7 of the Clayton Act "[unless] the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[71]

[C] The Bank Holding Company Act of 1956[72]

The Bank Holding Act covers companies that own 25 percent or more of a bank or otherwise control it. The relevant portions of this act apply the merger-related portions of the Bank Merger Acts to such companies.

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68. 12 U.S.C. §1828(c).
69. *Id.* In *United States v. Philadelphia National Bank*, 374 U.S. 321, 335–352 (1963), the Supreme Court held that bank mergers were still covered by Section 7 of the Clayton Act as well, and that regulatory approval did not confer antitrust immunity from a Section 7 challenge.
70. 12 U.S.C. §§1828(c)(5)–(7).
71. 12 U.S.C. §1828(c)(5)(b).
72. 12 U.S.C. §§1841–50.

§2.11 Acts Providing Antitrust Immunity

[A] The Webb-Pomerene Act

Congress passed the Webb-Pomerene Act[73] in 1918 to address concerns that American exporters were being forced to compete at a disadvantage against foreign cartels and foreign government-owned or subsidized producers. The act provides limited immunity under the Sherman Act for U.S. companies that form export trade associations. It allows Webb-Pomerene associations to charge uniform prices for the exported goods.[74] A Webb-Pomerene association may not interfere with domestic competition or restrain the export trade of any of its competitors.[75] All Webb-Pomerene associations must register with the FTC and file periodic reports.[76]

[B] The Export Trading Company Act of 1982

Title III of the Export Trading Company Act of 1982[77] provides similar protection to that contained in the Webb-Pomerene Act.[78] The protection is available to companies that obtain a certificate of review from the secretary of commerce establishing that the companies' proposed export trade practice(s) will not harm competition in the United States.

[C] The McCarran-Ferguson Act (Insurance)

In the McCarran-Ferguson Act of 1945, Congress gave the states the power to regulate and tax insurance.[79] The act provides antitrust immunity to the business of insurance but only to the extent that the business is regulated by state law. Thus, for example, insurance company mergers are not exempt from the premerger reporting requirements of the Hart-Scott-Rodino Act.

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73. 15 U.S.C. §§61–66.
74. 15 U.S.C. §62.
75. *Id.*
76. 15 U.S.C. §65. Information about active Webb-Pomerene associations may be found at the FTC's website, http://www.ftc.gov.
77. 15 U.S.C. §§4001–4003 and 4011–4021.
78. *See* §2.11[A] above.
79. 15 U.S.C. §§1011–1015.

[D] The Defense Production Act of 1950

Section 708 of the Defense Production Act of 1950 (as amended) also provides antitrust immunity.[80] The immunity is available to those who participate at the president's request in programs to promote the national defense.

[E] The Clayton Act and Norris-LaGuardia Act (Labor)

Sections 6 and 20 of the Clayton Act provide an exemption for organized labor activities.[81] The exemption was reinforced by passage of the Norris-LaGuardia Act in 1932.[82] The latter prohibits federal injunctions "[in cases] involving or growing out of [] labor dispute[s]."[83]

[F] The Capper-Volstead Act (Agriculture)

As noted above, Section 6 of the Clayton Act provides an antitrust exemption for agricultural cooperatives.[84] In 1922, Congress passed the Capper-Volstead Act, which expanded that exemption.[85] In 1932, Congress passed the Fisherman's Collective Marketing Act, which provided similar protection for the fishing industry.[86] The Robinson-Patman Act also contains a provision exempting internal payments by cooperatives to their members.[87]

[G] The Charitable Gift Annuity Antitrust Relief Act of 1995

With certain limitations, this act provides that neither federal nor state antitrust laws will apply to charitable gift annuities or charitable remainder trusts.[88]

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80. 50 U.S.C. app. §2158.
81. *See* §2.03[G], above.
82. 29 U.S.C. §§101–115.
83. 29 U.S.C. §101.
84. *See* §2.03[G], above.
85. 7 U.S.C. §§291–292.
86. 15 U.S.C. §§521–522.
87. 15 U.S.C. §13b.
88. 15 U.S.C. §§37 and 37a.

[H] The Curt Flood Act of 1998

In 1998, Congress passed the Curt Flood Act.[89] The act was named for the major league baseball player who unsuccessfully challenged baseball's reserve clause in the early 1970s.[90] The act partially eliminated major league professional baseball's judicially created exemption from the antitrust laws.[91] It grants standing to major league ballplayers to bring suit under the antitrust laws for conduct "to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commence."[92]

[I] The Newspaper Preservation Act

Congress passed the Newspaper Preservation Act[93] in 1970 "[i]n the public interest of maintaining a newspaper press editorially independent and reportorially independent and competitive in all parts of the United States."[94] The act provides a limited antitrust exemption for newspaper joint operating arrangements (e.g., joint production, printing, distribution, and sales) entered into before its passage.[95] The exemption only applies so long as (1) no more than one of the involved publications was likely to become or remain financially sound;[96] and (2) there is no combination of the papers' reporting or editorial staffs, and their editorial policies are independently determined.[97]

Renewals or modifications of pre-act joint operating arrangements are permissible so long as their terms are filed with the Department of Justice and they do not add new newspapers to the arrangement.[98] Future (i.e., post-act) newspaper joint operating arrangements require the prior written consent of the attorney general.[99] The attorney general may not consent without first having determined that no more than one of the involved papers is or is likely

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89. 15 U.S.C. §26b; Clayton Act §27.
90. *See Flood v. Kuhn*, 407 U.S. 258 (1972).
91. *See Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (*per curiam*); *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922); *American Needle, Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, (2009).
92. 15 U.S.C. §§26b(a) and (c); Clayton Act §27a(a) and (c).
93. 15 U.S.C. §§1801–1804.
94. 15 U.S.C. §1801.
95. 15 U.S.C. §1803(a).
96. *Id.*
97. 15 U.S.C. §1802(2).
98. 15 U.S.C. §1803(a).
99. 15 U.S.C. §1803(b).

to be financially sound and that the arrangement will "effectuate the policy and purpose" of the act.[100]

[J] The Local Government Antitrust Act of 1984

The Local Government Antitrust Act of 1984 (LGAA)[101] immunizes local governments and local government officials and employees acting in their official capacities from liability for damages under the antitrust laws.[102] It also immunizes anyone who has acted at the direction of any local government official or employee acting in his official capacity.[103] The courts have held that this statute does not prohibit injunction actions or forbid the award of attorney's fees to plaintiffs who prevail in such actions for injunctive relief.[104]

§2.12 The Wilson Tariff Act

Congress passed the Wilson Tariff Act in 1894 and amended it in 1913.[105] This act outlaws conspiracies in restraint of import trade and declares its violation to be a misdemeanor punishable by a fine of up to five thousand dollars. The act is largely unused today, because it is seen as redundant of Section 1 of the Sherman Act.

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100. *Id.*
101. 15 U.S.C. §§34–36.
102. 15 U.S.C. §35.
103. 15 U.S.C. §36.
104. *See, e.g., Wicker v. Union County Gen. Hosp.*, 673 F. Supp. 177, 186 (N.D. Miss. 1987) (equitable claims against a county hospital allowed to proceed though damage claims barred); *Montauk-Caribbean Airways, Inc. v. Hope*, 1985–2 Trade Cas. (CCH) ¶ 66,660, at 63,104 (E.D.N.Y. 1985)(equitable claim against public officials could proceed), *aff'd on other grounds*, 784 F.2d 91 (2d Cir.), *cert. denied*, 479 U.S. 872 (1986); *Lancaster County Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 n. 14 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992); *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 2000 U.S. App. LEXIS 8838, at *16-17 (10th Cir. 2000); *Superior-FCR Landfill, Inc. v. County of Wright*, 59 F. Supp. 2d 929, 933 (D. Minn. 1999).
105. 15 U.S.C. §§8–11.

§2.13 Miscellaneous Federal Statutory Provisions

There are many miscellaneous federal statutory provisions that come into play in the course of antitrust practice. The following are some of the most frequently encountered or used.

[A] Use of Declarations in Lieu of Affidavits: 28 U.S.C. §1746

This provision expressly allows the substitution of an unsworn "declaration, certificate, verification, or statement," for a notarized affidavit or other sworn statement "[w]herever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved," by a sworn statement.[106]

If executed outside the United States, the declaration may simply state: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)."[107] If executed within the United States: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date) (Signature)."[108]

This provision has broad application and is especially useful when working with clients outside the U.S. who do not have ready access to a U.S.-qualified notary. It is also helpful when preparing Hart-Scott-Rodino Premerger Notification and Report Forms, which must be accompanied by various certifications.[109]

[B] Use Immunity: 18 U.S.C. §§6001–6005

The use immunity statute allows federal prosecutors to compel trial or grand jury testimony from witnesses who assert their Fifth Amendment privilege against self-incrimination and refuse to testify. The prosecutor's power is not self-executing. He or she must obtain an immunity order from the supervising federal judge.[110]

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106. 28 U.S.C. §1746.
107. 28 U.S.C. §1746(1).
108. 28 U.S.C. §1746(2).
109. *See* §6.04, below.
110. 18 U.S.C. §6002. *See* §8.02, below.

Use immunity is not absolute. The statute only prevents the government from later using testimony obtained pursuant to the immunity order in a criminal case against the immunized witness.[111] It also prohibits the use of information "derived" from the immunized witness' testimony.[112] The statute does not prevent the government from proceeding criminally against the witness with independently obtained evidence. Nor does it prevent the government from prosecuting the witness "for perjury, giving a false statement, or otherwise failing to comply with the [immunity] order," or for otherwise obstructing justice.[113]

[C] Statute of Limitations for Criminal Antitrust Violations: 18 U.S.C. §3282

There is no specific statute of limitations for federal criminal antitrust violations. Instead, they are covered by a catchall section of the federal criminal code entitled "Offenses not capital."[114] This section provides a five-year statutory period for all noncapital offenses not otherwise specifically covered.[115]

[D] Expediting Act: 15 U.S.C. §29

This act provides for direct appeal to the Supreme Court from final judgments of district courts in cases in which the United States is a party and equitable relief has been sought.

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111. *Id.*
112. *Id.*
113. *Id.; see* 18 U.S.C. §1623 (perjury); 18 U.S.C. §§1501, *et seq.* (obstruction of justice).
114. 18 U.S.C. §3282. *See* §8.02, below.
115. Noncapital offenses are those that, like antitrust offenses, are not punishable by death.

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CHAPTER 3

Agreements in Restraint of Trade—Sherman Act, Section 1

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§3.01 Introduction

Sections 1 and 2 of the Sherman Antitrust Act (Sherman Act) state the first principles of United States (U.S.) antitrust law. Section 1, the subject of this chapter, focuses on multilateral actions—that is, on agreements between separate, independent actors that harm competition. According to the U. S. Supreme Court (the Court), such actions are judged more harshly than unilateral actions outlawed by Section 2 because:

> Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands . . . . This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.[1]

Section 1, which has analogues in virtually every state antitrust law as well as in Article 81 of the European Community (EC) Treaty and most national competition laws, reads:

> 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 hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or if any other person, $1,000,000, or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.[2]

On its face, the first sentence of Section 1 is breathtakingly—and unworkably—broad. All commercial contracts restrain trade. They require the parties to act as agreed and prohibit them from acting contrary to their agreement. Congress left it to the federal courts to shape the meaning of Section 1. Working with the factual situations presented them and the rest of the Sherman Act, they have had to determine the elements of a Section 1 violation and what types of restraints are and are not forbidden.

The courts early decided that Section 1 outlawed only "unreasonable" restraints, i.e., restraints that harm competition in the marketplace.[3] Over time, the courts have divided unreasonable (i.e., illegal) restraints into two

1. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–769 (1984).
2. 15 U.S.C. §1.
3. *See, e.g.*, *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

broad categories: (1) those deemed per se illegal and (2) those found illegal after being tested against the rule of reason.

The courts have defined per se illegal practices as those so inherently and obviously anticompetitive that they will be judged illegal without regard to any possible justification. Classic per se illegal practices almost all involve secret agreements between purported competitors designed to eliminate competition and allow them to increase prices. These practices include:

- Price-fixing—i.e., secret agreements between purported competitors about the prices at which they will sell their products or about other terms or conditions of sale, such as discounts, advertising allowances, credit terms, or warranty provisions;
- Bid-rigging agreements, which are viewed as a form of price-fixing;
- Agreements between purported competitors to restrict production or output in order to create an artificial scarcity;
- Agreements to allocate markets or customers, i.e., agreements between purported competitors not to compete against one another in a market or for sales to selected customers or groups of customers; and
- Certain agreements not to deal with specified suppliers, customers, or other competitors.

In addition, some forms of tying agreements, in which a seller refuses to sell a desirable product unless the buyer also agrees to buy an unwanted product(s), have historically been treated as per se illegal, although the law appears to be moving away from treating such agreements as per se illegal.

All other restraints are judged under the rule of reason. Unlike the per se rule, the rule of reason requires the plaintiff (whether government or private) to demonstrate that the challenged practice actually harms competition in a "relevant market." And the defendant has the opportunity to demonstrate that the practice is competitively justified, i.e., that its pro-competitive aspects outweigh any harm to competition. In recent years, the courts have added a third category of scrutiny labeled the "quick look" for practices whose anti-competitive effects are obvious and that have no apparent pro-competitive benefits.[4]

Perhaps the easiest approach to exploring Section 1 and some of the important issues that arise is through an analysis of the elements that a private plaintiff or prosecutor must prove in court to prevail on a claim that the defendant violated Section 1. The courts have held that to prevail a plaintiff or prosecutor must prove: (1) that there was an *agreement* (2) between two or more *separate parties*, (3) that the agreement *unreasonably* restrained trade

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4. *See, e.g.*, *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986) (group boycott); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15–18 (1984) (tying).

or competition (4) in or affecting *interstate commerce*, and (5) in the case of a private action, that the agreement *injured* the plaintiff in his business or property, or (6) in a criminal action, that the defendant acted with the requisite *criminal intent*.

§3.02 The Agreement Element

The most fundamental, and critical, element of any Section 1 violation is proof of an *agreement* between two or more separate parties. Agreements that violate Section 1 can be either horizontal or vertical. *Horizontal agreements* are those between competitors, i.e., entities at the same level of distribution. *Vertical agreements* are those between parties on different levels of the chain of distribution, such as between a manufacturer and a distributor, or between a wholesaler and a retailer. In *Business Electronics Corp. v. Sharp Electronics Corp.*,[5] the Supreme Court put it this way: "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints."[6] The Court clarified in a footnote, pointing out that all anticompetitive effects are of necessity horizontal, since all competition is horizontal, but that such horizontal effects can result from either horizontal or vertical agreements.[7]

[A] Horizontal Agreements

Whether the agreement is called collusion, a contract, a combination, concerted action, or a conspiracy, a plaintiff or prosecutor must prove, using either direct or circumstantial evidence, that there occurred a meeting of the minds between two or more separate parties.[8] As the Supreme Court has put it, there must be proof "that [the defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective."[9]

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5. 485 U.S. 717 (1988).
6. *Id.* at 730.
7. *Id.* at n.4.
8. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (A Section 1 conspiracy requires "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement.") (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).
9. *Monsanto Co. v. Spray-Rite Servs. Corp.*, 465 U.S. 752, 768 (1984). *Monsanto* involved allegations of a vertical conspiracy, but the Court soon adopted that decision's reasoning in a

The most important recurring issues here is what happens when there is no direct evidence of an illegal conspiracy. That is, what kinds of circumstantial evidence must a plaintiff or prosecutor allege and prove to prevail.

[1] Conscious Parallelism

A plaintiff or prosecutor cannot prove a horizontal agreement simply by proving that multiple sellers in a given market knowingly raised their prices within a short time of each other, a practice referred to as "conscious parallelism."[10] The plaintiff or prosecutor must prove that the price increase was the result of an agreement between two or more of the companies. The seemingly coordinated nature of the increase could be used as circumstantial evidence of an agreement.[11] But without additional evidence, sometimes referred to as *plus factors*, proof of consciously parallel behavior is not enough to establish a violation.[12]

In 2007, in *Bell Atlantic Corp. v. Twombly*, the Supreme Court provided some guidance about what a plaintiff must plead to survive a motion to dismiss in a case alleging parallel conduct.[13] There, the Supreme Court dismissed a complaint filed on behalf of a class of telephone and internet service customers against local telecommunications companies. The Court held that a mere allegation of parallel conduct is not sufficient to plead an antitrust conspiracy under Section 1 of the Sherman Act; a more particularized allegation of actual agreement is required.[14]

In *Twombly*, the consumer plaintiffs alleged that the defendant incumbent local exchange carriers (ILECs) engaged in a parallel course of conduct, refraining from engaging in competition with each other and resisting competition from competing local exchange carriers (CLECs). The plaintiffs did not allege any actual agreement or contract among the ILECs, but

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horizontal case in *Matsushita Electronics Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

10. *See generally Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954).
11. *See American Tobacco*, 328 U.S. at 810 (1946) (inference based on parallel behavior permitted); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) (inference of agreement based on parallel imposition of similar restraints).
12. As the Supreme Court stated in *Theatre Enterprises, Inc.*: "[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." 346 U.S. at 541.
13. 550 U.S. 544 (2007).
14. *Id.* at 556–57.

argued that the parallel conduct prevented competition in violation of the Telecommunications Act of 1996.[15]

The Court found no reason to infer the existence of an agreement from parallel conduct that could as easily have been independent and natural business reactions to similar market conditions. The Court stated that to maintain an antitrust action under Section 1, plaintiffs must plead allegations "plausibly suggesting (not merely consistent with) agreement."[16] According to the Court, this standard does not impose a probability requirement, but calls for sufficient facts to "raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[17]

The plaintiffs argued that under the Court's decision in *Conley v. Gibson*,[18] a complaint should not be dismissed for failure to state a claim unless it is clear that a plaintiff "can prove no set of facts" under which relief could be granted.[19] The Court disagreed, reasoning that *Conley* gave guidance for proving claims already judged sufficient, but did not provide a minimum standard for adequate pleading. The Court stated that the "no set of facts" language was incomplete and "best forgotten."[20]

[2] Use of Circumstantial Evidence

The additional evidence or plus factors need not take the form of direct evidence of an explicitly illegal agreement.[21] It is frequently impossible for a prosecutor or plaintiff to come up with such evidence. Circumstantial evidence can be used to support an inference of agreement.[22] In addition to parallel behavior, courts will look at the following, among other things: whether the defendants had a motive to enter an anticompetitive agreement; the existence of correspondence, meetings, or other communications among

15. *Id.* at 564.
16. *Id.* at 545.
17. *Id.* at 556.
18. 355 U.S. 41 (1957).
19. *Bell Atlantic*, 550 U.S. at 561 (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).
20. *Bell Atlantic*, 550 U.S. at 563; *see also, Pacific Bell Tel. Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109, 1123 (2009) (reiterating *Bell Atlantic's* rejection of the "no set of facts" standard as "too lenient"); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (holding that a pleading "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation").
21. *United States v. General Motors Corp.*, 384 U.S. 127, 142–143 (1966) ("explicit agreement is not a necessary part of a Sherman Act conspiracy").
22. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) ("the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove . . . [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective'"); *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969) ("'business behavior is admissible circumstantial evidence from which the fact finder may infer agreement'"); *see also American Tobacco Co. v. United States*, 328 U.S. 781, 809–810 (1946); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221–222 (1939).

the defendants (especially if such contacts were frequent or suspiciously timed in relation to price increases and/or the contacts concerned the subject matter of the alleged agreement); and whether it would have made economic sense for the defendants to act as they did if they were acting independently.[23]

But in *Matsushita Electronics Industries Co. v. Zenith Radio Corp.*,[24] the Supreme Court stated that "antitrust law limits the range of permissible inferences from ambiguous evidence."[25] The Court pointed out that a plaintiff lacking direct evidence of an agreement cannot survive a motion for summary judgment without at least presenting evidence "that tends to exclude the possibility that the alleged conspirators acted independently."[26] In other words, according to the Court, a claimant "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the claimant]."[27]

[3] Competitor Meetings and Price Exchanges

Two of the most commonly used forms of circumstantial evidence are evidence that the accused competitors held meetings or that they exchanged price or other competitively sensitive information. Such meetings and exchanges are not necessarily illegal in and of themselves.[28] But, because federal antitrust prosecutors focus their criminal enforcement efforts on agreements fixing prices or other terms or conditions of sale, such contacts

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23. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (more evidence of agreement required where the allegedly illegal conduct made no economic sense); *Monsanto*, 465 U.S. at 762.
24. 475 U.S. 574 (1986).
25. *Id.* at 588 ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy") (citing *Monsanto*, 465 U.S. at 764).
26. *Id.* at 588 (quoting *Monsanto*, 465 U.S. at 764); *see also First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288–289 (1968).
27. *Matsushita*, 475 U.S. at 588; *see also Bell Atlantic v. Twombly, supra*, 550 U.S. 544, 545 (plaintiff must plead allegations "plausibly suggesting" conspiracy); *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 468 and n.14 (1992) ("*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury").
28. *See United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 113 (1975) ("the dissemination of price information is not itself a *per se* violation of the Sherman Act"); *Cement Manufacturers' Protective Ass'n v. United States*, 268 U.S. 588, 606 (1925) (same); *Maple Flooring Assocs. v. United States*, 268 U.S. 563, 585–586 (1925) (same); *but see United States v. United States Gypsum Co.*, 438 U.S. 422, 453–460 (1972) (limiting need to obtain price information from competitor for purposes of determining availability of meeting competition defense under Robinson-Patman Act); *United States v. Container Corp. of Am.*, 393 U.S. 333, 334–337 (1969) (finding that an exchange among manufacturers of "the most recent price charged or quoted" was illegal because it "chill[ed] the vigor of price competition").

carry serious risks.[29] Courts permit prosecutors and plaintiffs to introduce evidence of contacts between competitors as circumstantial evidence of illegal collusive behavior. This is why antitrust counsel so often, and so forcefully, advise clients to avoid unnecessary contacts with competitors, whether in person, by telephone, or in writing. Email communications between competitors have proved to be an especially fruitful source of evidence supporting charges of collusion. It is especially critical that competitors avoid discussions about or exchanges of future prices.

It is also why meetings of trade associations or similar organizations made up of competitors, while generally legitimate, are potentially problematic and why such organizations often insist on the presence of antitrust counsel at their meetings.[30]

Occasional correspondence and meetings with competitors may be unavoidable. If such contacts must take place, however, participants should be plainly warned not to discuss or write about prices, and especially about prices to be charged—or about other terms or conditions of sale, such as discounts, credit terms, or warranties, to be set—now or in the future. Employees must be instructed that such discussions or correspondence are against company policy, that they are forbidden, and that any attempts by a competitor to raise such subjects should be unambiguously rebuffed and reported to company counsel.

[B] Vertical Agreements

Vertical agreements that violate Section 1 typically involve either vertical price-fixing (also known as resale price maintenance), tying and bundling, or a variety of other non-price restrictions.[31] With the exception of certain tying

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29. The danger to individuals and corporations accused of price fixing became substantially greater on June 22, 2004, when President Bush signed a bill that amended the Sherman Act to increase the maximum criminal penalties for antitrust violations from $10 million to $100 million and for individuals from $350 thousand to $1 million. The bill also increased the maximum prison sentence for individuals convicted of antitrust violations to ten years from three.
30. *See, e.g., Todd v. Exxon Corp.*, 275 F. 3d 191 (2d. Cir. 2001) (allowing plaintiffs to pursue rule-of-reason salary-fixing claims based on defendants' salary information exchange even though plaintiffs did not allege an agreement to fix salaries; *see also United States v. United States Gypsum Co.*, 438 U.S. 422, 453–460 (1972) (limiting the need to obtain price information from competitor for purposes of determining availability of meeting competition defense under Robinson–Patman Act); *United States v. Container Corp. of Am.*, 393 U.S. 333, 334–337 (1969) (finding that an exchange among manufacturers of "the most recent price charged or quoted" was illegal because it "chill[ed] the vigor of price competition").
31. *See* §3.04 below.

arrangements, virtually all vertical agreements are tested under the rule of reason.[32]

The Supreme Court long ago held, and it remains the law, that a manufacturer may, without violating the antitrust laws, unilaterally announce what its pricing policy is and that it will not work with distributors who refuse to adhere to that policy.[33] But a manufacturer who forces a dealer to adhere to its retail pricing policy as a condition of doing business may be found liable for vertical price-fixing.[34] So may a manufacturer who seeks the help of distributors or other outside entities in enforcing its pricing or other restrictive vertical policies.[35] Illegal vertical conspiracies have also frequently been found if a manufacturer has terminated, or imposed other restraints on, a discounting dealer in response to complaints from other dealers. The fact that a plaintiff or distributor acquiesced in an illegal arrangement with the defendant manufacturer does not provide a defense to an action based on the illegal arrangement.[36]

The Supreme Court held in *Monsanto* that "something more than evidence of complaints" followed by a termination is needed to support a

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32. Tying has been treated as per se illegal only if the seller has the economic power in the tying product. The courts have been edging toward examining all tying and bundling cases under the rule of reason. Resale price maintenance was at one time illegal per se but has been tested under the rule of reason since the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)(overruling *Dr. Miles Medical Co v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). *See* § §3.04[A][2][d] and [B][2][e] below.
33. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (the Sherman Act does not restrict the right of a seller "freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell"); *accord Monsanto Co. v. Spray-Rite Serv. Corp., 465* U.S. 752, 760–761 (1984) ("A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply.") (citations omitted).
34. For example, simply terminating a noncomplying dealer would probably be judged acceptable behavior but leasing space to a dealer only on the condition that he comply probably would not be. *See* §§3.04[A][1][a] and [A][1][b] below.
35. *See Monsanto*, 465 U.S. at 760–768; *Albrecht v. Herald Co.*, 390 U.S. 145, 149–150 (1968); *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 142 (1968); *United States v. General Motors Corp.*, 384 U.S. 127, 132–138, 143–145 (1966); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). It is worth noting that in the fall of 2002, the attorneys general for forty-three states announced that they had obtained a settlement valued at $143 million from five music distributors and three music retailers based on charges that the distributors and retailers had violated the antitrust laws by maintaining minimum advertised pricing (MAP) policies, even though the agreement did not prohibit the retailers from actually charging less than the advertised prices.
36. *See Perma Life*, 392 U.S. at 139, 144; *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968). *See also* §3.06[A][4] below.

claim by the terminated dealer.[37] The Court went on to state that the plaintiff must also produce "evidence that tends to exclude the possibility of independent action by the manufacturer and distributor."[38]

§3.03 The Separate Parties Element

That there can be no agreement unless there are at least two separate parties may appear self-evident. But the question whether two members of the same corporate family are separate enough to be capable of forming an illegal agreement—the intra-enterprise conspiracy issue—has created problems in both horizontal and vertical contexts.[39] The issues include whether a corporation can conspire with an officer, director, or employee; a division; a wholly owned subsidiary; a less than wholly owned subsidiary; or a sister subsidiary. Given the potentially enormous exposure to civil and criminal liability for violating Section 1, corporate affiliates other than wholly owned divisions or subsidiaries should consult antitrust counsel before engaging in practices that would raise antitrust concerns if undertaken in cooperation with independent parties.

In *Copperweld Corp. v. Independence Tube Corp.*,[40] the Supreme Court made it clear that a corporation cannot be found guilty or held liable for conspiring with an unincorporated division or with a wholly owned subsidiary.[41] It also made clear that divisions cannot be liable for conspiring with each other.[42] And in *Texaco, Inc. v. Dagher*,[43] the Court held that joint venturers will not be liable for fixing prices—at least in the context of a fully integrated

37. *Monsanto*, 465 U.S. at 762–68.
38. *Id.* at 768. Dealer terminations are the source of a wealth of case law.
39. Whether the separateness of the defendant parties is an element that must be pleaded and proved by the plaintiff or is a defense to be raised by the defendant is open to debate. In any event, the question of intra-enterprise conspiracy should be considered at the outset by any plaintiff planning to allege an illegal agreement between two entities that could be said to be part of the same enterprise.
40. 467 U.S. 752 (1984).
41. *Id.* at 771–77 ("the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of §1," because they "have a complete unity of interest"). Earlier Supreme Court cases addressing the issue and that the Court either overruled or distinguished, as necessary, include: *Perma Life Mufflers Inc. v. International Parts Corp.*, 392 U.S. 134, 141–142 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947).
42. *Id.* at 770–771.
43. 547 U.S. 1 (2006).

joint venture between two oil companies encompassing all of the companies' assets in a geographic region.[44]

But in *Copperweld*, the Court left open whether a corporation can conspire with a less than wholly owned subsidiary.[45] Some lower courts—a distinct minority—have since found that a parent can be found liable for conspiring with *any* subsidiary that is less than wholly owned.[46] Others have held that a corporation cannot conspire with any subsidiary that it plainly controls, i.e., in which it holds more than 50 percent of the voting securities.[47] Still others have expressed an openness to persuasion that control can exist even if the parent owns less than 50 percent of the shares of the subsidiary, especially if ownership of the remaining shares is widely dispersed.[48]

The cases that refuse to find a conspiracy between a corporation and any subsidiary it legally controls seem more attuned to reality, and more in keeping with the philosophy underlying the *Copperweld* decision, than those that limit *Copperweld* to wholly owned subsidiaries. The difficulty lies in formulating a clear definition of control. Unquestionably, under certain circumstances, a party with less than half the shares of a company can exercise control. At the same time, the courts have not yet—at least in the antitrust context—come up with a simple test for identifying such situations. If a bright line test is the goal, the definition used in the Hart-Scott-Rodino Rules (HSR Rules) is probably a good choice. There, control is defined as ownership of 50 percent or more of a corporation's voting securities *or* the ability, contractual or otherwise, to appoint a majority of the corporation's directors.[49]

Most courts have held that subsidiaries under common control, known as *sister subsidiaries*, cannot be liable for conspiring with each other.[50] Still others

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44. *See also American Needle Inc. v. National Football League*, 538 F.3d 736, 744 (7th Cir. 2008), *cert. granted* 129 S.Ct. 2859 (June 29, 2009) (Holding that, at least for some purposes, the National Football League is a single economic entity and so member teams not guilty of conspiring when agreeing about how to market their intellectual property).

45. *Copperweld*, 467 U.S. at 767.

46. *See Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477 (D. Or. 1987).

47. *See, e.g.*, *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211 (S.D. Ga. 1997) (no conspiracy possible between parent and 51 percent-owned subsidiary); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330 (N.D. Ill. 1997) (no conspiracy possible between parent and 82-percent-owned subsidiary); *Bell Atl. Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 705–707 (N.D. Cal. 1994) (no conspiracy possible between parent and 80 percent-owned subsidiary); *Leaco Enters., Inc. v. General Elec. Co.*, 737 F. Supp. 605, 608–609 (D. Or. 1990) (no conspiracy between parent and 91.9-percent-owned subsidiary); *Novatel Communications v. Cellular Tel. Supply, Inc.*, 1986-2 Trade Cas. (CCH) ¶ 67,412, at 62,172–173 (N.D. Ga. 1986) (no conspiracy possible between parent and 51 percent-owned subsidiary).

48. *See, e.g.*, *Sonitrol of Fresno, Inc. v. American Tel. & Tel. Co.*, 1986-1 Trade Cas. ¶ 67,080, at 62,566–67 (D.D.C. 1986).

49. 16 C.F.R. §801.1(b).

50. *See, e.g.*, *Eichorn v. AT&T Corp.*, 248 F.3d 131, 138 (3d Cir. 2001), cert. denied, 534 U.S. 1014 (2001) (no conspiracy possible between two wholly owned subsidiaries); *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990) (same);

have required an examination of the surrounding facts and circumstances to determine whether the affiliates function separately or as part of a single unit.[51]

Finally, the Supreme Court held in *Copperweld* that corporations are incapable of conspiring with their own officers, directors, or employees.[52] As the Supreme Court noted in *Copperweld*, however, many courts have found the separation necessary to support a claim if the officers or employees were "acting on their own behalf."[53]

§3.04 The Unreasonable Restraint of Trade Element

The courts have divided unreasonable agreements into two broad categories: (1) those deemed per se illegal and (2) those deemed unreasonable after examination under the rule of reason. The dividing line between the two has

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Odishelidze v. Aetna Life & Casualty Co., 853 F.2d 21, 23 (1st Cir. 1988) (same); *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268 (8th Cir. 1988) (same); *Directory Sales Management Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987) (same); *Hood v. Tenneco Texas Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984) (same); *Century Oil Tool, Inc. v. Production Specialties*, Inc., 737 F.2d 1316, 1317 (5th Cir. 1984) (same); *El Aguila Food Products Inc. V. Gruma Corp*., 301 F.Supp.2d 612, 627 (S.D.Tex. 2003) ("[N]o combination or conspiracy is possible between corporations that are commonly owned and controlled and that regularly conduct their business affairs in such a manner that the constitute, in effect, a single business entity."); *Bell Atl. Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702, 705–707 (N.D. Cal. 1994) (sister subsidiaries over which parent has legal control incapable of conspiring regardless of percentage ownership).

One court has held that, because they are separately incorporated, sister subsidiaries may be found to conspire even though they are both wholly owned by the same parent. *In re Ray Dobbins Lincoln-Mercury, Inc.*, 604 F. Supp. 203, 205 (W.D. Va. 1984). That decision is plainly out of the mainstream and was criticized by the Fourth Circuit in Advanced Health Care, above, 910 F.2d at 146. More recently, in *Geneva Pharmaceuticals Tech. Corp. v. Barr Laboratories, Inc.*, 201 F. Supp. 2d 236 (S.D.N.Y. 2002), the court found that two companies owned 62 percent and 75 percent by the same individual were capable of conspiring. But the court justified this on the grounds that the companies dealt with each other at arm's length, that one was not aware that the same individual controlled both, and that the individual did not actually use his ownership interest to exercise control over one of the companies.

51. *E.g.*, *Fishman v. Estate of Wirtz*, 807 F.2d 520, 542 n.19 (7th Cir. 1986); *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.* 201 F. Supp. 2d 236 (S.D.N.Y. 2002), *recons. denied* 2002 U.S. Dist. Lexis 15442.
52. *Copperweld*, 467 U.S. at 769 ("[o]fficers or employees of the same firm do not provide the plurality of actors imperative for a §1 conspiracy"); *see, e.g., Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1134 (3d Cir. 1995); *Fogel v. Metropolitan Life Insurance Co.*, 871 F. Supp. 571, 574 (E.D.N.Y. 1994).
53. *See, e.g., Copperweld*, 467 U.S. at 769; *Siegel Transfer*, 54 F.3d at 1135.

blurred somewhat in recent years. But it still forms a useful basis for categorization.

[A] Per Se Unreasonable Agreements

Per se illegal agreements are those deemed so inherently anticompetitive that they will be found unreasonable, and hence illegal, regardless of any possible justification.[54] Put another way, a prosecutor or plaintiff can establish the third element, namely, that the restraint is unreasonable, simply by proving that the defendants entered a per se illegal agreement without having to demonstrate actual harm to competition.

Per se unreasonable agreements can themselves be placed in two categories, namely, those involving: (1) prices directly, such as horizontal agreements fixing prices, or other terms or conditions of sale, such as discounts, advertising allowances, credit terms, or warranties, and bid-rigging; and (2) collusion in other areas, such as market and customer allocations, agreements to restrict production or output, some concerted refusals to deal, and some instances of tying or bundling.

[1] Per Se Illegal Agreements on Price

Horizontal price-fixing is the classic per se Section 1 violation. At its simplest, horizontal price-fixing involves an agreement between two or more competing sellers (whether manufacturers, wholesalers, or retailers) to charge the same prices going forward.[55] Simple price-fixing conspiracies have led to

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54. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (describing *per se* illegal agreements as those that "have such predictable and pernicious anticompetitive effect, and such limited potential for pro-competitive benefit"); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which 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."); *see also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 435–436 (1990); *NCAA v. Board of Regents of the University of Okla.*, 468 U.S. 85, 103–104 n.25 (1984); *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 349–351 n.19 (1982); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

55. *See United States v. General Motors Corp.*, 384 U.S. 127, 148 (1966) ("[P]rotection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws"); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) ("Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing."); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) (concerted action on pricing is an "actual or potential threat to the central nervous system of the economy"); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397–398 (1927) (declaring price-fixing *per se* illegal because "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition"); *Standard Oil Co. of N.J. v. United States*, 221

numerous criminal prosecutions and huge class-action settlements and judgments. However, price-fixing is not limited to straightforward agreements by competitors to charge identical prices; there are many variations, all equally illegal. Any agreement between competitors that results in raising or stabilizing prices is potentially per se illegal. Examples of such agreements include (1) minimum price-fixing, (2) price-related agreements on miscellaneous terms, and (3) bid-rigging.

[a] Minimum Price-Fixing

Minimum price-fixing agreements are horizontal agreements between competitors to put a floor under prices.[56]

[b] Price-Related Agreements on Miscellaneous Terms

The courts have held that agreements to eliminate, minimize, or otherwise restrict other terms or conditions of sale such as discounts, advertising allowances, credit terms, or freight charges are tantamount to price-fixing and thus per se illegal as well.[57]

[c] Bid-Rigging

Bid-rigging agreements are agreements among competing bidders or potential bidders that affect the prices they will bid for, or that attempt to secretly influence the outcome of, a contract or series of contracts. Bid-rigging is per se illegal whether the agreement concerns what the low bid will be, how much the individual bidders will bid, which bidder will win the contract being bid

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U.S. 1, 52 (1911); *see also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421–423 (1990) (refusal of group of lawyers to represent indigent defendants without fee increase found to be illegal *per se*).

56. *See Arizona v. Maricopa County Med. Soc'y*, 437 U.S. 332, 348–355 (1982) (reaffirming application of *per se* rule to horizontal fixing of maximum (as well as minimum) prices).

57. *E.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 645, 648 n.10 (1980) (conspiracy among competing wholesalers regarding credit terms offered to customers held a violation of section 1; also suggesting that use by competitors of a multiple basing point pricing system would be illegal); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 782 (1975) (holding price-fixing on professional services illegal); *Sugar Inst. v. United States*, 297 U.S. 553, 601–602 (1936) (agreement to adhere to prices and terms announced earlier found to be a violation of Section 1). *See also Blackburn v. Sweeney*, 52 F.3d 825, 827 (7th Cir. 1995) (agreement to restrict price advertising *per se* illegal); *United States v. Aquafredda*, 834 F.2d 915, 917 (11th Cir. 1987) (agreement to stop free services *per se* illegal), *cert. denied*, 485 U.S. 980 (1988); *Plymouth Dealers Ass'n v. United States*, 279 F.2d 128, 134 (9th Cir. 1960) (agreement on trade-in allowances *per se* illegal).

upon, or who will and will not bid.[58] In one form of bid-rigging, known as complementary bidding, a bidder may agree with one or more other bidders to intentionally submit an uncompetitively high bid in order to preserve the illusion of competition. Since 1980, bid-rigging has become by far the most frequent basis for antitrust criminal prosecutions, with the Department of Justice (DOJ) having targeted, among other industries, electrical construction, road paving, school busing, and waste hauling.

[2] Per Se Illegal Non-Price Agreements

The courts have also found certain agreements that do not directly involve pricing to be per se illegal violations of Section 1. These agreements include: (1) horizontal customer or market allocations; (2) output or production restrictions; (3) concerted refusals to deal; and (4) tying, tie-ins, and sales on condition.

[a] Horizontal Customer or Market Allocation

Horizontal customer or market allocation is the practice by competitors of dividing up customers or markets and agreeing not to compete with each other for sales to those customers or in those markets.[59]

[b] Output or Production Restrictions

Output or production restrictions are agreements between competitors to curtail output or restrict production. Courts presume that the purpose of

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58. *E.g.*, *United States v. Misle Bus. & Equip. Co.*, 967 F.2d 1227, 1235 (8th Cir. 1992); *United States v. MMR Corp.*, 907 F.2d 489, 496–497 (5th Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317–318 (4th Cir. 1982); *United States v. Koppers Co.*, 652 F.2d 290, 293–297 (2d. Cir), *cert. denied*, 454 U.S. 1083 (1981).
59. *E.g.*, *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) ("[O]ne of the classic examples of a *per se* violation of §1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition"); *United States v. Sealy, Inc.*, 388 U.S. 350, 353–354 (1967); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 240–241 (1899); *see also Palmer v. BRG of Ga., Inc.* 498 U.S. 46, 49–50 (1990) (*per curiam*) (per se illegality applies equally to market allocation by *potential* competitors).The DOJ recently attacked as a naked market allocation an agreement between two companies that operated competing weekly newspapers in Los Angeles, California, and Cleveland, Ohio. The two companies had simply agreed to stop competing in those cities, with one shutting down in L.A. and the other shutting down in Cleveland. *See* http://www.usdoj.gov/atr under case filings.

such agreements to limit supply is to gain the ability to raise prices and treat such agreements as illegal per se.[60]

[c] Concerted Refusals to Deal

The term *concerted refusals to deal* covers a variety of agreements not to deal with particular—or specified groups of—suppliers or customers. Also known as a *group boycott*, a horizontal concerted refusal to deal involves an agreement between two or more competitors to refuse to do business with another competitor or class of competitors, or with one or a group of suppliers or customers. More recent cases have placed some limits on the application of the per se rule to concerted refusals to deal.[61]

The Court's most recent decision in the area is *NYNEX Corporation v. Discon, Inc.*[62] There, plaintiff Discon was in the business of supplying equipment removal services to defendant NYNEX. When NYNEX switched to another supplier, Discon sued, claiming, among other things, that NYNEX's agreement with the other supplier constituted a per se illegal group boycott in violation of Section 1 of the Sherman Act. The Supreme Court vacated a court of appeals ruling that such an agreement could constitute a per se violation. The Court held that the per se rule against group boycotts applies only to horizontal agreements among direct competitors and thus did not apply to the vertical agreement between NYNEX and its other supplier.

The law in this area is not as clear-cut as in some others and is the source of much confusion and uncertainty.[63] Any proposal to engage in conduct that could fit the description of a concerted refusal to deal should be carefully reviewed with antitrust counsel.

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60. *See, e.g.*, *Hartford-Empire Co. v. United States*, 323 U.S. 386, 406–407 (1945); *United States v. American Linseed Oil Co.*, 262 U.S. 371, 389–390 (1923); *see also NCAA v. Board of Regents*, 468 U.S. 85, 100, 109 (1984) ("[w]here there is an agreement not to compete on terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement'").
61. *See, e.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 344 n.15 (1982); *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250 (1968); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (*per curiam*); *Klor's v. Broadway Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).
62. 525 U.S. 128 (1998).
63. *See, e.g.*, *Ross v. Bank of America*, 524 F.3d 217, 223–24 (2d Cir. 2008); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distribs., Inc.*, 637 F.2d 1376, 1382–1383 (9th Cir. 1981), *cert. denied*, 454 U.S. 831 (1982); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1366 (5th Cir. 1980).

[d] Tying, Tie-ins, and Sales on Condition

Tying agreements (also known as *tie-ins* or *sales on condition*) involve a seller who agrees to sell a highly desirable product or service (the *tying product*) only on the condition that the buyer also purchase a less desirable second product or service (the *tied product*), whether the buyer wants the second product or not. Tying is outlawed by Section 1 of the Sherman Act and Section 3 of the Clayton Act.[64] It can also be a predatory practice used to obtain or maintain a monopoly. As such, tying can comprise part of the proof necessary to establish a claim for monopolization, attempted monopolization, or conspiracy to monopolize under Section 2 of the Sherman Act.[65]

Not all tying arrangements are illegal. Moreover, not all illegal tying arrangements are illegal per se. A plaintiff seeking to prove a per se illegal tying violation must prove that (1) the seller conditioned the sale of one product or service on the purchase of a second; (2) the two products or services are in fact separate and not parts of a single product or service; (3) the seller has sufficient power in the market for the tying product to enforce the tie-in;[66] and (4) the tie-in affected a substantial amount of commerce.[67]

In *Jefferson Parish Hospital District No. 2 v. Hyde*,[68] the Supreme Court stated that "[*p*]*er se* condemnation—condemnation without inquiry into actual market conditions—is only appropriate if the existence of forcing is probable."[69] Although that may simply have been a restatement of the need to prove market power, some circuit courts have read it as requiring that a plaintiff seeking to make out a claim for per se illegality, must also prove anticompetitive effects in the tied product market.[70] This requirement is at odds with the traditional definition of per se illegality, which does away with any need to prove actual harm to competition.

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64. 15 U.S.C. §§1, 14; *see Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 461–479 (1992); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5–6 (1958). Note that Section 3 covers sales of goods but not of services.
65. *See* §§4.02[B], 4.03, 4.04 below.
66. *Eastman Kodak*, 504 U.S. at 461–479; *Northern Pacific Railway*, 356 U.S. at 5–7.
67. *See Eastman Kodak Co.*, 504 U.S. 451, 463 n.8, 466 (1992); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14–22 (1984); *Northern Pacific Railway*, 356 U.S. 1, 5–6 (1958). A plaintiff who cannot prove element number (3), market power, may still be able to establish a tying violation under the rule of reason. *See* §3.04[B][2] below.
68. 466 U.S. 2 (1984).
69. *Jefferson Parish*, 466 U.S. at 15.
70. *Compare, e.g., United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exch.*, 89 F.3d 233, 235–236 n.2 (5th Cir. 1996) (proof of anticompetitive effect required), *cert. denied*, 519 U.S. 1116 (1997) *with Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1503 (11th Cir. 1985) ("A claim that a tying arrangement is illegal per se eliminates the requirement that the plaintiff show an actual anti-competitive effect."). The courts are in agreement that proof of anticompetitive effects in the tied product market is required to make out a claim that a tying arrangement violates the rule of reason. *See* §3.04[B][2] below.

The Court has also stated that the market power that must be shown to sustain a tying claim under Section 1 is not as great as that required for proof of a Section 2 monopolization claim: "Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market."[71]

[B] Agreements That Violate the Rule of Reason

All agreements that are not illegal per se are judged under the rule of reason. The rule of reason requires that the plaintiff (whether government or private) do far more to prove the unreasonableness of the alleged practice than where the allegations involve per se illegality. The plaintiff must demonstrate that the challenged practice actually harms competition in a "relevant market."[72]

Put another way, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[73] If the plaintiff discharges that burden, the defendant may still come forward and demonstrate that the practice is justified from a competitive standpoint, i.e., that its pro-competitive aspects outweigh any possible harm to competition.[74]

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71. *Eastman Kodak*, 504 U.S. at 481 (citing *Fortner Enters., Inc. v. United States Steel Corp.*, (*Fortner I*) 394 U.S. 495, 502–503 (1969)); *see also United States Steel Corp. v. Fortner Enters.* (*Fortner II*), 429 U.S. 610, 620–621 (1977) (highlighting need to prove "uniqueness" of the tying product); *United States v. Loew's Inc.*, 371 U.S. 38, 45 (1962) ("Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."). In the absence of economic power, a tie-in is not *per se* illegal, and will be tested under the rule of reason. *White Motor Co. v. United States*, 372 U.S. 253, 262–263 (1963); *Northern Pacific Railway*, 356 U.S. at 6–7. *See* §3.04[B][2] below.
72. *E.g.*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (rule of reason involves "an inquiry into market power and market structure designed to assess the combination's actual effect" but "it is not necessary to prove that concerted activity threatens monopolization"). Many courts hold that plaintiffs must prove the defendant has market power in the relevant market. *See* §§4.02, 5.02, and 5.04 *below* for discussions on how to define a relevant market.
73. *National Society of Professional Eng'rs v. United States*, 435 U.S. 679, 691 (1978) (*quoting Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918)); *see also Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 and n.15 (1977).
74. In *NCAA v. Board of Regents*, 468 U.S. 85, 100–109 (1984), the Supreme Court devised a "quick look" scheme that lightens the plaintiff's burden of proving substantial adverse impact on competition in cases where the alleged agreement is one that would ordinarily receive per se illegal treatment. There, the plaintiff had alleged that the NCAA was engaged in output restriction, normally a per se illegal activity, when it limited the number of games its member colleges could televise. Although the Court felt it was appropriate to use rule of reason

In *State Oil Co. v. Khan*,[75] the Court described the rule of reason this way:

> [M]ost antitrust claims are analyzed under a "rule of reason," according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.[76]

Given Section 1's blanket condemnation of all restraints of trade, virtually any agreement could, under the proper circumstances, give rise to a rule-of-reason violation. The courts have found that a wide variety of practices may violate the rule of reason. Some examples follow.

[1] Horizontal Agreements That Can Violate the Rule of Reason[77]

In *United States v. Container Corp. of America*,[78] the Court found a Section 1 rule-of-reason violation based on proof of an agreement between competing sellers to exchange "the most recent prices charged or quoted" even though there was no agreement "to adhere to a price schedule."[79] The Court found that the agreement created an illegal tendency toward price stability and uniformity.[80] However, in *United States v. United States Gypsum Co.*[81] and

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analysis because of the nature of the NCAA and its activity, the Court relieved the plaintiff of proving substantial adverse impact.

75. 522 U.S. 3 (1997).

76. *Id.* at 10. In *State Oil*, the Court overruled its prior holding in *Albrecht v. Herald Co*., 390 U.S. 145 (1968), that maximum resale price-fixing was per se illegal, and held the practice subject to analysis under the rule of reason. *Id.* at 22. *See* §3.03[A][1][a] above.

77. For a useful discussion and analysis of horizontal agreements (especially joint ventures) and their legality, *see DOJ/FTC, Antitrust Guidelines for Collaborations Among Competitors* (released Apr. 7, 2000).

78. 393 U.S. 333 (1969).

79. *Id.* at 334–337. *Cf. Maple Flooring Manufacturer's Ass'n v. United States*, 268 U.S. 563, 567 (1925) (finding no violation in open exchange of *historical* price and other information that did not identify particular customers); *Cement Manufacturer's Protective Ass'n v. United States*, 268 U.S. 588, 606 (1925) (no violation found in exchange of price information about particular customers needed to combat customer fraud).

80. *United States v. Container Corp.*, 393 U.S. 333, 337 (1969) ("'in terms of market operations stabilization is but one form of manipulation'") (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)).

81. 438 U.S. 422 (1978) (holding that the fact that the exchange of price information in question had been undertaken in an attempt to comply with the meeting competition defense provided by the Robinson-Patman Act precluded finding the necessary criminal intent to support a finding of a criminal violation of the Sherman Act, but adding that it was not necessary to consult a competitor under the circumstances since a good faith belief that the

United States v. Citizens & S. National Bank,[82] the Court made it clear that not all exchanges of price information are illegal, only those that are likely to have an adverse impact on prices or competition generally.

In *National Society of Professional Engineers v. United States*,[83] the Court found that the defendant's canon of ethics violated Section 1 under the rule of reason. The canon did not allow professional engineers to discuss prices with potential customers until after the customer had chosen an engineer.[84]

In *FTC v. Indiana Federation of Dentists*,[85] the Court found a violation in a dental association's policy that prohibited members from providing insured patients' x-rays to their insurers. The Court held that the practice "impair[ed] the ability of the market to advance social welfare by ensuring the provision of goods and services to consumers at a price approximating the marginal cost of providing them."[86]

In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[87] the Supreme Court found a Section 1 violation by a member of a fire safety association that had persuaded the association to adopt a code that favored its products over those of its competitors.[88] In addition, in *American Society of Mechanical Engineers v. Hydrolevel Corp.*,[89] the Court found the engineering society had violated Section 1 when its agents acted against the plaintiff in response to requests from a competitor of the plaintiff.[90]

Other horizontal agreements that have given rise to rule of reason claims include agreements to use unfair business practices to eliminate a competitor,[91]

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competitor was offering a lower price would suffice to establish the meeting competition defense).

82. 422 U.S. 86, 113 (1975) ("[T]he dissemination of price information is not itself a per se violation of the Sherman Act."). *See generally DOJ and FTC Statements of Antitrust Enforcement Policy in Health Care.* These statements discuss the agencies' views as to what constitute permissible exchanges of information regarding prices, wages, and benefits.
83. 435 U.S. 679 (1978).
84. *Id.* at 692–693; *but see Broadcast Music Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (upholding under the rule of reason an agreement by music copyright owners on the fee for a blanket license to use their work).
85. 476 U.S. 447, 459–466 (1986). *See also NCAA v. Board of Regents*, 468 U.S. 85 (1984) ("quick look" rule-of-reason analysis used in case attacking NCAA restrictions on televising member colleges' football games).
86. *Indiana Federation of Dentists*, 476 U.S. at 459.
87. 486 U.S. 492 (1988).
88. *Id.* The Court rejected the association's arguments that its activities were entitled to immunity under the *Noerr-Pennington*/political action doctrine. *See* §3.08[D] below.
89. 456 U.S. 556 (1982).
90. *Id.* at 565–576.
91. *See, e.g.*, *Union City Barge Lines, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 138 (5th Cir. 1987); *A.H. Cox & Co. v. Star Mach. Co.*, 653 F.2d 1302, 1308 n.7 (9th Cir. 1981); *but see Albert Pick-Barth Co. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932) (holding such conspiracies *per se* illegal, a holding later limited but not overruled in

no-hire (or non-poach) agreements[92] and covenants not to compete. The latter are often found in employment contracts or in contracts for the sale of a business. They normally will be found legal so long as they are reasonably related to the main business purpose of the contract and are reasonable in scope and duration.[93] If non-competes go too far, they may be found to violate the rule of reason, or even to be illegal per se.[94] In *Palmer v. BRG of Georgia, Inc.*,[95] for example, the Supreme Court found that a covenant not to compete anywhere in the United States entered between two providers of bar examination preparatory courses, even though one licensed the other to sell its course in Georgia, was a per se illegal agreement to allocate territories.[96]

[2] Vertical Agreements That Can Violate the Rule of Reason

With the exception of certain tying agreements, virtually all vertical agreements are now analyzed under the rule of reason. This includes both agreements involving prices and non-price-related restraints.

George R. Whitten, Jr., Inc. v. Paddock Pool Builders, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975)).

92. No-hire, or non-poach, agreements are frequently found in confidentiality agreements entered between two companies considering a merger or acquisition. They prohibit the parties from using information gleaned about the other during due diligence to hire away, or "poach," critical employees from the other. In the few decisions analyzing such agreements, the courts have generally upheld them as reasonable whether or not subjecting them to full rule of reason analysis. The Supreme Court recently declined to hear an appeal of a Third Circuit ruling upholding a similar agreement. *See Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir.), *cert. denied*, 534 U.S. 1014 (2001); *see also Global Telesystems, Inc. v. KPNQwest, N.V.*, 151 F. Supp. 2d 478 (2001) (granting preliminary injunction to enforce non-poach agreement); *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859 (M.D. Tenn. 1980).
93. *See, e.g.*, *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060 (7th Cir. 1997); *Read v. Medical X-Ray Ctr., P.C.*, 110 F.3d 543 (8th Cir.), *cert. denied*, 522 U.S. 914 (1997); *LDDS Communications v. Automate Communications*, 35 F.3d 198, 199 (5th Cir. 1994) (such covenants must be ancillary to the sale and provide a reasonable protection to the seller); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 264–269 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982). Such covenants are generally lawful unless found to be "naked," i.e., the restraint's purported connection to some other transaction is merely a sham or it is unreasonable under the circumstances.
94. Sometimes a court that finds a non-compete illegal will strike it in its entirety. At other times, a court might strike, or limit, only the unreasonable portions, a practice known as "blue-penciling." Thus, for example, if a court determines that the only unreasonable aspect of a non-compete is its duration, the court might uphold the non-compete while imposing a shorter duration.
95. 498 U.S. 46 (1990) (*per curiam*).
96. *Id.* at 49–50.

[a] Vertical Price-Fixing or Resale Price Maintenance

Vertical price-fixing (also known as resale price maintenance) agreements are agreements between a supplier and a customer setting the prices the customer will charge to resell products purchased from the supplier. Before 1997, the courts treated vertical agreements to set both maximum and minimum prices as illegal per se.[97]

In 1997, however, in *State Oil v. Khan*,[98] the Supreme Court declared that agreements setting maximum resale prices should thereafter be tested under the rule of reason.[99] Ten years later, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[100] the court held that minimum price agreements between a manufacturer and distributor would no longer be treated as per se illegal under Section 1 of the Sherman Act.[101] In doing so, the court rejected a rule established in 1911 in its *Dr. Miles* decision.[102]

In *Leegin*, the Court reasoned that the economic and competitive effects of resale price maintenance restraints did not justify a per se ban. The Court acknowledged that "each side of the debate can find sources to support its position." But it found that most economists agreed that resale price maintenance can have pro-competitive justifications, including the promotion of "interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand." The Court also cited other economic benefits as well. For example, it pointed out that the elimination of price competition between retailers forces stores to "compete among themselves over services," which ultimately benefits the consumer.[103]

The Court pointed out that it had, over time, removed per se treatment for other non-price vertical restraints, such as exclusive territories, requiring certain retail practices regarding staffing or store environment, and maximum resale price maintenance. Thus, according to the Court, the overruling

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97. The Supreme Court first held minimum vertical price-fixing illegal in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). The Court declared maximum vertical price-fixing illegal in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). Other Supreme Court decisions on vertical price-fixing include: *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102–103 (1980); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (description of agreement as a consignment arrangement cannot avoid vertical price-fixing charge).
98. 522 U.S. 3 (1997).
99. *Id.* at 22.
100. 551 U.S. 877 (2007).
101. *Leegin*, 551 U.S. at 882.
102. *Dr. Miles Medical*, 220 U.S. 373.
103. *Id.* at 889–91.

of *Dr. Miles* achieved intellectual and jurisprudential coherence by applying the rule of reason to all vertical restraints imposed by manufacturers on retailers.[104]

The Court's *Leegin* decision has made the task of advising manufacturers on resale pricing policies somewhat easier. Even before *Leegin*, a manufacturer could suggest retail prices and refuse to deal with those dealers who do not go along without incurring liability so long as the retailers "independently decide" to adhere to the manufacturer's suggestions.[105] This concept dates back to the Supreme Court's 1919 holding in *United States v. Colgate & Co.*[106] But the line between what was permissible, if aggressive, encouragement to adhere to a manufacturer's suggested retail prices and impermissible vertical price-fixing was difficult to draw. Although *Leegin* (and *Khan*) have not ruled out the possibility that a minimum or maximum resale price maintenance agreement could violate Section 1 under the rule of reason, they have at least opened the way for manufacturers to be more aggressive in imposing such policies. A further reason for caution is that some state attorneys-general apparently continue to view the practice as per se illegal under their state antitrust laws.

Sellers often, and not unreasonably, believe it is important to maintain some control over the retail pricing of goods they have created. One method frequently employed pre-*Leegin* to avoid accusations of illegal price-fixing was the creation of a manufacturer's suggested retail price (the MSRP, sometimes called the "sticker price") or a similarly titled list of recommended resale prices. But to be safe from accusations of vertical price fixing, the manufacturer must make it clear that the buyer retains the freedom to set the prices at which it will resell the goods.[107]

A seller who wants even more control over pricing down the chain of distribution does have several options that—if carefully pursued—can help avoid accusations of vertical price-fixing. One solution for the seller who wants to control the prices charged consumers is to use a distribution system

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104. *Id.* at 882

105. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *accord Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *see also Simpson v. Union Oil Co.*, 377 U.S. 13, 20–24 (1964) (affirming legality of bona fide consignment pricing plans while holding that the consignment system in question was a sham that violated section 1); *United States v. General Elec. Co.*, 272 U.S. 476, 488 (1926) (upholding consignment plan that had effect of fixing retail prices on patented products).

106. 250 U.S. 300 (1919).

107. As an example of the dangers inherent in vertical agreements regarding resale pricing, in the fall of 2002 the attorneys general for forty-three states announced that they had obtained a settlement valued at $143 million from five music distributors and three music retailers based on charges that the distributors and retailers had violated the antitrust laws by maintaining minimum advertised pricing (MAP) policies, even though the agreement did not prohibit the retailers from actually charging less than the advertised prices.

that does not involve sale of goods to distributors. The simplest way to accomplish this is for the manufacturer simply to handle all distribution itself, either through its own employees or through a controlled sales subsidiary. A second solution is the use of independent sales agents who work on commission rather than by purchasing and reselling the products. A third, related solution is the use of a consignment system. If any of these systems are challenged in court, the key question asked by the court is whether title to the goods has passed to the sales agent. And the key determinant of that is which party bears the risk of loss if the goods are damaged or destroyed before being resold.

[b] Vertical Non-Price Restraints

In 1977, in *Continental T.V., Inc. v. GTE Sylvania Inc.* (*GTE Sylvania*),[108] the Supreme Court declared that vertical *non-price* restraints (as distinguished from vertical restraints affecting prices) were not per se illegal, but were instead subject to rule-of-reason analysis.[109] The Court pointed out that although such restraints might limit *intrabrand* competition (i.e., competition between competing distributors or retailers of products made by the same manufacturer), they were often justifiable as promoting *interbrand* competition (i.e., competition between products made by different manufacturers). The Court observed that the latter (interbrand competition) is the main focus of the antitrust laws and therefore carries more weight in the rule-of-reason balancing.[110] The Court subsequently observed that the pro-competitive aspects of vertical non-price restraints most often do outweigh any harm to intrabrand competition.[111]

Nonetheless, vertical non-price restrictions may still be challenged under the rule of reason. Indeed, despite the Court's ruling in *GTE Sylvania*, they continue to provide fertile soil for litigation and should be considered carefully with counsel before being implemented. Vertical non-price restraints that have frequently faced rule-of-reason challenge include territorial restrictions, dealer terminations and other refusals to deal, customer restrictions, exclusive dealing, tying, reciprocal dealing, and price protection agreements.

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108. 433 U.S. 36 (1977).

109. *Id.* at 51–52 (overruling *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), in which the Court had held customer and territorial restraints *per se* illegal); *accord Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) ("[T]he scope of *per se* illegality should be narrow in the context of vertical restraints."); *see also United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 381–382 (1967) (announcing a per se rule later overturned in *GTE Sylvania*); *White Motor Co. v. United States*, 372 U.S. 253, 261–263 (1963) (first applying rule-of-reason to territory and customer restrictions).

110. *GTE Sylvania*, 433 U.S. at 52 and n.19.

111. *Business Electronics*, 485 U.S. at 725 (1988).

[i] Territorial Restrictions

Territorial restrictions prohibit a dealer from selling the manufacturer's products outside of a particular geographic area, thereby limiting intrabrand competition.

[ii] Dealer Terminations

Dealer terminations, as well as similar vertical refusals to deal, frequently provoke litigation and so require particular care, especially if the termination follows complaints about the terminated dealer from competing dealers.[112] Refusals to deal are especially dangerous if a supplier can be characterized as having participated in or facilitated a horizontal conspiracy among its dealers.

[iii] Customer Restrictions

Customer restrictions are agreements that allow distributors to sell only to specified customers.

[iv] Exclusive Dealing

Exclusive dealing usually involves an agreement to grant an exclusive dealership or similar agreement that gives a single distributor the exclusive right to sell a manufacturer's products in a particular geographic area. This practice is normally legal absent the presence and abuse of market power.[113]

[v] Tying; Bundling; Full Line Forcing

As described above, tying agreements involve a seller that conditions the sale of one product or service (the *tying product*) on the purchase of another (the *tied product*).[114] Even if a plaintiff cannot prove that the seller had market power in the tying product, it may—at least theoretically—still make out a rule-of-reason violation if it can prove that the tie-in fostered sufficient anti-competitive impact in the tied product market.[115]

Bundling and full line forcing are forms of tying. They involve a manufacturer agreeing to sell one or more products only on the condition that the buyer takes a group, or the full line, of the manufacturer's products.

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112. *See* §§3.04[A][1][b] and 3.04[A][2][c] above.

113. *See United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 376 (1967) (generally upholding practice in the absence of abuse of monopoly power); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) (upholding exclusive requirements contract).

114. *See* §3.04[B][1] *above.*

115. *White Motor Co. v. United States*, 372 U.S. 253, 262–263 (1963); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 6–7 (1958).

[vi] Reciprocal Dealing

Reciprocal dealing agreements are agreements whereby one party agrees to deal with another only if the other agrees to deal with it in another area. The Supreme Court has suggested, without holding, that such arrangements could violate the rule of reason.[116] If the party imposing the agreement has market power the agreement could be viewed as a per se illegal tie-in.[117] Government and civil cases charging reciprocal dealing have been rare in recent years, even though in the 1960s the government actually used reciprocal dealing as the basis for criminal prosecution.

[vii] Price Protection Agreements

A price protection provision (also known as a most favored nations or most favored buyer clause) is an agreement by a seller to provide a particular buyer terms no less favorable than it provides any other customer. Such provisions are generally legal. Indeed, such treatment may even be mandated by the Robinson-Patman Act.[118] Nevertheless, the federal enforcement agencies have attacked price protection agreements that they believe have anticompetitive effects (usually in the context of actions by a monopolist or would-be monopolist).[119]

§3.05 The Interstate Commerce Element

The Sherman Act, like all federal statutes, is restricted by the Commerce Clause of the U.S. Constitution, which limits the reach of federal legislation to activities that affect interstate (as opposed to wholly intrastate) commerce.[120] Indeed, Section 1 itself limits its reach to agreements "in restraint of trade or commerce among the several States, or with foreign nations."[121] A private or government plaintiff must therefore prove that the alleged

116. *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 594 (1965) (reciprocal dealing is "one of the congeries of anticompetitive practices at which the antitrust laws are aimed").
117. *See, e.g.*, *Key Enters. v. Venice Hosp.*, 919 F.2d 1550, 1562 (11th Cir. 1990), *vacated*, 9 F.3d 893 (11th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994); *Betaseed v. U & I*, 681 F.2d 1203, 1221–1228 (9th Cir. 1982); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 425 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979).
118. 15 U.S.C. §13; *see* Chapter 7 below.
119. *See, e.g.*, *United States v. Delta Dental*, 1997-2 Trade Cas. (CCH) ¶ 71, 860 (D.R.I. 1997).
120. U.S. Const. art. I, §8.
121. 15 U.S.C. §1. The Supreme Court has stated that this language is not more restrictive than the Commerce Clause itself. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944) ("in enacting §1 Congress 'wanted to go the utmost extent of its Constitutional power in restraining trust and monopoly agreements' "); *accord Hospital*

violation involved practices that either occurred in or affected interstate commerce.

Historically, the standard for establishing this element has not been especially stringent. In *Hospital Building Co. v. Trustees of Rex Hospital*,[122] the Supreme Court stated that it is enough to show that the challenged activity "'substantially and adversely affect[ed] interstate commerce.'"[123] The Court subsequently added that it is enough if the challenged activities affect "some other appreciable activity demonstrably in interstate commerce," or if the challenged activity has "a not insubstantial effect on the interstate commerce involved."[124]

Successful defenses based on a failure to demonstrate an effect on interstate commerce have been rare. For example, one court of appeals has held that the antitrust laws covered a price-fixing conspiracy that took place entirely in Japan because the conspiracy had "an intended and substantial effect in the United States."[125] The Supreme Court has even indicated that pretrial dismissals on this basis should not be granted lightly.[126]

Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194–195 (1974).

122. 425 U.S. 738 (1976).

123. *Id.* at 743 (*quoting* Gulf Oil., 419 U.S. at 195); *see also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784 (1975) (upholding challenge to state bar association's minimum fee schedule for title examinations because "a title examination is an integral part of an interstate transaction"); *United States v. Yellow Cab Co.*, 332 U.S. 218, 228–233 (1947) (taxi service between local interstate train stations is interstate commerce but that between passengers' homes and train stations is not).

124. *McLain v. Real Estate Bd.*, 444 U.S. 232, 242–243, 246 (1980) (upholding challenge to brokerage commission fixing by local real estate brokers); *see also Summit Healthcare v. Pinhas*, 500 U.S. 322, 329–332 (1991) (despite a spirited dissent, finding sufficient interstate commerce in a hospital's exclusion of a single ophthalmologist).

125. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997), *cert denied*, 522 U.S. 1044 (1998) (quoting (and applying in criminal context) Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993)); *see also F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), in which the Supreme Court held that a foreigner who purchased goods abroad whose prices had been fixed in a global price-fixing conspiracy that included the United States could not sue in the United States at least so long as the foreign arm of the conspiracy was independently capable of fixing the price of the goods. The Court left open the question of what would happen if the foreign conspiracy was not independent of its U.S. counterpart.

126. *See McLain v. Real Estate Bd.*, 444 U.S. 232, 246 (1980) ("[A] complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief . . . .'") (*quoting Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)); *but see* discussion in §1.02[A][1] above of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), in which the Court imposed a stricter pleading standard than that set forth in *Conley v. Gibson.*

Nevertheless, Commerce Clause defenses can and have prevailed in cases that are truly local. One area in which this has happened with some frequency is in antitrust litigation involving health care.[127]

§3.06 The Injury Element: Injury, Antitrust Injury, Standing, and Damages

Injury and damages are governed by Sections 4 and 4A of the Clayton Act.[128] The former provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained."[129] "Persons" entitled to sue include individuals, partnerships, states, cities, other political subdivisions, foreign governments,[130] and corporations and other associations. Section 4A of the Clayton Act permits the United States to sue, but only for single damages.[131]

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127. *See, e.g.*, *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985) (dismissing psychiatrist's antitrust claim against hospital); *Hommrich v. Brown County Mental Health Ctr.*, 2000-1 Trade Cases (CCH) ¶ 72,801 (Wis. Ct. App.), *rev. denied*, 234 Wis. 2d 151, 610 N.W.2d 512 (2000) (dismissing federal antitrust claim that defendants attempted to monopolize area alcohol assessment and treatment); *Nash v. Northern Arkansas Human Servs. Sys.*, 1997-1 Trade Cas. (CCH) ¶ 71,787 (E.D. Ark. 1997) (dismissing claim against local health care center); *see also Valley Disposal v. Central Vermont Solid Waste Dist.*, 31 F.3d 89 (2d Cir. 1994) (dismissing antitrust claim challenging local municipality's waste ordinance); *Rose v. Morning Call*, Inc., 1997-1 Trade Cas. (CCH) ¶ 71,775, 79,471–472 (E.D. Pa. 1997) (dismissing antitrust claim against local newspaper in part because plaintiff failed to allege substantial adverse effect on interstate commerce). But the Supreme Court's decision in Summit Healthcare, above, finding interstate commerce sufficiently affected in a hospital's exclusion of a single ophthalmologist at the very least raised the bar on such dismissals. *Summit Healthcare*, 500 U.S. at 329–32; *see Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 781 (7th Cir. 1994) (noting that the precedential value of earlier decisions dismissing healthcare cases had been undermined by the Supreme Court's ruling in *Summit*).
128. 15 U.S.C. §§15 & 15a.
129. 15 U.S.C. §15. In addition, Sections 15 and 16 of the Clayton Act allow the attorney general, and private parties *threatened* with loss or damage from a violation of the antitrust laws, to seek injunctive relief in federal court. 15 U.S.C. §§25–26. For additional discussion of issues relating to injunctive relief, *see* §§6.11, 8.02, and 8.06 *below*.
130. *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 318–320 (1978); *but see* Clayton Act, Section 4, which generally limits a foreign government's recovery to single damages.
131. 15 U.S.C. §15a.

[A] Injury, Antitrust Injury, and Standing

Injury and standing are related concepts that derive from the language "any person who shall be injured in his business or property by reason of anything forbidden by the antitrust laws."[132] At the most basic level, the injury requirement (also known as the *impact* or *fact of injury* element) is not particularly onerous. A plaintiff must simply be able to demonstrate that he has suffered actual financial harm from the allegedly illegal activity.[133] If successful, he has satisfied this element and can prevail no matter how small his financial loss—an important consideration since the antitrust laws automatically award a victorious claimant his costs and attorneys fees.

The *business or property* requirement is also rarely a major hurdle. The Supreme Court has stated that "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property."[134] The Court has also held that a consumer who overpays for goods for his personal use is injured in "his property."[135]

Nevertheless, using the interrelated concepts of *injury*, *antitrust injury*, and *standing*, the Supreme Court has imposed—or attempted to impose—limits on both the availability of antitrust remedies and the complexity of antitrust litigation.

[1] Injury—The Indirect Purchaser, or *Illinois Brick*, Rule

In *Illinois Brick Co. v. Illinois* (*Illinois Brick*),[136] the Supreme Court held that consumers who overpaid for concrete block purchased from contractors several links down the distribution chain from the price-fixing manufacturers could not sue the manufacturers for price-fixing.[137] The Court reasoned that the consumers, or indirect purchasers, had not been the ones directly injured by the overcharge.[138] The Court took pains to declare that the indirect purchasers' lack of *injury* was "analytically distinct from the question of which

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132. The term *person* has been found to include corporations, governmentally authorized associations, and partnerships as well as individuals and political entities.

133. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (the alleged antitrust violation does not have to be the only cause of the plaintiff's injury); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697–700 (1962) (injury may be proved by inferences drawn from circumstantial evidence); *but see J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561–562 (1981) (injury could not be inferred only from the defendant having charged plaintiffs' competitors far lower prices).

134. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906).

135. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 341 (1979).

136. 431 U.S. 720 (1977).

137. *Id.* at 728, 730–737 (1977).

138. *Id.*

persons have sustained injuries too remote to give them *standing* to sue for damages under §4."[139]

At the same time, however, the Court stated that its decision was based in part on a fear of exposing manufacturers to multiple liability and in part on the evidentiary difficulties inherent in tracing overcharges through the chain of distribution. To further complicate matters, the Court then pointed out that the rule prohibiting suit by indirect purchasers would not apply if a "pre-existing cost-plus contract" insulated the direct purchaser "because its customer is committed to buying a fixed quantity regardless of price."[140] In addition, at least one court has held that if the distributors had participated in the manufacturers' price-fixing the indirect purchaser rule would not preclude suit by customers of the distributor.[141]

In *Kansas v. Utilicorp United, Inc.*,[142] the Supreme Court sought to clarify its *Illinois Brick* rule. It held that there would be no exception to the rule if the direct purchasers were public utilities that passed on cost increases dollar for dollar pursuant to government regulation.[143]

The *Illinois Brick* rule has not been especially popular. Some states have passed laws expressly permitting suits by indirect purchasers.[144] In addition, lower courts have sought to distinguish it or create additional exceptions.[145]

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139. 431 U.S. at 728 n.7 (emphasis added).
140. *Id.* at 736. The Court's decision was based in part on its desire to maintain consistency with an earlier decision in which it had placed limits on a price-fixing manufacturer's ability to assert the "pass-on defense," *i.e.*, the defense that the direct purchaser had passed the illegal price increase on to his own customers. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). In *Hanover Shoe* (as in *Illinois Brick*), the Court cited as primary among its reasons for limiting the pass-on defense the difficulties in proof inherent in tracing overcharges through the chain of distribution, while adding that it would also reduce the incentives of plaintiffs to sue. In *Illinois Brick*, the Supreme Court did suggest that the pass-on defense might be available "where the direct purchaser is owned or controlled by its customer." *Illinois Brick*, 431 U.S. at 736 n.16.
141. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 614–615 (7th Cir. 1997) (applying "co-conspirator exception," and allowing suit by indirect purchasers to proceed).
142. 497 U.S. 199 (1990).
143. *Id.* at 216–217 ("we think it an unwarranted and counterproductive exercise to litigate a series of exceptions"). *See also Blue Shield of Va. v. McCready*, 457 U.S. 465, 475, n.11 (1982).
144. *See, e.g.*, Ala. Code §6-5-60; Cal. Bus. & Prof. Code §16750(a); Miss. Code Ann. §75-21-9; *see also Stationary Eng'rs Local 39 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 1998-1 Trade Cas. (CCH) ¶ 72,167, at 72,194 n.4 (N.D. Cal. 1998) (under California law, indirect purchasers are not barred from bringing suit against manufacturers for price-fixing conspiracy).
145. *See, e.g.*, *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003)(Illinois Brick does not preclude injunction action by indirect purchasers, nor does it preclude damage action where "no realistic possibility" that direct purchaser will sue); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 480 (W.D. Pa. 1999) (the direct purchasers rule established

[2] Antitrust Injury

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[146] the Supreme Court declared that the antitrust laws were designed to protect competition rather than competitors.[147] To prevail an antitrust plaintiff must therefore show "antitrust injury," i.e., "injury of the type the antitrust laws were intended to prevent . . ..."[148]

In *Brunswick*, the Court rejected the Clayton Act, Section 7 claims of the plaintiff bowling centers. The plaintiffs had contended that Brunswick, by illegally buying up a number of competing bowling centers that would otherwise have failed, had prevented plaintiffs from reaping the higher prices they could have charged if their competitors had been allowed to fail. The Court explained that, although the plaintiffs' loss occurred "by reason of" Brunswick's unlawful acquisitions, "it did not occur 'by reason of' that which made the acquisitions unlawful."[149] Put another way, the plaintiff's losses stemmed not from diminished competition but from an increase in competition.

Five years later, in *Blue Shield of Virginia v. McCready*,[150] the Court declared that the antitrust injury requirement applies to claims brought under the Sherman Act as well. The court held that injury caused by conspiring insurance companies' refusal to provide insurance coverage for psychologists' services "flow[ed] from that which [made] defendants' acts unlawful."[151]

The Court further elucidated the antitrust injury doctrine in *Cargill, Inc. v. Monfort of Colorado, Inc.*[152] There, the Court found no antitrust injury in plaintiff's claim that a merger between two competitors would allow them to lower prices to his detriment.[153] And in *Atlantic Richfield Co. v. USA*

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in *Illinois Brick* does not preclude Clayton Act claims by plaintiffs who purchased fabricated products containing the price-fixed goods directly from those accused of participating in the price-fixing).

146. 429 U.S. 477, 489 (1977).
147. *Id.* at 489.
148. *Id.*
149. *Id.* at 488; *see also Bourns, Inc. v. Raychem Corp.*, 331 F.3d 704 (9th Cir. 2003)(plaintiff suffered no injury because it was not yet prepared to enter the market when the defendant's anticompetitive conduct occurred).
150. 457 U.S. 465 (1982).
151. *Id.* at 481–484; *see also Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990) ("Antitrust injury does not arise . . . until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct") (emphasis in original); *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519–539 (1983) (union's claims based on allegations of conspiracy among general contractors did not raise antitrust injury since "[i]t is not clear whether the Union's interests would be served or disserved by enhanced competition in the market").
152. 479 U.S. 104 (1986).
153. *Id.* at 111–119. The Court did add that if the plaintiff had been able to prove the defendants were likely to engage in predatory pricing, he might have succeeded. *Id.*

Petroleum Co.,[154] the Court found no antitrust injury in a gasoline retailer's claim that vertical price-fixing by a manufacturer that supplied competing retailers forced him to lower his prices.

[3] Standing

The standing requirement is based on causation. As the Supreme Court stated in *Illinois Brick*, it limits the availability of antitrust remedies by determining "which persons have sustained injuries too remote to give them standing to sue for damages under §4."[155] Like causation issues elsewhere in tort law, standing has required the courts to make some extremely difficult—and often conflicting—decisions based as much on policy as on purely legal considerations.

The Supreme Court's principal forays into standing occurred in the early 1980s. In *Blue Shield of Virginia v. McCready*,[156] the Court upheld the Section 1 standing of a patient who had been refused insurance coverage for psychologists' services. Plaintiff McCready claimed that the insurers and physicians had conspired to exclude psychologists from an insurance compensation package.[157] Defendants argued that the plaintiff lacked standing because (1) the conspiracy was directed at the psychologists not the patients and (2) she was "not an economic actor in the market being restrained."[158] The Court rejected those arguments. The Court also rejected the defendants' arguments (based on *Illinois Brick* and *Hawaii v. Standard Oil Co.*[159]) that allowing plaintiff to sue would lead, among other things, to possible duplicative recoveries and an increase in the complexity of litigation.[160]

One year later, in *Associated General Contractors v. California State Council of Carpenters*,[161] the Court found that the plaintiff union lacked standing to sue the defendant contractors for conspiring to coerce others to use nonunion labor.[162] Despite its statement in *Illinois Brick* that the rule of that case was based on lack of injury rather than lack of standing, the Court relied on *Illinois Brick* and its concerns with indirectness, duplicative recoveries, and speculative damages.[163] At the same time, the Court refused to adopt a bright-line test for standing. Instead, it cataloged several factors

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154. *Atlantic Richfield*, 495 U.S. at 336–39.
155. *Illinois Brick*, 431 U.S. at 728 n.7.
156. 457 U.S. 465 (1982).
157. *Id.* at 475–84.
158. *Id.* at 478–481.
159. 405 U.S. 251 (1972).
160. *McCready*, 457 U.S. at 474–475.
161. 459 U.S. 519 (1983).
162. *Id.* At 535–546.
163. *Id.* At 544–545.

(derived from earlier cases) to be considered when examining standing. These included the causal connection between the alleged antitrust violation and the plaintiff's harm; the defendant's motive; the nature of the alleged injury; and "the directness or indirectness of the asserted injury."[164]

[4] Unclean Hands, or *In Pari Delicto*

A final standing-related doctrine is that of unclean hands, or *in pari delicto*. At one time, it was considered a valid defense that the plaintiff in an antitrust suit was also an antitrust violator or had participated in the antitrust violation that formed the basis for its action. The Supreme Court subsequently modified that rule, holding that neither circumstance would necessarily negate standing, at least so long as the plaintiff was not a prime mover in the violation.

In *Kiefer Stewart Co. v. Joseph Seagrams & Sons*,[165] the Supreme Court held that a wholesaler could recover for price-fixing from its suppliers despite evidence that the wholesaler had itself participated in a price-fixing conspiracy with its competitors.[166] And in *Perma Life Mufflers v. International Parts Corp.*,[167] the Court extended that protection to plaintiff franchisees who actually participated in the illegal scheme with their franchisor.[168] The Court observed that "once it is shown that the plaintiffs did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it . . . the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."[169]

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164. *Id.* at 536–545. In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109–113 (1986), the Court observed that less restrictive standing rules may apply for plaintiffs seeking injunctive, as opposed to treble damage, relief because there is no reason to fear duplicative recovery. *See also Andrx Pharmaceuticals, Inc. v. Biovail Corp. Int'l*, 256 F.3d 799 (D.C. Cir. 2001) (reversing lower court ruling that dismissed case for lack of standing, appellate court notes that standing inquiry must look to party's "intent and preparedness to enter the market from which it alleges it was excluded").
165. 340 U.S. 211 (1951).
166. *Id.* at 214. The Court explained: "If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioners, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured." *Id.*
167. 392 U.S. 134 (1968).
168. *Id.* at 139–140.
169. *Id.*

[B] Proof and Measure of Damages

Antitrust damages may be measured by any method that provides a reasonable approximation of the plaintiff's economic harm. One common measure is the difference between the price paid by the plaintiff-purchaser and the fair market price, i.e., the price he would have paid had the violation not occurred. Another measure is lost profits.[170]

The Supreme Court has stated that antitrust damages may not be based on pure "speculation or guesswork."[171] But it has also made clear that an antitrust plaintiff's burden of proving damages, which often requires a calculation of what might have happened had the antitrust violation not occurred, is not as rigorous as that in more typical contract or tort cases.[172] The Court has expressed concern that an antitrust violator not be allowed to "profit from his wrongdoing" and escape liability by requiring precise proof of the inherently imprecise or unprovable.[173]

§3.07 The Criminal Intent Element

In *United States v. United States Gypsum Co.*,[174] the Supreme Court held that a federal antitrust prosecutor must prove that the defendant possessed criminal intent: "a defendant's state of mind or intent is an element of a criminal

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170. Issues relating to specific measures of damages have rarely made it to the Supreme Court. These issues are usually resolved by the lower courts (or through settlements).

171. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) ("[T]he jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data . . ..").

172. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981) ("Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land"); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123–125 (1969) (citing in the context of a monopolization case "the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts"); *see, e.g., In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 533–34 (6th Cir. 2008) (plaintiffs' expert testimony alone sufficient to support damage $23 million damage award despite minor imperfections).

173. *Id.* at 566 (quoting *Bigelow*, 327 U.S. at 264); *Zenith*, 395 U.S. at 122–25; *see also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("The wrongdoer is not entitled to complain that [damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.").

174. 438 U.S. 422 (1978).

antitrust offense which must be established by evidence and inferences drawn therefrom." The Court went on to state that the prosecutor can do this either by proving that the defendant's conduct (1) had an anticompetitive effect and was undertaken with knowledge of its probable consequences, or (2) had the purpose of producing anti-competitive effects.

In part because of the need to prove intent, the DOJ's Antitrust Division today confines its pursuit of criminal sanctions almost exclusively to instances of hard-core, per se violations such as price-fixing and bid-rigging.[175] The Antitrust Division does, however, offer lenient treatment, i.e., no criminal charges, to companies and individuals that discover and report antitrust violations.[176]

§3.08 Defenses and Immunities

Defendants in antitrust actions may avail themselves of all of the defenses, such as the statute of limitations and lack of personal or subject matter jurisdiction, normally available to litigants. Certain issues particular to antitrust are discussed below. In addition, there are several defenses unique to antitrust—state action (*Parker v. Brown*), unclean hands (*in pari delicto*), and *Noerr-Pennington* (or political action).

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175. Scott D. Hammond, "Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program 1" (March 26, 2008), http://www.usdoj.gov/ar/public/speeches/232716.htm ("The detection, prosecution, and deterrence of cartel offenses remains the highest priority of the Antitrust Division); DOJ Antitrust Division 1999 Annual Report, "The Criminal Enforcement Program," (archived at http://www.usdoj.gov/atr) (stating that criminal investigations and prosecutions are confined to "hardcore cartel activity such as price-fixing, bid-rigging, and market-allocation agreements"). However, the DOJ has acknowledged that in some of these situations "there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action." *Antitrust Division Manual*, Ch. III.C.5.

In at least one instance, the DOJ has relied on this very provision and the parties' lack of covert activity to explain to a court why it did not proceed criminally against accused price-fixers. *See U.S. v. Seminole Fertilizer Corp., 1*997 WL 692953, 1997-2 Trade Cases P 71,942 (M.D. Fla.) (competitive impact statement) *citing* Antitrust Division Manual, Sec. III.E at III–12 (now Ch. III.C.5) ("there [is] virtually no evidence of covert activity, which indicate[s] that the subjects of the investigation were *not aware* of, or did *not appreciate*, the full *consequences* of their actions. This lack of covertness is one of the main reasons this case is being filed civilly rather than criminally."). (Emphasis in original.)

176. *See* §8.02 below for a discussion of the DOJ's Leniency Programs.

[A] The Statute of Limitations and Tolling

The Clayton Act applies a four-year statute of limitations—running from the date the claim "accrues"—to all private antitrust claims.[177] An antitrust claim accrues only if damages are ascertainable.[178] Under the continuing violation doctrine, each new overt act in furtherance of a conspiracy and each new injury starts a new statutory period.[179] Put another way, the statute of limitations for a continuing conspiracy does not begin to run until the conspiracy ends.[180] A coconspirator's withdrawal from an ongoing conspiracy—if communicated effectively—will start the statute running as to that party.[181]

Like plaintiffs in other tort cases, antitrust plaintiffs confronted with a statute of limitations defense may seek to prove facts that would support a "tolling," i.e., suspension, of the statutory time period. The time period is thus effectively extended for the duration of the toll. If the plaintiff has sued within the extended period, the defense is defeated. There are several grounds for tolling that apply to all cases, but the two that most commonly arise in antitrust cases are the government action toll, which is a statutory toll specific to antitrust actions, and fraudulent concealment.

[1] The Government Action Toll

Section 5(i) of the Clayton Act tolls the statute for private plaintiffs if the U.S. government has filed a criminal or civil action to "prevent, restrain, or punish," a violation of the antitrust laws. The government action toll applies if: (1) the private suit is based, at least in part, on the government action; and

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177. Clayton Act, §4B, 15 U.S.C. §15b (1994). The statute of limitations for criminal prosecutions under the antitrust laws is five years. 18 U.S.C. §3282. *See* §8.02 *below*.

178. *E.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971).

179. *Zenith Radio Corp.*, 401 U.S. at 338 ("[E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages the statute of limitations runs from the commission of the act"); *see also Klehr v. A.O. Smith, et al.*, 521 U.S. 179, 188–189 (1997) (applying *Zenith*/Clayton Act accrual rule in RICO context).

180. Note, however, that damages are only available for losses incurred during the four years immediately preceding the filing of suit unless the plaintiff proves fraudulent concealment or some other basis for tolling the running of the statute of limitations.

181. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 464–465 (1978) ("Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment."); *In re Brand Name Prescription Drugs Litigation*, 123 F.3d 599, 616 (7th Cir. 1997) ("To terminate one's liability for the continuing illegal acts of a conspiracy that one had joined, a withdrawing member must either report the conspiracy to the authorities or announce his withdrawal to his coconspirators.").

(2) the private suit is brought within one year of the end of the government action.[182]

[2] The Fraudulent Concealment Toll

The fraudulent concealment toll recognizes that fraud is effective only if the victim is unaware that it has occurred and that it may be unfair to hold such victims to strict statutory time limitations.[183] Courts will therefore toll the statute of limitations in fraud cases—which include bid-rigging and similar antitrust conspiracies—but only if the plaintiff proves that: (1) the defendant wrongfully concealed the violation; (2) through no fault of its own, the plaintiff failed to timely discover the basis of his or her claim; and (3) the plaintiff exercised due diligence in protecting his or her own interests. Mere silence by the defendant is not normally enough—the defendant must have taken affirmative steps to conceal the violation, although some courts have found certain conspiracies to be "self-concealing."[184]

[B] Issues and Defenses Relating to Jurisdiction and Venue

Section 12 of the Clayton Act allows an antitrust suit to be brought against a corporation, and process to be served, wherever in the United States it may be found or transacts business.[185] The most controversial issues relating to personal and subject matter jurisdiction arise in the context of the extraterritorial enforcement of the antitrust laws. Specifically, whether, and if so under what circumstances: (1) conduct that occurred wholly outside the United States may form the basis for a claim brought in the U.S. court system that an individual or business entity violated the United States antitrust laws, an issue commonly referred to as "extraterritoriality" or "the extraterritorial application of the U.S. antitrust laws;" and (2) a party that engaged in conduct

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182. 15 U.S.C. §16(i). This provision also states that government single damage actions brought under Section 4A of the Clayton Act do *not* trigger its toll. *See Zenith Radio Corp.*, 401 U.S. at 335–38 (toll allowed even though government had not named defendant as coconspirator since overall conspiracy alleged was "at least in part the same conspiracy as was the object of the Government's suit"); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 321–23 (1965) (tolling allowed where "both suits set up substantially the same claims"); *Leh v. General Petroleum Corp.*, 382 U.S. 54, 65 (1965) (toll allowed even though private suit named fewer defendants and covered longer time and narrower geographic area).
183. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974).
184. *Id.* Courts may also impose tolls on similarly equitable grounds such as duress or inducement.
185. 15 U.S.C. §22.

outside the United States that allegedly violated the antitrust laws will be subject to personal jurisdiction in United States courts.[186]

[1] Extraterritorial Application of the U.S. Antitrust Laws

Questions regarding the extraterritorial application of the United States antitrust laws—i.e., the ability of the antitrust laws to reach and punish or penalize actors or conduct located outside the United States—are of obvious interest to international competition law practitioners. In 1982, Congress passed the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) to help clarify the extraterritorial reach of the Sherman Act. It states that the Sherman Act shall not apply to trade or commerce with foreign nations unless the conduct has "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce, U.S. import commerce, or U.S. export commerce, and the conduct gives rise to a claim under Sections 1–7 of the Sherman Act.[187]

In *Hartford Fire Insurance Co. v. United States*,[188] the Supreme Court allowed private and state attorney general antitrust claims to proceed in United States courts against three London insurance companies even though the activity complained of did not take place in the United States. The Court stated that "it is well-established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[189]

The Court's most recent pronouncement in the area came in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*[190] There, the plaintiff was a foreign corporation that claimed to have been injured as a result of having purchased products abroad whose prices had been fixed by a foreign price-fixing conspiracy. The U.S. Court of Appeals for the D.C. Circuit ruled that, under the FTAIA,

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186. *See Department of Justice Guidelines on International Operations* (1988). As a general rule issues of personal jurisdiction are governed by standard long-arm analysis set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).
187. 15 U.S.C. §6a. *See, e.g., Ferromin International Trade Corp. v. UCAR International, Inc.*, 153 F. Supp. 2d 700 (E.D. Pa. 2001) (citing FTAIA to bar suits by foreign buyers against U.S. sellers if purchases made with no U.S. connections).
188. 509 U.S. 764 (1993).
189. *Id.* at 796 (citing *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986)); *see also Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (no defense that conspiracy to restrain U.S. trade occurred partially outside the United States); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) (L. Hand, J.); *see also United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (applying *Hartford Fire* in criminal context to price-fixing conspiracy conducted entirely in Japan), *cert. denied*, 522 U.S. 1044 (1998).
190. 542 U.S. 155 (2004).

the plaintiff could sue in the U.S. courts simply because the conspiracy also harmed U.S. purchasers. Because the D.C. court's decision was in conflict with a decision rendered in another federal court of appeal, the Supreme Court granted *certiorari*.[191]

The Supreme Court overturned the D.C. appellate court's decision. It sided with the DOJ and several foreign governments and held that the FTAIA did not permit the foreign plaintiffs to sue in the U.S. The Court noted that the "FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets."[192]

Unfortunately, the Court did not completely clarify the situation for potential foreign litigants. Instead, it remanded the case to the D.C. court to decide (1) whether the plaintiffs had preserved their argument that the foreign harm occurred only because the conspiracy also included the United States, and (2) if so, whether that fact would be sufficient to confer jurisdiction in the United States under the FTAIA.[193] The D.C. court subsequently found that the plaintiff had successfully preserved and pleaded the claim but decided that there was no subject matter jurisdiction under the FTAIA.[194] The court held that the FTAIA's requirement that the acts "give[] rise to" harm in the United States "indicates a direct causal relationship, that is proximate causation, and is not satisfied by the mere but-for nexus" pled by the plaintiffs.[195]

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191. *Compare Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 427 (5th Cir. 2001) (foreigner's suit not permitted because foreign injury independent of any injury to U.S. competition) with *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 400 (2d Cir. 2002) (foreigner's suit permitted even though foreign injury was independent of U.S. competitive harm). *See also Rotec Industries v. Mitsubishi Corp.*, 348 F.3d 1116 (9th Cir. 2003)(court found it had no subject matter jurisdiction over a Robinson-Patman Act §2(a) claim because the alleged kickbacks took place entirely outside of the U.S.).
192. *Empagran*, 542 U.S. at 161.
193. *Id.* at 175.
194. *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 417 F.3d 1267, 1269 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1092 (2005).
195. *Id.* at 1271. Interestingly, the Court of Appeals for the Second Circuit, which had found in favor of jurisdiction in the *Kruman v. Christie's* case, came out the other way in a case that was remanded to it for proceedings in light of the Supreme Court's ruling in *Empagran*. *See Sniado v. Bank Austria AG*, No. 02-7012 (2d Cir. Aug. 5, 2004). Plaintiffs in the case had filed a class action charging several European banks with violations of Section 1 of the Sherman Act by fixing foreign exchange rates. The court not only dismissed the action based on Empagran but found against the plaintiff in his attempt to invoke the question left open by the Supreme Court, *i.e.*, from arguing that the European conspiracy was dependent upon the existence of a U.S. conspiracy as well. The court found that the plaintiff's amended complaint "did not allege that currency exchange fees in the United States reached supra-competitive

[2] Personal Jurisdiction

The question under what circumstances will U.S. courts exercise personal jurisdiction over non-U.S. antitrust defendants is also frequently litigated, with the motion to dismiss for lack of personal jurisdiction often used by counsel defending non-U.S. parties sued in the U.S. courts. The basic test for determining personal jurisdiction is one of due process, i.e., whether the defendant has sufficient contacts with the jurisdiction in which the court sits that forcing the defendant to defend itself there would not violate "traditional notions of fair play and substantial justice."[196]

Application of this due process standard can vary from jurisdiction to jurisdiction and a full exploration of the subject is beyond the scope of this book.[197] As a general rule, however, most courts will find due process satisfied and exercise jurisdiction if the defendant: (1) can be characterized as residing in or doing business in the state in which the court sits (often called *general jurisdiction*); (2) engaged in significant acts within the state that are related to the matter for which it is being sued (often called *specific jurisdiction*); or (3) engaged in significant acts outside the jurisdiction that were directed at plaintiff in the jurisdiction and harmed plaintiff there (another form of specific jurisdiction).

As noted above, Section 12 of the Clayton Act allows an antitrust suit to be brought against a corporation, and process to be served, wherever it may be found or transacts business.[198] Section 12 does not automatically confer personal jurisdiction over all corporations sued under the antitrust laws—the plaintiff must still demonstrate that the exercise of jurisdiction would satisfy due process. But many courts have interpreted this provision to mean that personal jurisdiction over a *corporate* antitrust defendant may be based on its contacts with the United States as a whole rather than on its contacts with the state in which it has been sued.[199]

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levels, nor that but for the European conspiracy's effect on United States commerce, he was injured in Europe."

196. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Hanson v. Denckla*, 357 U.S. 235 (1958).

197. For the most part, issues of personal jurisdiction are resolved by looking to the law of the state in which the court sits, whether the court be a state or a federal court. Most states have passed long-arm statutes that say they will exercise jurisdiction to the full extent authorized by due process. For more on personal jurisdiction, a good starting point is Wright and Miller, Federal Practice and Procedure §§1061–1075 (Third Edition, West Group 2002).

198. 15 U.S.C. §22.

199. *See, e.g.*, *Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 848 (11th Cir. 1988); *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 846 F. Supp. 374, 379 n.8 (E.D. Pa. 1994). The same rule has been applied in other areas in which federal law

The national contacts rule has not been applied to individual—as opposed to corporate—antitrust defendants.[200] But a 1993 amendment to the Federal Rules of Civil Procedure (Fed. R. Civ. P.) does state that so long as due process is satisfied and the claim is one brought under federal law, then service of process on a foreign defendant is sufficient "to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state."[201] Some courts have interpreted this provision as authorizing the use of a national contacts test to satisfy due process for foreign individuals as well as corporations (assuming, of course, that the other prerequisites of the rule are met).[202]

[C] The State Action (or *Parker v. Brown*) Defense

The state action doctrine provides a partial or complete defense (immunity) for antitrust defendants who can demonstrate that their actions were taken in response to state law or administrative direction.[203] There are two prerequisites: (1) the challenged restraint must have been "clearly articulated and affirmatively expressed as state policy"; and (2) "the policy must be 'actively supervised' by the State itself."[204]

The Supreme Court first articulated this doctrine in *Parker v. Brown*.[205] It subsequently held that the immunity does not apply directly to local

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provides for nationwide service of process is provided. *See, e.g, Securities Investors Protection Corp. v. Vigman*, 764 F.2d 1309 (9th Cir. 1985).

200. *See, e.g., Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 848 (11th Cir. 1988); *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 846 F. Supp. 374, 379 n.8 (E.D. Pa. 1994).

201. F. R. Civ. P. 4(k)(2).

202. *See, e.g., ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001); *BP Chems. Ltd. v. Formosa Chem. Fibre Corp.*, 229 F.3d 254, 258 (3d. Cir. 2000); *United States v. Swiss Am. Bank*, 191 F.3d 30, 42 (1999).

203. In addition, there are numerous partial and complete immunities from the antitrust laws available to regulated industries.

204. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (citing *Bates v. State Bar*, 433 U.S. 350, 359–363 (1977) (state bar rule limiting lawyer advertising immune because enforced by state supreme court)).

205. 317 U.S. 341 (1943). The Supreme Court issued a series of decisions in this area between 1975 and 1985 that are somewhat difficult to reconcile. In addition to the decisions cited elsewhere in this section, these included: *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 55–66 (1985) (immunity for railroad's collective ratemaking); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55 (1982) (no immunity for city ordinance imposing moratorium on cable operator's expansion); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102–106 (1980) (no immunity for California statute that enforced resale price maintenance on wine retailers); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109–111 (1978) (program requiring state approval of location of new car dealerships immune); *Cantor v. Detroit Edison Co.*, 428 U.S.

governments acting strictly on their own, i.e., without direction from the state.[206] In *City of Columbia v. Omni Outdoor Advertising, Inc.*,[207] the Court held that a municipality will be entitled to *Parker v. Brown* immunity only if it acts with authority granted by the state and if "suppression of competition is the 'foreseeable result'" of the state grant of authority.[208]

The Local Government Antitrust Act of 1984 (LGAA)[209] immunized local governments and local government officials and employees acting in their official capacities from liability for damages under the antitrust laws.[210] It also immunized anyone who acted at the direction of any local government official or employee acting in his official capacity.[211] The courts have held that this statute does not prohibit injunction actions or forbid the award of attorneys fees to plaintiffs who prevail in such actions.[212]

Most recently, in *United States Postal Service v. Flamingo Industries (USA) Ltd.*,[213] the Supreme Court was asked to decide whether the United States Postal Service (USPS), a government-created and owned entity, could be subject to private antitrust suit. The plaintiff, a mail sack producer, claimed that USPS had sought to monopolize mail sack production. Though not basing its decision on the state action immunity doctrine, the Supreme Court nonetheless held that the USPS could not be sued. It reasoned that because the service was a creation of the executive branch of the U.S. government, which was not

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579, 592–598 (1976) (no immunity for regulated utility's provision of free light bulbs to customers though done pursuant to state-approved tariff); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791–792 (1975) (no immunity for county bar association minimum fee schedules even though state bar enforced same).

206. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985) (immunity for city monopoly of sewage treatment as an authorized implementation of state policy).
207. 499 U.S. 365 (1991).
208. *Id.* at 370–373. The Court rejected an argument that there is, or should be, an exception to the state action doctrine when politicians or political entities conspire with private actors to restrain trade: "Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a 'conspiracy' charge." *Id.* at 375.
209. 15 U.S.C. §§34–36.
210. 15 U.S.C. §35.
211. 15 U.S.C. §36.
212. *See, e.g., Lancaster County Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 n.14 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992); *Wicker v. Union County Gen. Hosp.*, 673 F. Supp. 177, 186 (N.D. Miss. 1987)(equitable claims against a county hospital allowed to proceed though damage claims barred); *Montauk-Caribbean Airways, Inc. v. Hope*, 1985-2 Trade Cas. (CCH) ¶ 66,660, at 63,104 (E.D.N.Y. 1985)(equitable claim against public officials could proceed), *aff'd on other grounds*, 784 F.2d 91 (2d Cir.), *cert. denied*, 479 U.S. 872 (1986).
213. 540 U.S. 736 (2004).

a "person" within the meaning of the Sherman Act, the service was not a "person" either and thus was not amenable to suit under the act.[214]

[D] The *Noerr-Pennington* or Political Action Defense

The *Noerr-Pennington*, or political action, doctrine provides a partial or complete defense to antitrust claims for collective or unilateral attempts to obtain legislative action, administrative action or rulings, or legal decisions.[215] The evolution of the doctrine began with *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*,[216] which held that collective legislative lobbying by competitors was immune from antitrust attack.[217] The Court did, however, point out that there would be a "sham" exception for "what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[218]

In *United Mine Workers v. Pennington*,[219] the Court found that the political action doctrine immunity applied to collective attempts to influence administrative processes.[220] In *California Motor Transport Co. v. Trucking Unlimited*,[221] the Court placed attempts to obtain redress through the courts under the doctrine's protection, while holding that the plaintiffs' complaint alleged facts that, if proved, could overcome the defendants' claim to immunity.[222] And in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (*PRE*),[223] the Court provided a more detailed explanation of the sham exception. It stated that *Noerr* immunity does not apply to acts that are: (1) objectively baseless; and (2) constitute "an attempt to interfere *directly* with the business relationships of a competitor, through the use [of] the governmental

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214. *Id.* at 748.
215. One useful source of information about the doctrine and about the federal enforcement agencies' view of its applicability is the FTC Staff Report issued in November 2006 entitled *Enforcement Perspectives on the Noerr-Pennington Doctrine. Available at* www.ftc.gov.
216. 365 U.S. 127 (1961).
217. *Id.* at 142–144.
218. *Id.* at 144.
219. 381 U.S. 657 (1965).
220. *Id.* at 670 ("Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.").
221. 404 U.S. 508 (1972).
222. *Id.* at 509–516. The alleged facts included claims that the defendant trucking companies had publicly threatened to challenge all attempts to enter the truck transport business regardless of merit.
223. 508 U.S. 49 (1993). The government action defense is often raised by plaintiffs/counterclaim defendants in patent infringement litigation because defendants accused of infringement frequently counterclaim that the infringement suit is really part of an attempt to maintain or obtain a monopoly. *See* §4.06[C], below.

process—as opposed to the *outcome* of that process as an anticompetitive weapon."[224]

One final point on the *Noerr* doctrine and the sham exception of interest to lawyers counseling foreign clients with interests in the United States: U.S. courts have recognized that the sham exception may apply to allow antitrust suits against U.S. competitors who have improperly invoked import relief laws, such as those involving anti-dumping, solely to harass foreign competitors.[225]

[E] Unclean Hands or *In Pari Delicto*

At one time, it was considered a valid defense that the plaintiff in an antitrust suit had participated in the antitrust violation that formed the basis for its action. In *Perma Life Mufflers Inc. v. International Parts Corp.*,[226] however, the Court held that plaintiff franchisees who actually participated in the illegal scheme with their franchisor could still sue the franchisor.[227] The Court observed that "once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it . . . the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."[228]

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224. *Id.* at 60–61 ((*quoting Noerr Motor Freight*, 365 U.S. at 144 and *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991)); *see also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421–25 (1990) (denying political action immunity to trial lawyers' group refusal to represent impoverished defendants); *see also* §4.06[C], below.

    It is worth noting that in *City of Columbia*, the Court refused to allow an exception to the political action doctrine for instances when government officials conspire with a private party to employ government action as a means of stifling competition. 499 U.S. at 382–384. *See also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (Noerr-Pennington defense rejected and member of a private fire safety association found to violate Section 1 when it persuaded the association to adopt a code that favored its products over those of its competitors).

225. *See, e.g.*, *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168 (D. Del. 1979); *Nike, Inc. v. Rubber Manufacturers Association, Inc.*, 509 F. Supp. 912 (S.D.N.Y. 1981); *Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 650 F.2d 9 (2d. Cir. 1981); *U.S. v. Singer Manufacturing Corp.*, 374 U.S. 174 (1963). *See also DOJ/FTC Antitrust Enforcement Guidelines for International Operations* (1995), at S-1, *et seq.*

226. 392 U.S. 134 (1968).

227. *Id.* at 139–140.

228. *Id. See* §3.06[A][4], above, for additional discussion of this doctrine.

[F] Implied Immunities

Despite voicing a reluctance to do so,[229] the Supreme Court has, in some instances, found that antitrust enforcement would be inconsistent with a pervasive regulatory scheme and has thus declared that activity governed by that regulatory scheme is "impliedly" immune from antitrust liability.[230] The Court's most recent decision in this area came in 2007 in *Credit Suisse Securities (USA) LLC v. Billing*.[231] There, the Supreme Court held that the securities laws "implicitly preclude[ed]" an antitrust action by investors against several investment banks claiming that the banks' underwriting practices violated the antitrust laws.

The plaintiff investors had alleged that the defendant underwriters engaged in anticompetitive practices when issuing new securities by requiring investors to commit to various anticompetitive conditions before purchase. The court stated that antitrust law would not apply if its application was incompatible with existing securities law and provided four criteria to assess incompatibility: (1) whether the Securities and Exchange Commission (SEC) had regulatory authority under the securities laws to address the subject activity; (2) whether the SEC used that authority to regulate the subject activity; (3) whether there was a risk that, if both antitrust and securities laws applied to the activity, "conflicting guidance, requirements, duties and privileges" would result; and (4) whether the practices potentially affected by the conflict "lie squarely within an area of financial market activity that the securities law seeks to regulate."[232]

The Court found that the answer to all but the third was clearly *yes*, leaving only the question of the risk of conflicts in dispute. The Court then stated that there was a significant risk of injury to the securities markets if antitrust law was applied, noting several factors. The Court stated that the complexity of securities law creates a "fine line" between conduct that is permitted and forbidden, and that expertise in securities law is needed to identify that line. The Court also stated that evidence tending to show unlawful activity under antitrust laws and evidence tending to show lawful activity under the securities laws may overlap, causing inconsistent results. The threat of injury would have a chilling effect on underwriting activity, since underwriters would have

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229. *See, e.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350–51 (1963) (implied immunity "strongly disfavored").

230. *See, e.g., Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) (finding stock exchange brokerage commission rate fixing immune because of SEC regulation); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (immunity to be implied only when absolutely necessary and then "only to the minimum extent necessary.").

231. 551 U.S. 264 (2007).

232. *Id.* at 275–76.

to behave in ways that comply with both securities and antitrust laws to avoid liability.[233]

The Court observed that the "enforcement-related need" for antitrust lawsuits in this context was small because of the SEC's active enforcement of underwriters' conduct, the investor's ability to bring lawsuits and receive damages under the securities law, and the SEC's consideration of competition-related concerns in the creation of SEC policy, rules, and regulations.[234]

§3.09 Treatment of Joint Ventures Under Section 1

The term *joint venture* is shorthand for a fluid and virtually limitless concept—all of the ways in which two or more companies or individuals can cooperate to accomplish their mutual business goals. Although the possible permutations are endless, most joint ventures involve cooperation in one or more of the following four categories: research and development, production, distribution, and sales and marketing.[235] As a rule, joint ventures involving research and development or production are less likely to raise antitrust problems. The courts and enforcement authorities will look with greater skepticism at those involving sales and marketing alone, especially those in which the parties give up pricing independence, i.e., they agree on how or what to price their products.

[A] Joint Ventures as Mergers

Joint ventures that encompass all or several of the four categories described above normally are treated as the equivalents of mergers and analyzed as such under Section 7 of the Clayton Act.[236] If the joint venture involves an exchange of assets or the formation of a new corporation and the contribution of assets to it, the parties may be required to file Hart-Scott-Rodino Premerger Notification and Report Forms before undertaking the venture.[237] If so, they

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233. *See id*. at 283.
234. *Id.* at 283.
235. In 2000, the DOJ and FTC issued their *Antitrust Guidelines for Collaborations Among Competitors*, often referred to as the Joint Venture Guidelines. These guidelines contain a useful discussion of the legal treatment of joint ventures. *See also* §3.09[E], above.
236. *See, e.g.*, *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 170 (1964).
237. *See* Chapter 6 *below* for an explanation of how to determine whether the parties to a proposed joint venture, or merger or acquisition, must submit a *Hart-Scott-Rodino Notification*.

must generally wait at least thirty days after filing before commencing the venture. This waiting period allows the federal antitrust enforcement authorities time to conduct their preliminary analysis. The analysis and the pre-merger review process are discussed in greater detail in Chapters 5 and 6.

[B] Rule-of-Reason Analysis

All other joint ventures are analyzed primarily under Section 1 of the Sherman Act using the rule of reason, although they may be challenged under Section 2 as well. The rule-of-reason analysis is described above.[238] Briefly, a determination must be made whether the venture can lead to the exercise of market power, and if so whether its anticompetitive aspects outweigh any pro-competitive benefits.

As applied to joint ventures, three additional factors have emerged as crucial to determining legality, especially where the venture may involve cooperation on price, production, or customers. These factors are openness, increased efficiency, and sharing of risk. In the absence of these factors, joint ventures that involve cooperation on sales and marketing and on prices to be charged are viewed as no, or little, more than excuses to collude on prices, limit output, or allocate customers or markets. Known as *naked restraints*, such joint ventures are likely to be treated as per se illegal.[239]

[1] Openness

If two or more parties are jointly marketing and/or pricing their products, it is crucial that they do so openly if they hope to survive antitrust challenge. In other words, the parties should not continue to hold themselves out to their customers as independent competitors. If they do, the joint venture begins to take on the characteristics of a per se illegal price-fixing conspiracy—i.e., an attempt to maintain the appearance of competition while the participants are in fact secretly agreeing on prices.

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238. *See* §3.04[B], above.

239. *See Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) (*per se* treatment appropriate where only purpose and effect of the *joint venture* is to limit competition).

Other important Supreme Court decisions involving joint ventures include: *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (finding that NCAA television plan limiting the individual televised marketing of member schools' football games was illegal using rule-of-reason analysis); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) (finding a maximum fee schedule *per se* illegal and noting the absence both of shared risk and of any efficiencies created by the plan); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) (holding that blanket license system should be analyzed under rule of reason, not the per se rule).

[2] Shared Risk

There must also be an element of shared risk to the venture. Once again, this element helps distinguish a legitimate joint venture from a surreptitious agreement to fix prices or restrict output. In the case of the latter, there is no risk shared (other than the risk of going to jail, which does not count). Indeed, the whole purpose of such an arrangement is to eliminate the risk inherent in competition.

[3] Increased Efficiency

Finally, the joint venture must justify itself as improving efficiency for the partners. This is simply another way of saying that the venture's pro-competitive aspects must outweigh its harm to competition—the classic rule-of-reason balancing analysis. Without this, there is no reason to allow the partners to cooperate in ways that may otherwise harm competition. Improved efficiency as a result of cooperation could come in any number of areas, such as economies of scale, integration of production facilities, plant specialization, and transportation costs. When analyzing a joint venture, or any other agreement under the rule of reason, one important consideration is whether it is the least restrictive method of accomplishing the parties' goals.

In 2006, the Supreme Court shed light on how to analyze joint ventures with its decision in *Texaco, Inc. v. Dagher*.[240] Reversing a ruling by the United States Court of Appeals for the Ninth Circuit, the Supreme Court held that decisions by a bona fide, efficiency-enhancing joint venture regarding the pricing of its own products cannot, as a matter of law, constitute per se unlawful price fixing—even if, as there, the venture continued to sell its products under two brand names.[241]

The Texaco case involved a joint venture formed by Texaco and Shell that combined the companies' refining and marketing operations in the western United States. Although the venture, named Equilon, continued to market under both the Texaco and Shell brand names, it produced both brands at the same refineries, shipped both brands through the same pipelines, and, most importantly, sold both brands to gas stations at the same price. This combination reduced the two companies' costs by $800 million a year.[242]

Gas station owners filed a class action in California against Shell and Texaco, alleging that they fixed the prices for the two brands of gasoline, thereby violating Section 1 of the Sherman Act. The plaintiffs charged only a violation of the per se rule. They made no claim that the arrangement violated

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240. 547 U.S. 1 (2006).
241. *Id.* at 6–8.
242. *Id.* at 6 n.1.

the rule of reason, thereby foregoing any opportunity to show that specific conditions in the gasoline market caused the joint pricing of the Shell and Texaco brands to injure consumers.[243]

The Supreme Court reasoned that that per se rule did not apply because Texaco and Shell no longer competed with one another in the gasoline market. Rather, they participated in that market only through a joint venture that operated substantially more efficiently than they had separately. "In other words," the Court explained, "the pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities." "We see no reason," the Court continued, "to treat Equilon differently just because it chose to sell gasoline under two district brands at a single price."[244]

The Court also rejected the appellate court's use of the ancillary restraints doctrine. The Court stated that the doctrine had "no application here, where the business practice being challenged involves the core activity of the joint venture itself—namely, the pricing of the very goods produced and sold by Equilon."[245]

[C] Collateral Restraints

The term *collateral restraints* refers to the common practice of joint venturers of imposing restrictions on each other that are related but not central to the basic business rationale for their cooperation. Such restraints are judged under the rule of reason and are generally upheld if reasonably related to the goals of a legitimate joint venture. If not, they too may be viewed as naked restraints that violate the antitrust laws.

[D] Exclusion from the Joint Venture and the Essential Facilities Doctrine

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co. (Northwest Stationers)*,[246] the Supreme Court considered the issue of under what circumstances the expulsion of a competitor from a joint venture would give rise to a claim. Holding that the expulsion did not constitute a per se illegal violation of Section 1 of the Sherman Act, the Court set forth several

243. *Id.* at 4.
244. *Id.* at 6–7.
245. *Id.* at 7–8.
246. 472 U.S. 284 (1985).

factors to consider: the importance of access for effective competition; the extent of the venture's market power; the availability of alternative means to obtain the same end; and why access was denied.[247]

This holding was an outgrowth of the *essential facilities doctrine*, first enunciated by the Court in *United States v. Terminal Railroad Association*.[248] There, the Court found a Section 1 violation in a joint venture formed by several railroad companies to buy and run rail terminals. The joint venture denied nonmembers the ability to use the terminals. The Court based its decision on a finding that the nonmembers could not compete effectively without access to these essential facilities.[249]

[E] Federal Guidelines

Useful additional guidance for the analysis of joint ventures may be found in the FTC and DOJ's *Antitrust Guidelines for Collaborations Among Competitors*, commonly referred to as the *Joint Venture Guidelines*, and in the agencies' *Statements of Antitrust Enforcement Policy in Health Care*. Both documents provide descriptions of the analysis undertaken by government lawyers and economists when examining a joint venture for antitrust compliance.[250]

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247. *Id.* at 289–298 ("not all concerted refusals to deal should be accorded *per se* treatment and . . . this one should not").
248. 224 U.S. 383 (1912). *See* §4.02[B][2], below, for additional discussion of the essential facilities doctrine, which is most often invoked in the context of a Sherman Act, Section 2 monopolization claim.
249. *Id.* at 397–405. *See also Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407–10 (2004) (finding no antitrust violation in Verizon's failure to obey Telecommunication Act provisions requiring it to provide interconnection access to competitor); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (requiring owner of three Aspen ski areas to reinstate owner of the fourth in joint marketing program); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Associated Press v. United States*, 326 U.S. 1 (1945); *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208–1211 (9th Cir 1997), *cert. denied*, 523 U.S. 1094 (1998) (monopolist can refuse to deal with a competitor unless essential facilities doctrine requires that it do so); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (requiring AT&T to allow MCI to connect its telephone lines to AT&T's national network).
250. *See* § 5.03 below for further discussion of the Joint Venture Guidelines.

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CHAPTER 4

Monopolization and Attempted Monopolization—Sherman Act, Section 2

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§4.01 Introduction

Unlike Section 1 of the Sherman Antitrust Act (Sherman Act), which focuses on agreements between multiple parties, Section 2 focuses primarily on unilateral actions, i.e., monopolization and attempts to monopolize.[1] Section 2 also outlaws conspiracies to monopolize.[2] Like Section 1, Section 2 has an analogue in the European Community (EC) Treaty—in this case Article 82 and its prohibition against the abuse of a dominant position.

Section 2 reads:

> 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, and, on conviction thereof, shall be punished by a fine not exceeding [one] million dollars if a corporation, or, if any other person, [one] hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[3]

This chapter examines the elements required for a private or government plaintiff to prove claims for monopolization, attempted monopolization, and conspiracy to monopolize. It also discusses the conflicts between the antitrust laws' rules against monopolization and the laws providing for protection of intellectual property, especially the patent laws' award of a limited monopoly for innovation.

§4.02 The Elements of a Monopolization Claim

The courts have set forth two elements that a plaintiff must prove to prevail on a claim for monopolization: (1) possession of monopoly power in a relevant market; and (2) willful acquisition and maintenance of that power

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1. As noted at the beginning of Chapter 3, the United States (U.S.) Supreme Court (the Court) has stated that "concerted" activity subject to Section 1 is judged more sternly than unilateral activity subject to Section 2. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–69 (1984). As the remainder of this chapter demonstrates, however, this should not necessarily be taken as an invitation to test the limits of Section 2.
2. There is considerable overlap between Section 1's prohibition on agreements in restraint of trade and Section 2's on conspiracies to monopolize. It is thus not unusual to find plaintiffs asserting claims under both sections using the same facts.
3. 15 U.S.C. §2. As discussed elsewhere, although Section 2 and other antitrust laws provide criminal sanctions, the federal antitrust enforcement agencies confine their use of criminal sanctions to cases in which the defendants are suspected of having engaged in hard-core, intentional violations of Section 1. *See* §§3.01, 8.02.

through improper means, i.e., as opposed to having acquired and maintained monopoly power "through growth or development as a consequence of a superior product, business acumen, or historic accident."[4] Put another way, the possession of monopoly power does not, in and of itself, constitute monopolization, i.e., it is not alone illegal.

[A] Monopoly Power in a Relevant Market

The United States Supreme Court has defined monopoly power as "the power to control market prices or exclude competition."[5] Such power can exist only in the context of a relevant market. A *relevant market* has two components: a product, consisting of goods or services (the product market) and a location (the geographic market).[6] Definition of the relevant market is critical. The outcome of litigation frequently turns on how the market is defined. As a general but by no means universal rule, the broader the market, the less likely it is that the defendant will be found to have monopoly power.[7]

[1] The Product Market

The key to determining the extent of a product market is substitutability or interchangeability. A product market is not necessarily limited to a single product or service. Instead, it includes all products that buyers may reasonably substitute for the specific product or service in question, i.e., all "products that have reasonable interchangeability for the purposes for which they are produced, namely, price, use, and qualities considered."[8] Because the focus is on substitutability from the buyers' point of view, this is often referred to as *demand side substitutability*.

One way to determine demand side substitutability is an analysis of the *cross-elasticity of demand*. The Supreme Court has defined demand cross-elasticity as "the responsiveness of the sales of one product to price changes

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4. *United States v. Grinnell Corp.,* 384 U.S. 563, 570–71 (1966); *Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451, 481 (1992).
5. *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 391 (1956); *see also American Tobacco Co. v. United States,* 321 U.S. 781, 811 (1946).
6. *Brown Shoe v. United States,* 370 U.S. 294, 336 (1962); *E.I. du Pont de Nemours,* 351 U.S. at 394–404. *See Eastman Kodak,* 504 U.S. 451 (aftermarket for service or replacement parts for a single company's product(s) may constitute a product market). *See also* DOJ and FTC *1992 Horizontal Merger Guidelines*.
7. Market definition is also required for rule-of-reason analysis under Section 1 (*see* §3.04[B]) and merger analysis under Section 7 of the Clayton Act (*see* § §5.02 and 5.04 below for a detailed discussion of market definition in the merger context).
8. *Brown Shoe,* 370 U.S. at 324–25; *E.I. du Pont de Nemours,* 351 U.S. at 394–404. *See also Times-Picayune Publ'g Co. v. United States,* 345 U.S. 594 (1953).

of the other."[9] If a slight change in the price of one product will cause buyers to shift their purchases to other products, demand will be deemed highly elastic and the products will be deemed substitutable and parts of the same product market. Conversely, if customers do not switch from a product even when confronted with a major increase in its price, demand will be considered inelastic, and the product alone may be found to constitute a relevant product market.

Courts may also examine *supply-side substitutability* in determining the relevant product market. Supply-side analysis asks whether, and at what price level, other suppliers can and will switch productive capacity to a product if its price rises. Similarly, courts may look to whether, and at what price level, foreign companies that already make the product but do not now export it to the United States will begin to do so if prices rise.

A related concept is *barriers to entry*. This examines whether barriers, such as tariffs or other trade barriers, patents or trade secrets, technological issues, or problems in obtaining distribution, will prevent competing sellers from entering the product market in response to a price increase. At least in theory, high cost alone is not considered a barrier to entry.

Courts may also look for the existence of relevant *submarkets* within larger relevant markets.[10] Because a submarket must have all the characteristics of a market to be legally significant, the term is often the source of confusion and adds little to the analysis. At the other end of the spectrum, courts will also recognize *cluster markets*, markets consisting of a collection of related goods and services.[11] The Supreme Court has also held that there may be a market (or aftermarket) consisting of the sales of replacement parts, consumables, and/or service or maintenance for the products of a single manufacturer.[12]

In *Kodak*, plaintiffs were independent companies that offered service for Kodak copiers.[13] They claimed that Kodak was monopolizing and attempting to monopolize the market for service for Kodak copiers, in part by tying copier service to the purchase of Kodak-brand parts.[14] The Supreme Court held that Kodak could be liable for monopolizing the *aftermarkets* consisting of parts or service for Kodak-made copiers and/or for tying if the plaintiffs could prove that owners of Kodak copiers: (1) were "locked-into" keeping

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9. *Brown Shoe,* 370 U.S. at 324–25; *E.I. du Pont de Nemours,* 351 U.S. at 400.
10. *E.g.*, *Brown Shoe,* 370 U.S. at 325.
11. *E.g.*, *Grinnell Corp.,* 384 U.S. at 572 (cluster market consisting of fire and burglary protection services); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 356–57 (1963) (banking services as cluster market); *FTC v. Staples, Inc.,* 970 F. Supp. 1066, 1073 (D.D.C. 1997) (finding product market consisting of bundle of products typically purchased from office supply superstores).
12. *Eastman Kodak,* 504 U.S. at 481–82.
13. *Id.* at 455.
14. *Id.* at 456.

their machines because of high switching costs and the copiers' long life-spans and; (2) had not, at the time they purchased the machines, been able accurately to predict the "life-cycle cost" of owning the machines because of "high information costs," *i.e.,* a lack of accurate information about the cost of operating and maintaining the machines over their likely useful lives.[15] The Court rejected Kodak's argument that there could never be a separate aftermarket because competition in the aftermarket would always be disciplined by competition in the market for the "primary" product, *i.e.,* copiers.[16]

[2] The Geographic Market

The relevant geographic market is the area in which the sellers sell the product or service in question and in which buyers realistically purchase it.[17] The relevant geographic market may be the United States as a whole or it may be an area as small as a single state, metropolitan area, or even part of a city.[18] The geographic market selected must, therefore, both "correspond to the commercial realities" of the industry and be economically significant.

Factors that will be used to determine the relevant geographic market include cross-elasticities of supply and demand, location of customers, distribution patterns, shipping costs, the scope of supply contracts, and whether, and how far, customers will travel to obtain the product or service.

[3] Monopoly Power

Monopoly power is "the power to control market prices or exclude competition."[19] The market power that must be shown to sustain a Section 2

15. *Id.* at 473–87.
16. *Id. See, e.g., Newcal Indus. v. Ikon Office Solutions,* 513 F.3d 1038 (9th Cir. 2008), *cert. denied* 129 S. Ct. 2788 (2009) (upholding complaint asserting claim that defendant monopolized product market consisting of service for single manufacturer's products).
17. *Tampa Elec. Co. v. Nashville Coal Co.,* 365 U.S. 320, 327 (1961) (geographic market is "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies"); *see also United States v. Marine Bancorporation,* 418 U.S. 602, 619 (1974); *United States v. Phillipsburg Nat'l Bank & Trust Co.,* 399 U.S 350, 364–65 (1970); *United States v. Pabst Brewing Co.,* 384 U.S. 546, 559 (1966); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 359 (1963); *Standard Oil Co. v. United States,* 337 U.S. 293, 299 n.5 (1949).
18. *Brown Shoe,* 370 U.S. at 336–37. Although U.S. antitrust lawyers often talk of global markets and the extraterritorial application of the antitrust laws, the U.S. antitrust laws only outlaw acts that harm competition in the United States. *See* §3.08[B], above, for additional discussion of the extraterritorial application of the U.S. antitrust laws.
19. *E.I. du Pont de Nemours,* 351 U.S. at 391; *see also Fortner Enters., Inc. v. United States Steel Corp.,* 394 U.S. 495, 503 (1969) (market power defined as "the ability of a single seller to raise price and restrict output, for reduced output is the almost inevitable result of higher prices"); *Jefferson Parish Hosp. Dist. No. 2. v. Hyde,* 466 U.S. 2, 14 (1984) (market power [in tying

claim is greater than that needed for proof of a tying claim under Section 1.[20] Its existence may be proved either directly or with circumstantial evidence. Direct evidence may take the form of proof that the alleged monopolist actually controlled prices or excluded competitors.[21] Circumstantial evidence may include market share, which underscores the importance of proper market definition when prosecuting or defending a monopolization case, as well as other factors that have come to be seen as indicative of the presence of a monopoly.[22]

The question of what, if any, percentage market share will constitute *prima facie* proof of monopoly power has never been completely answered by the courts. It is almost certainly safe to say that proof that the accused monopolist has a share of 90 percent or more of a relevant product or geographic market will be sufficient to prove monopoly power.[23] At anything less than that, however, courts *may* be willing to listen to arguments that market share is either insufficient to grant dominance or a misleading indicator of control over the market.[24] For example, ease of entry or the availability of imports may mitigate a large U.S. market share. So may the structure of the market. One can argue, for example, that an accused's large share of a market in which

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context] defined as power "to force a purchaser to do something he would not do in a competitive market").

20. *Eastman Kodak Co,* 504 U.S. at 481 (citing *Fortner Enters., Inc. v. United States Steel Corp.,* 394 U.S. 495, 502–03 (1968)) ("Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market.").
21. *See, e.g., American Tobacco Co. v. United States,* 328 U.S. 781 (1946); *see also Eastman Kodak,* 504 U.S. at 479 n.29 (1992) (market power can be gained "through some natural and legal advantage such as patent, copyright, or business acumen").
22. *See, e.g.*, *NCAA v. Board of Regents of the Univ. of Oklahoma,* 468 U.S. 85, 112 (1984) ("'When a product is controlled by one interest, without substitutes available in the market, there is monopoly power'") (quoting *E.I. du Pont de Nemours,* 351 U.S. at 394).
23. *Eastman Kodak,* 504 U.S. at 481 (80 percent enough to support an inference of monopoly power); United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) (market share of 87 percent enough); *International Boxing Club of New York v. United States,* 358 U.S. 242, 249 (1959) (market share of 93 percent enough); *E.I. du Pont de Nemours,* 351 U.S. at 391, 404 (market share of 75 percent may be enough (*dictum*)); *United States v. Aluminum Co. of Am.,* 148 F.2d 416, 424 (2d Cir. 1945) (on certification from the U.S. Supreme Court) (90-percent market share enough, 60–64 percent doubtful, "certainly thirty-three percent is not").
24. *See, e.g.*, *United States v. General Dynamics Corp.,* 415 U.S. 486, 498–510 (1974) ("statistics concerning market share and concentration, while of great significance, [are] not conclusive indicators of anti-competitive effects") (citing *Brown Shoe*, 370 U.S. at 322 n.38 (1962) and *United States v. Continental Can Co.,* 378 U.S. 441, 458 (1964)); *see also Maris Distrib. Co. v. Anheuser-Busch, Inc.,* 302 F.3d 1207 (11th Cir. 2002) (manufacturer's market share in the market for its own products will not be imputed to the separate market for ownership interests in its distributorships); *Intergraph Corp. v. Intel Corp.,* 195 F.3d 1346 (Fed. Cir. 1999) (also refusing to impute market share from one market to another).

most or all of the sales take place through the submission of competitive bids, and there are several other eligible, active bidders just as likely as the accused to win the next bid, does not indicate the presence of monopoly power.

At the same time, and for similar reasons, a court may be willing to find monopoly power if the accused monopolist has far less than a 90-percent market share. Thus, high barriers to entry, lack of available import competition, an absence of strong competitors, regulatory hurdles, supra-normal profits, cost advantages, price leadership, or a high and long-stable market share may be used in an effort to prove the existence of market power.

At one time, the ownership of a patent was presumed to confer market power on the patent holder. But the Supreme Court eliminated that presumption with its 2006 decision in *Illinois Tool Works v. Independent Ink.*[25] There, the Court found that because a patent may not necessarily confer market power on the patent holder in all cases, plaintiffs in antitrust tying cases must prove that the patent holder has actual market power in the relevant market to qualify for per se treatment. The Supreme Court cited, among other reasons for its decision: (1) the absence of critical analysis underlying its earlier decisions that market power should be presumed; (2) later Congressional changes to the patent misuse laws that had formed the basis for the presumption; (3) extensive commentary by antitrust scholars and economists; and (4) guidelines of the DOJ and FTC that declined to make such a presumption.[26]

[B] Willfulness

Proof that an accused monopolist has monopoly power in a relevant market is not alone enough to make out a claim for monopolization. The claimant must also prove "willfulness," i.e., that the accused monopolist obtained or maintained its monopoly (market power) through unfair or predatory means or that it abused that power. This element thus seeks to balance the conflict between our dislike of monopolies and our desire to encourage the kind of successful competition that can lead to market power.[27] Though the antitrust laws will not punish those who earn their monopolies through effective business practices or through simple good luck, they do not tolerate those who cheat (sometimes called *predation*) to obtain a monopoly or to maintain it.

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[28] the Supreme Court stated that the defendant's intent is "relevant to the question whether the

25. 547 U.S. 28 (2006).
26. *Id.* at 33–46.
27. *See United States v. Grinnell Corp.,* 384 U.S. 563, 570–71 (1966) (distinguishing "willful acquisition or maintenance" of market power from "growth or development as a consequence of a superior product, business acumen, or historic accident").
28. 472 U.S. 585 (1985).

conduct" is "exclusionary" or "predatory."[29] The Court went on to state that whether conduct will be found to be predatory or exclusionary requires an examination of the conduct's effects not only on the complaining party, but on consumers and "whether it has impaired competition in an unnecessarily restrictive way."[30] The Court added: "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."[31]

Actions need not be illegal standing alone to qualify as predatory, although if they are, willfulness is more easily proved. Other examples of exclusionary conduct that may satisfy the willfulness element include: (1) predatory pricing,[32] predatory purchasing,[33] and price squeezes;[34] (2) refusals to deal with competitors[35] or to allow competitors to use facilities essential for effective

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29. *Id.* at 602. The Court distinguished the relevance of intent here to the requirement that a plaintiff alleging an attempt to monopolize prove specific intent to monopolize. *See Times-Picayune Publ'g Co. v. United States,* 345 U.S. 594, 626 (1953) ("While the completed offense of monopolization under §2 demands only a general intent to do the act . . . a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged.")
30. *Aspen Skiing,* 472 U.S. at 605.
31. *Id.* at 605 and n.33 (quoting Robert H. Bork, *The Antitrust Paradox* 138 (1978)). The Court also noted with approval the following quote from 3 Phillip E. Areeda & Turner, *Antitrust Law* 78 (1978): "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." *Id.* at n.32.
32. *See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 117 (1986); *Brooke Group v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 222 (1993).
33. *See, e.g., Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. Inc.,* 549 U.S. 312 (2007).
34. *See, e.g., Aluminum Co. of Am.,* 148 F.2d at 436–38 (2d Cir. 1945) (alleged price squeeze involved Alcoa, which had a monopoly in aluminum ingot and also processed ingot into sheet, overcharging competing processors so that they could not compete effectively with Alcoa); *see also Covad Communications Co. v. Bellsouth Corp.,* 374 F.3d 1044 (11th Cir. 2004) (price squeeze claim permitted to proceed though court relied on Trinko to dismiss plaintiffs' Section 2 claims based on the refusal to deal and essential facilities doctrines); *but see Pacific Bell Telephone Co. v. linkLine Communications, Inc.,* 129 S. Ct. 1109 (Feb. 25, 2009) (no price squeeze claim in an instance in which the monopolist had no duty to deal with its competitors at wholesale and its retail prices were not predatory) (see discussion below).
35. *E.g., Eastman Kodak,* 504 U.S. at 483 ("If Kodak adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated §2"); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 600–11 (1985) (holding that monopolist's refusal to engage in joint marketing effort was exclusionary conduct sufficient to support a finding of monopolization); *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 375 (1927); *but see Verizon Communications Inc. v. Law Offices of Curtis V. Trinko,* 540 U.S. 398 (2004) (stating that "Aspen Skiing is at or near the outer boundary of §liability," on refusal to deal and finding no illegal refusal to deal when incumbent local exchange carrier failed to fulfill interconnection obligations imposed by Telecommunications Act of 1996); *Covad Communications Company v. Bellsouth Corporation,* 374 F.3d 1044 (11th Cir. 2004) (court relied on *Trinko* to dismiss plaintiffs' Section 2 claims based on the refusal to deal).

competition;[36] (3) use of market power in one area as leverage to obtain or maintain market power in another;[37] (4) misuse of product information to gain a competitive advantage; (5) misuse of litigation to harm competitors;[38] and (6) customer restrictions designed to exclude competition, such as refusals to deal with disloyal customers or suppliers.[39]

[1] Predatory Pricing, Predatory Purchasing, and Price Squeezes

Predatory Pricing. Predatory pricing has long been used to support the willfulness element in monopolization claims. The theory is that a monopolist or would-be monopolist may sell its products at below-cost prices in an effort to drive competitors out of business. If this strategy works, the monopolist can then, in the ensuing absence of competition, charge higher prices and more than recoup any losses.[40]

Predatory pricing theory has been controversial since Congress first outlawed the practice in the Robinson-Patman Act in 1936. Although it continues to be recognized in the case law, many economists (and economics-minded antitrust lawyers and scholars) deride the theory. At the extreme, some have argued that predatory pricing should simply be ignored. They believe that it is irrational, that it is almost certain not to work, and that it is therefore quite rare. Moreover, they contend that lower prices, whatever the reason, should always be welcomed.[41]

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36. *See* §3.09[D] above.
37. *Berkey Photo Inc. v. Eastman Kodak Co.,* 603 F.2d 263, 275–276 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980); *United States v. Microsoft,* 87 F. Supp. 2d 30 (D.D.C. 2000). However, in *Verizon Communications Inc.,* 540 U.S. at 415, n.4, *rev'g* 305 F.3d 89 (2002), the Court held that there cannot be a monopoly leveraging claim without proof of a dangerous probability of success and overruled Berkey to the extent it suggested otherwise.
38. *See* §4.06[A] below, on the misuse of patent infringement litigation as a possible basis for a monopolization claim.
39. *See, e.g., Lorain Journal Co. v. United States,* 342 U.S. 143 (1951); *United States v. Dentsply International,* 399 F.3d 181 (3d Cir. 2005), *cert. denied,* 546 U.S. 1089 (2006); *United States v. Microsoft,* 253 F.3d 34 (D.C. Cir. 2001).
40. *See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 117 (1986) (predatory pricing defined as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run"); *see also Brooke Group v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 222 (1993) (quoting *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 455 (1993)) ("we interpret §2 of the Sherman Act to condemn predatory pricing when it poses 'a dangerous probability of actual monopolization'").
41. Similar arguments have long been advanced against the Robinson-Patman Act's prohibition of price-discrimination, *i.e.*, the practice of charging different prices to similarly situated customers. *See* Chapter 7 below.

The Supreme Court has so far refused to eliminate predatory pricing as a possible basis for a monopolization, or attempted monopolization, claim.[42] And, although it has formally reserved judgment on whether above-cost pricing can ever support a predatory pricing claim, the Court has strongly suggested that it will not.[43] The Court has not, however, told us *which* measure of cost to use to decide whether predation is present. Cost is a fluid concept, difficult to measure (especially if, as is common, the accused monopolist makes more than one product), and with many possible formulations, no one of which is completely satisfactory.

This has led to a long-running debate. On one side, it has been argued that predatory pricing claims, if they must be allowed, should be confined to instances in which the accused monopolist charged below marginal costs, i.e., below the additional costs incurred to produce one additional unit of output of the product. Although some courts have adopted this measure, others have rejected it. The argument against the use of marginal cost is that marginal costs, which, by definition, do not include allocations for fixed costs, do not even begin to approximate the average actual cost of producing an item. Also, because marginal costs are so low compared to average total costs in many industries, this theory would make proving predatory pricing nearly impossible.

Because average total costs, which must include allocations for fixed costs and sales and general and administrative overheads, are so subject to debate in their calculation, and because for short-term costing purposes, the fixed portion of the costs are by definition not transferable to other product lines and therefore cannot be put to other uses, many courts accept proof that the accused monopolist has charged below average variable costs, i.e, average costs not including fixed costs. This compromise has the advantage of allowing for easier measurement than for marginal costs or total costs. At the same time, it does not provide a cost measure so low as to virtually eliminate the

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42. For example, in *Cargill,* 479 U.S. at 117, while finding that the plaintiff, a competitor of two companies whose merger it was challenging, had not shown antitrust injury, the Court held out the possibility that a similarly situated plaintiff might show antitrust injury if it could demonstrate a likelihood that the newly merged defendants would engage in predatory pricing in an effort to drive plaintiff out of the market.

43. *See Brooke Group,* 509 U.S. at 222–24 ("the reasoning in both opinions suggests that only below-cost prices should suffice, and we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws") (citing *Cargill*, 479 U.S. at 116–18 and notes 12 and 14; *Matsushita*, 475 U.S. at 585 n.9)); *see also Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition"); *United States v. AMR Corp.,* 140 F. Supp. 2d 1141 (D. Kan.) (court grants summary judgment to defendant American Airlines in DOJ suit charging that American used predatory pricing in an attempt to eliminate smaller, lower priced competitors).

possibility of ever proving below cost pricing. Other courts, however, continue to use average total costs as their yardstick.

Predatory Purchasing. In 2007, in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. Inc.*,[44] the Supreme Court was, for the first time, presented with the issue whether a monopolist could be liable for engaging in predatory *purchasing*, as opposed to pricing. Imposing the same standard it had employed for testing claims of predatory pricing in *Brooke Group*, the Court ruled that such a claim could be sustained if the claimant could show that the: (1) predatory bidding led to the monopolist's selling its output at prices below its costs; and (2) monopolist had a dangerous probability of recouping the losses it incurred by bidding up input prices.[45]

In *Weyerhaeuser*, the plaintiff Ross-Simmons and the defendant Weyerhaeuser operated lumber mills in the Pacific Northwest that produced finished hardwood lumber. The critical input for these competing mills was red alder sawlogs. Ross-Simmons operated one mill, while Weyerhaeuser eventually expanded its operations to include six mills in the region, which by 2001 were acquiring 65 percent of the available alder sawlogs. Ross-Simmons and Weyerhaeuser each bid in the open market for the acquisition of red alder sawlogs. Ross-Simmons claimed that Weyerhaeuser used its buying power in the saw log market predatorily to bid up the prices to a level which Ross-Simmons could not afford to pay, thereby putting it out of business. Ross-Simmons offered the following proof: (1) "Weyerhaeuser's large share of the alder purchasing market," (2) "rising alder sawlog prices during the alleged predation period," and (3) "Weyerhaeuser's declining profits during that same period."[46]

Although the Court allowed for the possibility of such a claim, it rejected a lower court ruling that would have imposed a less stringent standard on the plaintiffs than that imposed in *Brooke Group*. The Supreme Court concluded that "predatory bidding" claims were "analytically similar" to predatory pricing claims and thus should be subject to the *Brooke Group* test. Citing the symmetry in the economics of monopsony (buy-side power) and monopoly (sell-side power), the Court stated that "[b]oth claims involve the deliberate use of unilateral pricing measures for anticompetitive purposes" and "logically require firms to incur short-term losses on the chance that they might reap supracompetitive profits in the future." In addition, according to the Court, rational businesses will be no more likely to make this sacrifice for "predatory bidding" schemes than they would be for predatory pricing schemes. Such schemes are "rarely tried, and even more rarely successful."[47]

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44. 549 U.S. 312 (2007).
45. *Id.* at 314–26 *citing Brooke Group,* 509 U.S. at 222–24.
46. *Id.* at 315–16.
47. *Id.* at 317–24.

The Court also asserted that, just as in predatory pricing, "predatory bidding" actions are often pro-competitive. The Court cited a variety of legitimate pro-competitive justifications for a buyer to bid up input prices, such as attempting to gain market share based on increased efficiency, changing to a more input-intensive production process, and hedging against future supply fluctuations. Further, a failed predatory bidding scheme, like a failed predatory pricing scheme, may be beneficial to consumers, according to the Court. The initial high prices are likely to lead to the acquisition of a higher volume of inputs and, therefore, result in a higher volume of output and lower output prices.[48]

Price Squeezes. A price squeeze occurs when a vertically integrated company raises its wholesale prices while lowering its retail prices, thereby "squeezing" the potential profit margins of its wholesale customers who compete against it at retail. Before 2009, a dominant wholesaler that engaged in a price squeeze was at risk of incurring liability for monopolization under Section 2.[49]

In 2009, however, the Supreme Court effectively eliminated most price squeeze claims with its decision in *Pacific Bell v. linkLine*.[50] Citing the need for clear rules and safe harbors in antitrust law, the Court held that a price squeeze claim will not lie against a company that has no antitrust duty to deal with its competitors at wholesale and where its retail prices are not predatory:

> Plaintiffs' price squeeze claim, looking to the relation between retail and wholesale prices, is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level. If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price *both* these services in a manner that preserves its rivals' profit margins.[51]

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48. *Id.*
49. *See, e.g.*, *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 436–38 (2d Cir. 1945) (alleged price squeeze involved Alcoa, which had a monopoly in aluminum ingot and also processed ingot into sheet, overcharging competing processors so that they could not compete effectively with Alcoa); *see also Covad Communications*, 374 F.3d 1044 (11th Cir. 2004) (price squeeze claim permitted to proceed though court relied on *Trinko* to dismiss plaintiffs' Section 2 claims based on the refusal to deal and essential facilities doctrines).
50. 129 S. Ct. 1109 (2009).
51. *Id.* at 1118–23.

[2] The Essential Facilities Doctrine

The Supreme Court first enunciated the essential facilities doctrine in *United States v. Terminal Railroad Association*.[52] There the Court found a Section 1 violation in a joint venture formed by several railroad companies to buy and run rail terminals. The joint venture denied nonmembers the ability to use the terminals. The Court based its decision on a finding that the nonmembers could not compete effectively without access to these "essential facilities."[53] The doctrine also applies to unilateral conduct under Section 2.[54]

In the *Aspen*[55] case, the owner of one of four major ski resorts in Aspen, Colorado, had been permitted to participate in a joint marketing program offered by the owner of the three other resorts. The latter then decided to exclude the former from the program. The excluded owner sued, claiming treble damages under Section 2 of the Sherman Act for "exclusionary" practices. The Court stated that monopoly firms are generally not obliged to engage in joint marketing programs with competitors, but that the general rule can change if the monopolist's refusal to allow the competitor to participate in a cooperative venture "makes an important change in a pattern of distribution" of goods. In a holding related to the essential facilities doctrine, the Court found that the monopolist's termination of the long-standing cooperative marketing arrangement did affect consumer choice, that the termination had an adverse effect on the smaller competitor's market share, and that it was not justified "by any normal business purpose."[56]

The Supreme Court's most recent pronouncement in this area came in its 2004 decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*.[57] There, the defendant Verizon was a local telephone exchange with a monopoly in the New York area that dated back to its origin as part of the Bell network. Under the 1996 Telecommunications Act, Verizon had been required to share its network with competitive local exchange carriers. The plaintiff in

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52. 224 U.S. 383 (1912).
53. *Id.* at 397–405.
54. *See, e.g.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Associated Press v. United States,* 326 U.S. 1 (1941); *Image Technical Servs. v. Eastman Kodak Co.,* 125 F.3d 1195, 1208–1211 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998) (monopolist can refuse to deal with a competitor unless essential facilities doctrine requires that it do so); *MCI Communications Corp. v. AT&T,* 708 F.2d 1081, 1132 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983) (requiring AT&T to allow MCI to connect its telephone lines to AT&T's national network on essential facilities grounds); *see also Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.,* 472 U.S. 284, 289–98 (1985) (expulsion of a competitor from a joint venture where no essential facility was present held not to constitute a per se illegal violation of Section 1 of the Sherman Act).
55. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985).
56. *Id.* at 608.
57. 540 U.S. 398 (2004).

Trinko, a customer of a competitive carrier, sued claiming that Verizon had violated Section 2 when it did not fulfill the interconnection obligations imposed by the Telecommunications Act, thereby discouraging customers from switching to its competitors.

The Supreme Court ruled for Verizon. It first found that the Telecommunications Act neither created new antitrust claims nor limited existing antitrust claims and so proceeded to analyze the claims to see whether they satisfied Section 2.[58] The Court first pointed out that Section 2 *generally* does not restrict the "long recognized right" to refuse to deal with competitors.[59] It acknowledged that limited exceptions can arise, as exemplified by the *Aspen* case. But, stating that its decision in *Aspen* was "at or near the outer boundary of Section 2 liability," the Court found that the limited *Aspen* exception did not apply.[60] Unlike *Trinko*, it involved a situation in which the defendant had refused to provide the plaintiff a product it provided to the general public, and, indeed, one it had previously provided to the plaintiff.[61] The Court also refused to find that Trinko had stated a claim under the essential facilities doctrine, adding that it had never formally adopted that doctrine and would neither adopt nor reject it now.[62]

§4.03 Elements of Attempted Monopolization

A plaintiff or prosecutor seeking to prove an attempt to monopolize does not need to prove that the defendant actually has monopoly power. Instead, it must supply proof: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[63]

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58. *Id.* at 406–07.
59. *Id.* at 407 (*quoting U.S. v. Colgate & Co.,* 250 U.S. 300, 307 (1919)).
60. *Id.* at 406–08.
61. *Id.*
62. *Id.* at 408–10. In *Covad Communications Company v. Bellsouth Corporation,* 374 F.3d 1044 (11th Cir. 2004), another case charging failure to comply with Telecommunications Act interconnection rules, the court of appeals relied on *Trinko* to dismiss plaintiffs' Section 2 claims based on the refusal to deal and essential facilities doctrines, but did allow the plaintiffs to proceed with their price squeeze claim.
63. *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993) (reversing lower court finding of attempted monopolization on ground that intent to achieve monopoly is alone insufficient to establish dangerous probability of success).

[A] Predatory or Anticompetitive Conduct

This element can be satisfied by proof of the type of willful conduct discussed in Section §4.02[B], above.[64] In addition, tying or full line forcing by a monopolist can be used as evidence of an attempt to monopolize another market.[65] Also known as leveraging, tying enables one with a monopoly over one product to use its market power in that product to seek market power in another.

[B] Specific Intent to Monopolize

The specific intent element requires proof that the defendant intended to destroy competition or obtain a monopoly.[66] Although this element can be satisfied with circumstantial evidence, proof that the defendant sought to increase sales and build market share will not alone satisfy this element. As the Supreme Court stated in *Spectrum Sports, Inc. v. McQuillan,*[67] Section 2 does not discourage vigorous, even severe, competition:

> The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.[68]

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64. *See generally Spectrum Sports,* 506 U.S. at 456.
65. *See, e.g.*, *United States v. Microsoft Corp.,* 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001); *LePage's Inc. v. 3M (Minnesota Mining and Manufacturing Co.),* 324 F.3d 141 (3d Cir. 2003), *cert. denied* 542 U.S. 953 (2004) (jury could find that monopolist's "bundling" of discounts across product lines could be viewed as illegal predatory conduct).
66. *Spectrum Sports,* 506 U.S. at 456–60 (1993) (specific intent required but will not itself substitute for proof of dangerous probability of success); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 602 (1984) (proof of specific intent to monopolize requires proof of "an intent that goes beyond a mere intent to do the act") (quoting *United States v. Aluminum Co. of Am.,* 148 F.2d 416, 432 (2d Cir. 1945) (L. Hand, J.)); *Times-Picayune Publ'g Co. v. United States,* 345 U.S. 594, 626 (1953.
67. 506 U.S. 447 (1993).
68. *Id*. at 458. *See also Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 767–68 (1983) ("It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster"); *United States Steel Corp. v. Fortner Enters., Inc.,* 429 U.S. 610, 612 n.1 (1977) ("increasing sales and increasing market share are normal business goals, not forbidden by §2 without other evidence of an intent to monopolize").

[C] Dangerous Probability of Success

The dangerous probability of success element finds its source in two Supreme Court decisions, *Swift & Co. v. United States*[69] and *American Tobacco Co. v. United States.*[70] Although some lower courts have attempted to write this requirement out of the law, in *Spectrum Sports, Inc. v. McQuillan,*[71] the Supreme Court confirmed the need to prove dangerous probability of success: "§2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."[72]

The Court also made it clear that the determination whether there is a dangerous probability of success requires consideration of "the relevant market and the defendant's ability to lessen or destroy competition in that market."[73] In other words, it requires an examination of the same factors, e.g., market share, market structure, entry barriers, likely supply and demand responses, used to determine monopoly power or the likelihood that a merger or acquisition will harm competition.[74]

§4.04 Elements of Conspiracy to Monopolize

The Supreme Court has rarely had to address claims of conspiracy to monopolize, in part because there is little to distinguish such claims from the more common, and usually more easily proved, conspiracy claims under Section 1 of the Sherman Act or illegal merger claims under Section 7 of the Clayton Act. In *American Tobacco Co. v. United States,*[75] the Court held that the claim required proof of a conspiracy (i.e., an agreement), a specific intent to acquire monopoly power, and the ability to do so:

> A correct interpretation of [section 2] and of the authorities makes it the crime of monopolizing, under §2 of the Sherman Act, for parties, as in these cases, to

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69. 196 U.S. 375, 396 (1905) ("But when that intent [to monopolize], and the consequent dangerous probability exist, [section 2] . . . directs itself against that dangerous probability as well as against the completed result.").
70. 328 U.S. 781, 785 (1946) (affirming Section 2 conviction based on following jury instruction: "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it.").
71. 506 U.S. 447 (1993).
72. *Id.* at 456–59 (citing *Copperweld Corp.,* 467 U.S. at 767–68 (1983)) ("Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization.").
73. *Id.* at 456.
74. *See* §4.02 above and §§5.02, 5.04 below.
75. 328 U.S. 781 (1946).

> combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power.[76]

The Court then made clear that the claimant must also demonstrate that the conspirators took overt acts, acts that need not themselves have been unlawful, in pursuit of their goals:

> It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful . . .. [I]f they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.[77]

Finally, the Court stressed that there is no need to prove "exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors."[78] It is enough that the jury can find "that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."[79]

§4.05 Remedies

Remedies available for violations of Section 2 vary depending on the claimant. Government agencies may seek either structural or conduct remedies. Like successful Section 1 plaintiffs, private Section 2 litigants may obtain damages and injunctive relief.

[A] Government Actions

Government monopolization cases are some of the most high-profile and controversial cases on record. They involve the government taking on the biggest, wealthiest companies in cases that are vigorously fought not just in court, but in Congress, the press, and the arena of public opinion.

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76. *Id*. at 809–10. *See also United States v. Yellow Cab Co.,* 332 U.S. 218 (1947).
77. American Tobacco, 328 U.S. at 809–10.
78. *Id*.
79. *Id*.

In the twenty or so years immediately following Congress's passage of the Sherman Act in 1890, the government used its newfound power to break up trusts or cartels in the steel, rail, and petroleum industries.[80] Again beginning in the late 1940s, the government took on various monopolies, including those in tobacco, motion picture distribution, and aluminum. In the late 1960s, as antitrust enforcement increased, the government also once again began to bring—for the first time since the early years of the century—so-called structural cases, most notably against IBM and AT&T, seeking the breakup of those companies.[81]

These cases highlight the government's long-held preference for structural rather than conduct remedies in monopolization and merger cases.[82] Given a choice, the government prefers not to remain involved in policing a monopolist's activities after it has achieved a victory. Most recently, in *United States v. Microsoft Corp.*,[83] the government, having prevailed in its action against Microsoft, sought a combination of conduct remedies and the structural remedy of breaking Microsoft in two.[84]

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80. *See Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1 (1911); *United States v. Trans-Missouri Freight Ass'n,* 166 U.S. 290 (1897); *United States v. Addyston Pipe & Steel Co.,* 85 F. 271 (1898), *aff'd*, 175 U.S. 211 (1899).
81. *See Stipulation for Voluntary Dismissal of the AT&T case,* 47 Fed. Reg. 4166 (Jan. 28, 1982).
82. For more on the distinction between structural and conduct remedies *see* Section §6.12 below.
83. 87 F. Supp. 2d 30 (D.D.C. 2000). On appeal, the Court of Appeals vacated a district court final judgment that had ordered the breakup of Microsoft and remanded the case for a determination of an appropriate remedy. 253 F.3d 34 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 350 (2001). The Court of Appeals did uphold the district court's findings of fact as well as its determination that Microsoft illegally acted to maintain its monopoly power over the personal computer operating system market through anticompetitive behavior in violation of section 2 of the Sherman Act. *Id.* at 46. But the Court of Appeals reversed the district court's determination that Microsoft was guilty of attempted monopolization of the internet browser market. *Id.*

    Finally, the Court reversed and remanded the district court's determination that Microsoft was guilty of illegally "tying" its internet browser, Microsoft Explorer, to the Windows operating system in order to leverage its operating system monopoly into the browser market. *Id.* In remanding the tying portion of the decision to the district court, the Court of Appeals held that the tying arrangement was not *per se* illegal, as held by the district court. *Id.* at 85–96. Instead, the Court instructed the district court to consider whether the tying arrangement was illegal under the rule-of-reason standard. *Id.* at 95–96. The Court noted that although the lower court could still find that Microsoft had committed a tying violation, it could do so only after weighing the potential pro-competitive effects of the tying arrangement against any anticompetitive effects. *Id.*

    Much of the Court of Appeals' decision focused on the appearance of partiality created by District Judge Penfield Jackson's numerous public statements during the pendency of the case before him in the district court. On remand, the Court of Appeals instructed that the case be assigned to a new judge. This case was subsequently settled. Information about the settlement may be found at http://www.usdoj.gov/atr.
84. The government papers are archived at http://www.usdoj.gov/atr. Since the settlement of the DOJ's case against Microsoft, several states have filed class-action lawsuits against the

[B] Private Actions

Damage remedies available to private litigants who prove claims for monopolization, attempted monopolization, or conspiracy to monopolize are similar to those available for claimants under Section 1. As explained in greater detail in Chapter 3, the Supreme Court has stated that antitrust damages may not be based on pure "speculation or guesswork."[85] However, it has also made clear that an antitrust plaintiff's burden of proving damages, which often requires an assessment of what might have happened had the antitrust violation not occurred, is not as rigorous as that in more typical contract or tort cases.[86] The Court has stated that an antitrust violator should not escape damage liability just because the plaintiff has failed to provide precise proof of that which is inherently unprovable.[87]

As in Section 1 cases, Section 2 damages may be measured in any reasonable manner. Possibilities include the difference between the price paid by the plaintiff-purchaser and the price he would have paid if the violation had not occurred, profits lost by a competitor plaintiff, or, if the plaintiff's business has been destroyed, lost goodwill, or going-concern value.

A successful private litigant may also obtain injunctive relief under Section 16 of the Clayton Act.[88] This may take the form, for example, of an order requiring a monopolist to cease its anticompetitive behavior or requiring the defendant to allow the plaintiff access to an essential facility, such as a long-distance telephone network.[89]

The Supreme Court's 1990 decision in *California v. American Stores Co.*,[90] indicates that a divestiture decree may also be available to a private litigant. There, the Supreme Court resolved a long-simmering debate by holding that a divestiture remedy is available to a private litigant who has successfully

company for violations of state antitrust laws. In recent months, Microsoft has reached proposed settlements with nineteen states and the District of Columbia. *See* Microsoft.com: Consumer Class Action Settlement Information, *at* http://www.microsoft.com/about/legal/consumersettlements/default.mspx.

85. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *see* §3.07[B] above.

86. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981); *see also Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700 (1962).

87. *Id.*; *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Bigelow*, 327 U.S. at 264; *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

88. 15 U.S.C. §26.

89. *E.g.*, *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132–44 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983) (ordering AT&T to allow MCI to connect to AT&T's national long distance telephone network).

90. 495 U.S. 271 (1990).

challenged a merger or acquisition under Section 7 of the Clayton Act.[91] In the breadth of its language, this holding at least suggests that similar relief might be available to private litigants under Section 2.[92]

§4.06 Patents and Antitrust

The conflict between the desire to encourage effective competition and the desire to prevent monopolies is most acute at the boundary between antitrust and the patent laws.[93] The patent laws and, to a lesser degree, laws protecting other intellectual property like trademarks, copyrights, and trade secrets, seek to foster innovation, a cornerstone of competition, by awarding the inventor a temporary (twenty-year) monopoly over the patented invention.[94] One result of this award is that parties accused of patent infringement frequently assert monopolization counterclaims and vice versa.

The courts have determined that, in the absence of misconduct by the patent holder, the congressional policy reflected in the patent laws will outweigh that of the antitrust laws. So courts generally will not use the antitrust laws to penalize a patent holder for exploiting its monopoly. Thus, the courts will permit the patent holder to license the patent to others and take other steps consistent with the legal possession of a limited monopoly.

[A] The Patent Misuse Doctrine

But there are limits on a patent holder's ability to exploit its patent monopoly. As its name suggests, the patent misuse doctrine prohibits the misuse of

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91. *Id*. at 278–96. The Court's opinion contains a useful discussion of the history of divestiture and dissolution orders under the antitrust laws.
92. Although the decision holds only that divestiture is available as a remedy to a Section 7 plaintiff, its broad language is certainly consistent with a conclusion that the same remedy would also be available to a Section 2 plaintiff, *e.g.*, "[A] district court has the power to order divestiture in appropriate cases brought under §16 of the Clayton Act . . .." *Id*. at 295. The Court made a point of stating, however, that its holding "does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief under §15 [of the Clayton Act]." *Id*.
93. *See generally* DOJ and FTC Report, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (April 2007); Herbert Hovenkamp, Mark D. Janis, and Mark Lemley, *IP and Antitrust* (2002); "Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace," A Report by the Federal Trade Commission Staff, May 1996, chs. 6 ("Innovation, Intellectual Property, and Competition") and 8 ("Intellectual Property and Antitrust Policy for New Technologies").
94. 35 U.S.C. §101.

patents to monopolize a market.[95] Although a patent holder may fully exploit his patent, he or she may not be allowed to combine multiple patents to create a larger monopoly. Similarly, patent owners may be found liable for monopolization if they exchange patent licenses (cross-licensing), pool them, package them for sale, purchase additional patents in an effort to procure a monopoly or oligopoly, seek to enforce them in bad faith, or extend the patent's term by requiring post-expiration royalties.[96] Patent misuse may be asserted as a defense to an infringement claim or as the basis for an affirmative claim of monopolization.[97]

In *Eastman Kodak Co. v. Image Technical Services, Inc.*,[98] the Supreme Court also made clear that one who has obtained a monopoly through patents could be liable for using those patents to leverage its way into another market.[99] On remand, the Ninth Circuit suggested, without so holding that, in a concept related to essential facilities, a monopolist's unilateral refusal to license a patent could be actionable.[100]

Finally, the DOJ and FTC have warned of possible dangers when competitors settle infringement suits.[101] Their concern is that in the guise of settling competitors will allocate markets, a per se violation, or engage in other anticompetitive conduct. The agencies have expressed special concern with this practice in the pharmaceutical industry. There, holders of patents for valuable drugs and generic manufacturers frequently find themselves in litigation with the patent holder accusing the generic manufacturer of infringement and the generic maker accusing the patent holder of monopolization. The agencies are particularly leery of so-called *reverse payments*, whereby the patent holder pays the generic manufacturer to refrain from

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95. It is worth noting that the Supreme Court recently eliminated the long-standing presumption that a patent confers market power on the patent holder. *See Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).
96. *See, e.g.*, *Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 868–70 (Fed. Cir. 1997); *cert. denied*, 525 U.S. 815 (1997); FTC and DOJ, Antitrust Guidelines for the Licensing of Intellectual Property; *see* §4.06[B][D] below.
97. Virginia Panel Corp., 133 F.3d at 868–74.
98. 504 U.S. 451 (1992).
99. *Id*. at 479–80 n.29 ("The Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next' ") (quoting *Times Picayune Publ'g Co. v. United States*, 345 U.S. 594, 611 (1953)).
100. *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1215–18 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998).
101. Remarks of Joel Klein, Assistant Attorney General for Antitrust Division (May 2, 1997) archived at http://www.usdoj.gov; *see also* §4.06[D] below.

competing with the patent holder for a specified period.[102] The issue has also surfaced in the courts in private litigation, with mixed results.[103]

[B] The *Walker Process* Doctrine

An important aspect of the patent misuse doctrine holds that one who has obtained a patent illegally is not entitled to the protection from antitrust liability ordinarily accorded a patent holder. In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*,[104] the Supreme Court ruled that possession of a patent obtained through fraud on the United States Patent and Trademark Office (USPTO) was no defense to a counterclaim charging the patent holder with monopolization.[105] Because the complexities of the patent procurement system make it extremely difficult to prove the type of fraud on the USPTO necessary to support a *Walker Process* claim, affirmative antitrust cases based on the doctrine have been extremely rare. The doctrine is more frequently invoked defensively, i.e., as a counterclaim, by parties accused of patent infringement.[106] In addition, citing *Walker Process*, the DOJ and the FTC have stated that they "may challenge the enforcement of invalid intellectual property rights as antitrust violations."[107]

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102. For example, on March 31, 2009, the FTC announced that it had fined Bristol-Myers Squibb $2.1 million for failing to inform it about payments to generic manufacturer Apotex, Inc., to postpone its release of a generic version of BMS's Plavix. *See* http://www2.ftc.gov/opa/2009/03/bmsplavix.shtm. And on February 2, 2009, the FTC announced that it had sued to challenge agreements under which Solvay Pharmaceuticals paid generic makers Watson Pharmaceuticals and Par Pharmaceuticals to delay their sale of generic versions of the drug AndroGel until 2015. *See* http://www2.ftc.gov/opa/2009/02/androgel.shtm.
103. *Compare*, *e.g.*, *In re Cardizem CD Antitrust Litigation,* 332 F.3d 896 (6th Cir. 2003) (settlement agreement between patent holder and generic maker found to be *per se* illegal) *with Valley Drug Co. v. Geneva Pharm.*, 344 F.3d 1294 (11th Cir. 2003) (reversing lower court ruling that had found a settlement agreement two competitors illegal).
104. 382 U.S. 172 (1965).
105. *Id.* at 175–77. After pointing out that it had long "recognized that an injured party may attack the misuse of patent rights," the Court stated that proof that the counterclaim/defendant/patentholder had "obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office . . . would be sufficient to strip [it] of its exemption from the antitrust laws." *Id.* at 177. The Court added that good faith, "includ[ing] an honest mistake as to the effect of prior installation upon patentability," would constitute a "complete defense." *Id.*
106. As a result, many decisions in the area come from the United States Court of Appeals for the Federal Circuit, which has jurisdiction over appeals of patent infringement cases. Of note, however, are two recent cases that assert *Walker Process* affirmatively, have survived motions, and are proceeding. *See Kaiser Foundation Health Plan Inc. v. Abbott Laboratories, Inc.*, 552 F.3d 1033 (9th Cir. 2009); and *Delano Farms Co. v. Cal. Table Grape Comm'n*, 2009 WL 426600 (E.D. Cal. 2009).
107. FTC and DOJ, *Antitrust Guidelines for the Licensing of Intellectual Property* §6. These Guidelines are discussed in greater detail at §4.06[D].

An important development in the *Walker Process* area came with the United States Court of Appeals for the Federal Circuit's (CAFC's) decisions in *Nobelpharma AB v. Implant Innovations, Inc.*[108] In its initial decision, the court ruled (over a vigorous dissent) that only affirmative misrepresentations to the USPTO could support a *Walker Process* claim.[109] Proof of mere omissions, the court held, would not be enough.[110] This ruling, which was at odds with long-established fraud law, drew substantial criticism. In an unusual move, the court granted rehearing *en banc* and reversed itself. It held that deliberate acts of omission in USPTO filings *could* form the basis for a *Walker Process* claim.[111]

Interestingly, the CAFC also declared that, from then on, all cases before it involving the issue "whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws," would be decided under Federal Circuit law.[112] This signaled a departure from its previous practice of looking to the law of the circuit in which the case originated for rules of decision on non-patent issues. The court reasoned that most *Walker Process* claims are brought as counterclaims in patent infringement actions and that it could thereby avoid the confusion that could result if it had to "'embark on an effort to interpret the laws of the [circuit in which the case originated].'"[113]

[C] The Sham Litigation and *Noerr-Pennington* Doctrines

The sham litigation doctrine is a close relative of the patent misuse and *Walker Process* doctrines. Like those doctrines, the sham litigation doctrine allows a party accused of patent infringement to assert monpolization or attempted monopolization claims against the patent holder.[114] To prevail, the alleged

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108. 141 F.3d 1059 (Fed. Cir.) (*en banc*) (*rev'g* decision at 129 F.3d 1463 (Fed. Cir. 1997)), *cert. denied*, 525 U.S. 876 (1998).
109. 129 F.3d at 1472–75.
110. *Id.*
111. *Nobelpharma AB,* 141 F.3d at 1067–72 ("We agree that if the evidence shows that the asserted patent was acquired by means of either a fraudulent misrepresentation *or a fraudulent omission* and that the party asserting the patent was aware of the fraud when bringing suit, such conduct can expose a patentee to liability under the antitrust laws") (emphasis added); *see also In re Buspirone Patent & Antitrust Litigation*, 185 F. Supp. 363 (S.D.N.Y. 2002) (Walker Process theory will overcome Noerr-Pennington defense if the defendant did not obtain the patent by fraud but made false statements to the Food and Drug Administration about the coverage of a patent and sought to enforce patent for uses it did not cover).
112. 141 F.3d at 1067–68.
113. *Id.* The court added that it would continue to apply the law of the circuit of origination "to issues involving other elements of antitrust law . . .." *Id.* at 1068.
114. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.,* 508 U.S. 49 (1993).

infringer must prove (1) that the patent holder's infringement claims were objectively baseless, and (2) constituted "an attempt to interfere *directly* with the business relationships of a competitor, through the use [of] the governmental *process*–as opposed to the *outcome* of that process as an anti-competitive weapon."[115] Like *Walker Process* claims, sham litigation claims are most commonly brought as counterclaims. Also, like *Walker Process* claims, they are difficult to prove.

The sham litigation doctrine arose as an exception to the *Noerr-Pennington* (or political action) doctrine, which grants antitrust immunity to collective and unilateral attempts to petition government bodies, including the courts, seeking redress of wrongs, legislative action, or other legitimate goals.[116] The sham litigation doctrine is part of a broader exception, which holds that *Noerr-Pennington* immunity generally does not extend to bad faith, objectively baseless attempts or those based on falsehoods.[117]

[D] FTC Intellectual Property Guidelines

Reflecting the increasing importance of intellectual property in the growth of the United States and world economies, and the need for guidance as to how the antitrust laws will be applied to its licensing, the FTC and DOJ in 1995 issued *Antitrust Guidelines for the Licensing of Intellectual Property (IP Guidelines)*.[118] These guidelines state at the outset that the agencies regard intellectual property as similar to other forms of property for antitrust purposes. They go on to say that the agencies do not presume that possession of intellectual property creates market power and that they recognize the need for and generally pro-competitive nature of the licensing of

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115. *Id.* at 60–61 (emphasis in original; citations omitted) (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) and *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991)); *see also Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 868–874 (Fed. Cir. 1997), *cert. denied*, 525 U.S. 815 (1998).
116. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (Noerr); (collective lobbying by competitors in favor of legislation immune from antitrust attack); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965) (*Pennington*) (immunity extended to collective attempts to affect administrative processes); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (immunity extended to collective efforts in judicial actions). The *Noerr-Pennington* doctrine is discussed in greater detail at §3.09[D].
117. *Professional Real Estate Investors*, 508 U.S. at 60–61.
118. Like much of the material in this chapter, the *IP Guidelines* are relevant not only to monopolization claims, but also to the merger analysis set forth in Chapter 5. The FTC has provided additional information about its views on and analysis of these issues in a publication entitled *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, A Report by the Federal Trade Commission Staff, May 1996.

intellectual property.[119] The guidelines then explain the agencies' approach to analyzing licensing schemes and provide numerous useful examples.

[1] Innovation Markets

One important aspect of the *IP Guidelines* is the discussion of so-called innovation markets.[120] Often, a licensing arrangement will affect competition in the research and development of a good or process that has not yet actually become a marketable product. The *IP Guidelines* thus define an innovation market as "consist[ing] of the research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development."[121] They then go on to describe the analysis they will undertake to determine whether a licensing arrangement has harmed or will harm competition in an innovation market.[122]

[2] Anticompetitive Effects and the Antitrust "Safety Zone"

The guidelines next describe how the agencies use the rule of reason to evaluate licensing arrangements and their potential anticompetitive effects. They point out that even if anticompetitive effects are likely, they may be counterbalanced by pro-competitive effects such as efficiencies or by mitigating factors, such as a relatively short duration.[123]

In the interests of providing some measure of certainty, the guidelines also provide an antitrust "safety zone." They state that, except in extraordinary circumstances, the agencies will not challenge an intellectual property licensing arrangement, if (1) the restraint is not facially anticompetitive and (2) the licensor and its licensees collectively account for no more than 20 percent of each relevant market significantly affected by the restraint.[124] The *IP Guidelines* add that the safety zone "does not apply to those transfers of intellectual property rights to which merger analysis is applied."[125]

[3] Description of the Agencies' Application of General Principles

The *IP Guidelines* next describe how the agencies will analyze straight licensing arrangements, as well cross-licensing and pooling arrangements, and the

119. *Intellectual Property Guidelines* §2.
120. *Id.* §3.2.3.
121. *Id.*
122. *Id.*
123. *Id.* §4.
124. *Id.* §4.3. The IP Guidelines define "facially anticompetitive" restraints as those that would normally be viewed as *per se* illegal. *Id.* n.31.
125. *Id.* §4.3.

acquisition of intellectual property. They do this in the context of various types of restraints such as horizontal restraints, resale price restraints, tying arrangements, and exclusive dealing.[126] The guidelines conclude with a warning that the agencies may challenge attempts to enforce invalid intellectual property rights as antitrust violations.[127]

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126. *Id*. §5.
127. *Id*. §6. In other words, they may invoke the *Walker Process* doctrine. *See* §4.06[B] above.

CHAPTER

5

Mergers, Acquisitions, and Joint Ventures—Clayton Act, Section 7

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§5.01 Introduction

Congress passed the Clayton Act in 1914 in part to address concerns that the Sherman Act's bans on contracts in restraint of trade and monopolization did not sufficiently address the problem of anticompetitive mergers and acquisitions.[1] In Section 7 of the Clayton Act, Congress outlawed every acquisition of stock:

> where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition *may* be to substantially lessen competition or to tend to create a monopoly.[2]

Section 7, like Sections 1 and 2 of the Sherman Act, has an analogue in the European Community (EC) Council Regulation 139/04, known as the EC Merger Regulation.[3] Like Section 7, the EC Merger Regulation applies to regulate "concentrations," i.e., mergers, acquisitions and full function joint ventures, that threaten to harm competition. Unlike Section 7, it also explicitly applies to changes in control, which can occur whenever there is a possible change in who may "exercis[e] decisive influence on an undertaking." But, as explained below, this difference is probably not material, since Section 7 has been read to cover changes in control like those envisioned by the EC Merger Regulation. Premerger reporting under the Hart-Scott-Rodino Antitrust Improvements Act (Hart-Scott-Rodino Act or HSR Act) is not limited to acquisitions in which actual voting control changes hands.

By using the word "may" in Section 7, Congress created an "incipiency" standard. Congress outlawed not just acquisitions that would immediately create a monopoly or give the parties market power, but those acquisitions that had the potential to do so. Trying to determine—and to formulate rules and guidelines that will help determine—whether a merger, acquisition, or joint venture has crossed the line of incipiency has occupied the courts, the federal antitrust enforcement authorities, and counsel advising clients planning such transactions, ever since.

The Clayton Act permits both pre- and post-acquisition challenges. The latter can attack either transactions that violated the act at the time they occurred or those that did not begin to harm competition until later.

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1. The Clayton Act also addressed a number of issues that had not been completely covered in the Sherman Act, such as tie-ins, civil actions, and statutes of limitations. *See* Chapter 2 above.
2. Clayton Act §7 (15 U.S.C. §18) (emphasis added). In 1950, Congress amended Section 7 to cover acquisitions of assets as well as of stock. In 1980, Congress again amended Section 7 to make clear that it applied to local acquisitions that affected interstate commerce and that it applied to acquisitions by individuals as well as corporations.
3. 1989 OJ L395/1 as amended by Council Regulation EC 1310/97.

That post-acquisition challenges are rare today is attributable in large part to the passage of the HSR Act in 1976.[4]

The HSR Act, which is analogous to the EC Administrative Regulation,[5] requires that parties to proposed mergers, acquisitions, and joint ventures of a specified minimum size notify the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) of their plans and (with some exceptions) wait at least thirty days before closing. The notification and waiting period give the government enforcement authorities time to examine the proposed transaction for compliance with Section 7 (and the other antitrust laws). The authorities may allow the transaction to proceed as planned or they may demand that the parties change or abandon the transaction. As a last resort, the FTC or DOJ can sue in federal court for an order preliminarily and permanently enjoining the transaction.[6]

Important corporate decisions about whether and how to expend the vast amounts of time, effort, and money required to accomplish a major transaction turn on calculations of the likelihood that a proposed transaction will be subject to or survive government antitrust review or legal challenge. A company's antitrust lawyer thus plays a critical role in advising on a planned merger, acquisition, or joint venture that could provoke government scrutiny.

The antitrust lawyer's role should begin early in the planning process. With the lawyer's aid, the company can structure the transaction and frame the HSR notification to minimize agency hostility. The lawyer can also review and seek benign explanations for problematic documents; help the company avoid creating documentary evidence that might lead the authorities to misunderstand the markets and the company's plans; and help create documents that demonstrate the pro-competitive benefits of the planned transaction.[7] The sooner and the more the antitrust lawyer knows about the transaction and the parties, the better he or she will be able to persuade the government

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4. Clayton Act §7A, 15 U.S.C. §18a. The HSR Act is dealt with in greater depth in Chapter 6 below.
5. Counsel Regulation 139/2004 (EC) of 20 January 2004, 2004 O.J. (L24) (EC).
6. If a federal court issues a preliminary injunction, the DOJ can, if necessary, then seek a permanent injunction from the court. The FTC, on the other hand, does not continue in federal court, but instead reverts to administrative procedures. *See* §§8.02[C] and 8.03[C], below.
7. In their zeal to promote a transaction, some marketing people, strategic planners, and investment bankers have a recurring and potentially troublesome tendency to create documents trumpeting the deal using language like "this will allow the acquirer to achieve (or extend its) market dominance" or that describe how the deal will enable the acquirer to "cut off our competitors' air supply." Such documents are obviously no help when trying to persuade the government of the pro-competitive nature of a transaction. Since companies must turn over such documents to the government with their HSR Premerger Notification and Report Form, it is the lawyer's job to prevent the creation of such documents, or, if too late, to demonstrate why they are merely unrealistic hyperbole or puffery.

not to challenge the transaction, negotiate alterations with the government, or, if those efforts fail, convince a court not to issue an injunction.[8]

An antitrust lawyer analyzing a proposed transaction for compliance with Section 7—whether it be a private lawyer advising a corporate client or a government lawyer confronted with an HSR notification of a proposed transaction—must look primarily to two sources for guidance. The ultimate source is the body of case law interpreting Section 7. These decisions form the precedent that a court will follow when deciding a government (or, less frequently, private) challenge to a proposed, or (far less frequently) already completed, transaction.

The second source derives from the antitrust enforcement agencies' recognition of the importance to individual companies and to overall economic efficiency of predictability in the merger review process. To that end, the DOJ in 1982 first issued *Merger Guidelines* that describe the process it uses to analyze a proposed merger, acquisition, or joint venture for antitrust compliance.[9] These guidelines acknowledge the primacy of the case law and recognize that the government may ultimately need to prove its case in court. But the *Merger Guidelines* do not adhere religiously to the case law. Instead, the guidelines, which the agencies have repeatedly updated and commented on, state that the government sometimes employs theoretical economic concepts that have not yet been adopted by the courts. The guidelines do not have the force of law and the courts need not rely on them as precedent. But the guidelines do influence the thinking of and are regularly cited by at least some courts.

The antitrust lawyer's goal is (generally) to avoid a legal confrontation with the government over a client's proposed transaction. There is rarely anything to be gained. Such a confrontation will inevitably delay, and increase

8. *See* §6.04[A][4] below for a discussion of documents that must be submitted to the government with a party's Hart-Scott-Rodino Premerger Notification and Report Form.

9. The DOJ released its original *Merger Guidelines* in 1982 and a revised version in 1984. The DOJ and the FTC jointly released an updated version of their *Merger Guidelines* in 1992. The 1992 guidelines superseded the 1984 guidelines with respect to horizontal mergers, but explicitly adopted and incorporated by reference the *1984 Merger Guidelines*' treatment of non-horizontal mergers. On April 8, 1997, the agencies released a revised version of the 1992 *Merger Guidelines* that changed only the section on "Efficiencies." In April of 2000, the agencies released their *Antitrust Guidelines for Collaborations Among Competitors* (commonly known as the *Joint Venture Guidelines*). These guidelines contain useful guidance on the application of merger law to joint ventures. *See* §5.03 below.

In 2006, the agencies issued their joint *Commentary on the Horizontal Merger Guidelines*, in which they further described and clarified the analysis they undertake when reviewing a proposed merger. Most recently, in 2009, the agencies announced that they would hold a series of workshops with interested parties to elicit comments to assist them in revising and updating the Merger Guidelines.

Copies of the various guidelines and related documents can be found at the agency websites: http://www.usdoj.gov/atr or http://www.ftc.gov.

the cost of, the transaction. So examining a proposed transaction in light of the government *Merger Guidelines* and *Antitrust Guidelines for Collaborations Among Competitors* (*Joint Venture Guidelines*) has become the obligatory first step in the private antitrust lawyer's analysis.

§5.02 *The Merger Guidelines*

The DOJ and the FTC, the two federal agencies with partially overlapping authority for enforcing the federal antitrust laws, have published two sets of guidelines to assist practitioners in analyzing proposed transactions: The 1992 *Merger Guidelines* (as revised in 1997) and the 2000 *Joint Venture Guidelines*.[10] The *Merger Guidelines* set forth with reasonable—although by no means uniform—clarity, the step-by-step analysis undertaken by the government when deciding whether to challenge a proposed merger, acquisition, or joint venture.[11]

In 2006, the agencies published their *Commentary on the Horizontal Merger Guidelines*.[12] The commentary provides further insight into their analytical process. Of particular note is the recurring theme that the agencies do not necessarily apply the guidelines in a linear progression through the analytical elements in the order set forth in the guidelines. In other words, they do not necessarily start by defining the relevant market(s) and then move on, in order, to examine market concentration, and end by examining mitigating

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10. The two agencies have also published two other statements that contain useful information in this area: (1) a *Statement of Antitrust Enforcement Policy in Health Care* specifically directed to antitrust issues raised by the healthcare field; (2) *Antitrust Guidelines for the Licensing of Intellectual Property*, which are discussed at §4.03[C] above, both of which can be found on the agency websites: http://www.usdoj.gov/atr or http://www.ftc.gov.

    Additional information on health care industry mergers and other competition issues can be found in "Improving Health Care—A Dose of Competition," published jointly in July 2004 by the FTC and DOJ. The 361-page report, which generally endorses increased competition rather than more government regulation as the way to repair the nation's health care delivery system, can be found at either: http://www.usdoj.gov/atr/public/health_care/20694.htm or http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

11. Other useful adjuncts to the Guidelines are: (1) the FTC's "A Study of the Commission's Divestiture Process" FTC, 1999, archived at http://www.ftc.gov, which can be of particular assistance to antitrust counsel working with a proposed transaction that raises antitrust issues that may require partial divestiture or similar remedies to survive agency review; (2) the DOJ's 2003 "Coordinated Effects Policy Manual," archived at www.usdoj.gov/atr, which explores the use of coordinated (as opposed to unilateral) effects in merger analysis; (3) the FTC's and DOJ's jointly published study entitled "Merger Challenges Data, Fiscal Years 1999–2003," which tabulates the market share and concentration levels associated with decision to challenge mergers. *See also* §6.11 below.

12. The commentary can be found at either http://www.ftc.gov or http://www.usdoj.gov/atr.

factors before deciding the likely competitive effects of the proposed transaction. Instead, according to the agencies, their central focus is on the analysis of likely competitive effects and that analysis is as likely to inform their market definition and the other factors as the reverse.

The *Merger Guidelines* and the *Joint Venture Guidelines* should be consulted directly when actually trying to analyze a proposed deal.[13] The following is a brief overview of the *Merger Guidelines*.

[A] The Guidelines: Horizontal Mergers

The *Merger Guidelines* state that their ultimate purpose is to determine: "whether the merger is likely to create or enhance market power or to facilitate its exercise."[14] Reflecting the case law's use of market concentration and post-transaction combined market shares as important initial indicators of the presence of market power or the likelihood of oligopolistic behavior (i.e., collusion), the *Merger Guidelines* state that, once a relevant market has been identified, the first step in the government's analysis is an attempt to measure those factors. Like the case law, however, the guidelines recognize that high concentration does not necessarily result in market power or increase the likelihood of collusion. Thus, the guidelines also describe a series of factors that, when considered singly or in combination, may mitigate high concentration and render the proposed transaction competitively benign.

[1] Defining the Market

The *Merger Guidelines* use a modified version of the Supreme Court's *Brown Shoe* approach to market definition.[15] As the Court did in *Brown Shoe*, they acknowledge that a market has both product and geographic components. As in *Brown Shoe* and the cases that follow it, the guidelines look to the concepts of substitutability and cross-elasticity of demand to help determine which products occupy the same market. Also, as in *Brown Shoe* and the later cases, the guidelines look to shipping costs, normal shipping distances, and the like to help determine the geographic reach of the market.

Unlike *Brown Shoe* and the later decisions, however, the *Merger Guidelines* state that the agencies confine their market definition analysis to how consumers will respond to a "small but significant and nontransitory" increase

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13. Practical aspects of dealing with the agencies are addressed in Chapter 6.
14. U.S. Department of Justice and Federal Trade Commission *1992 Horizontal Merger Guidelines* (*Merger Guidelines*) §0.2.
15. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *see* §4 [A] above and §5.04 below.

in the price of the product in question (the SNIPP test). By *nontransitory*, they mean "unlikely to vanish soon."

To conduct this aspect of their analysis, the agencies assume the existence of a monopoly in the given product in a given geographic area. They then ask whether a small but significant and nontransitory increase in the price of that product would result in an increase or decrease in the seller's profits. If the price increase would result in lower profits—by causing buyers to turn to other products or purchase the product outside the geographic area—then the product and geographic markets will be deemed to include those other products and other areas. The process is repeated until a relevant market is found where the price increase will result in higher or at least equal profits.[16] In addition, the agencies consider the possibility that the monopolist would use price discrimination—i.e., confining the price increase to those buyers that it knows are unlikely to switch—to make the price increase more profitable.[17]

The *Merger Guidelines*' next step in defining the relevant market consists of an attempt to identify all firms that participate in the relevant market. These firms include those actually producing the relevant products and selling them in the relevant geographic area. They also include, where appropriate, those firms selling used, reconditioned, or recycled versions of the relevant products.

The agencies do not confine their search to such companies. They include firms that would likely enter the market within one year (whether by building new capacity, shifting existing capacity, or acquiring another firm's capacity) in the event of the ubiquitous "small but significant and nontransitory price increase." Firms are not considered likely entrants if entry would require them to incur significant "sunk costs of entry" (i.e., costs that could not be recovered by using the items purchased to produce other products) that could not be recovered within a year.[18]

[2] Measuring Concentration: The Herfindahl-Hirschman Index

Once the agencies have defined the market(s) in which the merging companies compete, they next attempt to determine the effect the proposed transaction will have on concentration in the market(s). Rather than use straight market share and market concentration ratios, the agencies employ a market-share-based index they feel provides a more precise measure.

Known as the Herfindahl-Hirschman Index (HHI), this index is a single number derived by adding together the squares of the known market shares. The greater the HHI, the greater the concentration. According to the guidelines,

16. *Merger Guidelines* § §1.0–1.2.
17. *Merger Guidelines* § §1.12, 1.22.
18. *Merger Guidelines* §1.3.

any market with an HHI of less than 1,000 is deemed *unconcentrated*; one with an HHI between 1,000 and 1,800 is *moderately concentrated*; and any market with an HHI that exceeds 1,800 is *highly concentrated*.[19]

Once the government calculates the HHI for any market in which the combining parties compete, the government measures the increase in concentration, i.e., the increase in the HHI that could result from the proposed combination. The long way to do this is to recalculate the HHI after removing the squares of the combining parties' original market shares, combining those shares, squaring that newly combined share, adding that figure back into the index, and then subtracting the pre-combination index from the new, post-combination total. The short way is to multiply the combining parties' market shares by each other and then by 2 ($2AB$, where A and B are the market shares of the combining parties). The resulting figure is the increase in the HHI that will result from the firms' combination and may be added to the pre-combination HHI to derive the post-combination HHI.[20]

The *Merger Guidelines* state that the agencies will consider transactions having the following results to be presumptively legal: (1) any transaction that will result in a post-combination HHI of less than 1,000; (2) any transaction that will result in a post-combination HHI between 1,000 and 1,800 *and* that involves an increase in the HHI of less than 100; and (3) any transaction that will result in a post-combination HHI in excess of 1,800 *and* that involves an increase in the HHI of less than 50.

The converse of those propositions is also true. Any transaction that will result in a post-combination HHI of over 1,000 and involves an increase of over 100 points, and any transaction that will result in an HHI over 1,800 with an increase of over fifty points is presumed "likely to create or enhance market power or facilitate its exercise."[21] As more fully discussed below, this latter presumption can be rebutted with evidence of a wide variety of mitigating market factors.[22]

[3] Unilateral Effects

Unilateral effects is a term used by the enforcement agencies to describe the possible increase in the ability of a merged firm to raise prices on its own

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19. *Merger Guidelines* §§1.5–1.51.
20. For example, assume a market with five participants, each with a 20-percent market share and a proposal that two of the participants merge. The pre-combination HHI would be 2,000 (20 squared = 400; 400 + 400 + 400 + 400 + 400 = 2,000). The post-combination HHI would be 2,800 (20 + 20 = 40; 40 squared = 1,600; 1,600 + 400 + 400 + 400 = 2,800) and the increase attributable to the combination would be 800 (2,800–2,000 = 800). The same result can be reached quickly by using the formula $2AB$ (2 x 20 x 20 = 800; 800 + 2,000 = 2,800).
21. *Merger Guidelines* §§1.5, 1.51.
22. *See* §5.02[4] below.

(without regard to competition) as the result of the proposed transaction.[23] The term reflects a concern that analysis that examines only the likely increase in oligopolistic behavior or the ability to collude resulting from a reduction in the number of competitors is too narrow. It is not entirely clear how unilateral effects analysis differs from the traditional focus on market power, i.e., the ability to control prices or exclude competition. However, since the agencies use the concept in determining whether and how to attack a proposed transaction, it cannot be ignored.[24]

The *Merger Guidelines* suggest that unilateral effects can occur in at least two different market settings, namely, those in which the: (1) combining firms' products, while competitive with each other, are not perfect substitutes;[25] and (2) products of the combining firms are very similar ("relatively undifferentiated") and the two firms are distinguished primarily by their capacities, giving the merged firm the ability to suppress output and raise prices.[26]

[4] Mitigating Factors

A finding under the HHI test that a transaction is presumptively legal should—and virtually always does—mean an end to the analysis. The transaction will almost certainly be cleared without further inquiry. However, an opposite finding does not necessarily mean that the government will oppose the transaction. The agencies will examine several possible mitigating factors. Once these mitigating factors are considered, many transactions that "fail" the HHI test nevertheless escape agency challenge.

The mitigating factors reflect the agencies' (and the courts') recognition that HHI (or market share) analysis is imprecise and cannot account for many market circumstances that, either individually or in combination, may render a transaction that fails HHI analysis competitively harmless. These factors include, among others, ease of entry, efficiencies, likely business failure of one of the parties, the market's structure, trends away from concentration in the market, the comparative strength of sellers and buyers, and the existence of foreign (or other on-the fringe) competitors that could enter, but have not yet entered, the U.S. market.

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23. *Merger Guidelines* §2.2.
24. *See, e.g.*, *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997); *United States v. Long Island Jewish Med. Ctr.*, 1997-2 Trade Cas. (CCH) ¶ 71,960 (E.D.N.Y. 1997); *State of New York v. Kraft Gen. Foods*, 926 F. Supp. 321, 352–358 (S.D.N.Y. 1995) (concluding that merger of two cereal manufacturers was unlikely to produce anticompetitive unilateral effects); *United States v. Gillette Co.*, 828 F. Supp. 78, 84 (D.D.C. 1993) (concluding that merger is unlikely to produce unilateral or collusive anticompetitive effects).
25. *Merger Guidelines* §2.21.
26. *Merger Guidelines* §2.22.

[a] Ease of Entry

The *Merger Guidelines* recognize that even if a proposed transaction is likely to result in an immediate increase in prices, it may not create a long-term harm to competition. It may simply attract new entrants to the market, drawn by the ability to charge higher prices. So the *Merger Guidelines* state that if a significant and nontransitory price increase of five percent or more *would* immediately attract "committed" new entrants (i.e., those that must incur significant sunk costs to enter) to a market, the price increase is unlikely to stick and competition is unlikely to be harmed.[27]

The guidelines use a three-step analysis: (1) Will the committed new entrants timely (i.e., quickly) achieve a significant market impact?[28] (2) Will the committed new entry be profitable at prices at or below premerger prices?[29] and (3) Will timely and likely entry be sufficient to return market prices to their premerger level?[30]

[b] Efficiencies

The *Merger Guidelines* acknowledge that mergers can create efficiencies that will make the merged entity a more effective competitor than the two companies would have been separately. These efficiencies can lead to lower prices, improved quality, enhanced services, or new products. Thus, the guidelines state that the agencies will consider efficiencies a mitigating factor.[31] They warn, however, that the agencies will consider only *merger-specific efficiencies*, i.e., "only those efficiencies likely to be accomplished with the proposed merger

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27. *See generally, Merger Guidelines* §3.
28. *Merger Guidelines* §3.2.
29. *Merger Guidelines* §3.3.
30. *Merger Guidelines* §3.4.
31. *Merger Guidelines* §4. The agencies revised this section in 1997 to provide a clearer description of their analysis. In February 2009, the FTC released a study analyzing the treatment of efficiencies in FTC merger matters during the period 1997–2007. (Archived at www.ftc.gov). The study sought to determine what types of efficiency claims the parties to proposed mergers raised and how the FTC's two Bureaus (Competition and Economics) treated each type of efficiency claim.

    The study concluded that there was little difference in how the staffs of the two bureaus reviewed efficiency claims, with both most frequently citing as a basis for rejecting efficiency claims that the claim lacked verifiability or merger specificity. The less specific efficiency claims were, the less likely either bureau was to accept them. The study found that both bureaus were as likely to accept fixed-cost savings arguments as they were to accept claims of variable-cost savings and that both were more likely to accept dynamic efficiency arguments than claims that other types of efficiencies would result. The study noted that merging entities most frequently claimed overhead efficiencies and facilities rationalization, while other popular efficiency arguments included raw-material savings and production-cost efficiencies.

and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects."[32] The agencies generally give little or no weight to claims of efficiencies derived from planned reductions to the merged sales and marketing departments. They believe that such reductions may actually be evidence that the merged entity will have market power sufficient to require less of an effort to market its products.

The *Merger Guidelines* point out that certain efficiency claims are easier to prove and hence more likely to be "cognizable" than others. In descending order of likely effectiveness, they mention claims: (1) that the merger will allow the merged firms to reduce the marginal cost of production; (2) that the merger will increase efficiency in research and development; and (3) relating to reducing procurement, management, or capital costs. The *Merger Guidelines* also note that the greater the likely harm to competition as measured by the HHI, the greater any cognizable efficiencies must be to offset that harm.[33]

[c] **Failing and Exiting Assets**

The *Merger Guidelines* also acknowledge that a merger that fails the HHI test can be saved if one of the merging parties (or one of its divisions) would otherwise fail or leave the market affected by the proposed merger.[34] The agencies place strict limits on when this defense will apply, requiring that all four of the following circumstances be met: (1) the failing firm will be unable to meet its financial obligations in the near future; (2) the failing firm will not be able to successfully reorganize under Chapter 11 of the Bankruptcy Code; (3) the failing firm has tried and failed to find alternate buyers that would pose less of a threat to competition; and (4) the assets of the failing firm will disappear from the market if the acquisition is barred.[35] A similar analysis determines whether the defense applies if the failing entity is merely a failing division of one of the merging entities rather than the entire merging entity.[36]

Although the test for establishing the failing firm defense is quite difficult to meet, parties often present arguments that do not fulfill all of these strict requirements. The agencies will still generally consider weakness—short of

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32. *Id.*
33. *Id. See, e.g.*, *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1090 (D.D.C. 1997) (district court granted FTC's request for a preliminary injunction against the proposed combination of two chains of office supply superstores in part because it found that the stores' efficiency claims were largely unverified and not merger-specific).
34. *See generally Merger Guidelines* §5; *see also United States v. General Dynamics Corp.*, 415 U.S. 486 (1984); *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *International Shoe Co. v. Federal Trade Comm'n*, 280 U.S. 291 (1930).
35. *Merger Guidelines* §5.1.
36. *Merger Guidelines* §5.2.

imminent failure—as a factor in their overall analysis. Similarly, a selling party often attempts to convince the agencies that the transaction should be allowed because otherwise it would simply leave the market.

[d] Market Structure

The structure of the market in which the combining parties compete can also provide a mitigating factor. For example, high concentration in a market—such as construction or the supply of automotive components to automobile manufacturers—that requires competitors to bid for contracts (a bidding market), does not necessarily indicate a lack of competitive vitality. If, after the combination, there remain three or four companies eligible, willing, and able to compete (bid) for each contract in the bidding market, competition will, at least arguably, be preserved. Moreover, if individual contracts are very large, current market shares can be misleading. The award of the next contract could dramatically alter the competitors' relative market shares.

[e] Customer Bargaining Power

The authorities also recognize that a parity of bargaining power between buyers and sellers can make it far less likely that a newly merged seller—no matter how large—will be able to impose a price increase. When analyzing proposed transactions, especially those that have "failed the HHI test," the agencies will invariably call the customers of the parties and ask them for their views on the transaction and on its competitive impact. If the customers do not express alarm at the prospect of the combination, or even better, if they welcome it, the agencies are less likely to oppose it. Antitrust counsel can help here by providing the government investigators with contact information for appropriate customer representatives (information that the government investigators often request) and by suggesting that their clients alert their customers to the possible inquiry and encourage them to respond favorably.[37]

[B] The Guidelines: Non-Horizontal Mergers

As noted above, the 1992 *Merger Guidelines* deal only with horizontal mergers, i.e., mergers between competitors, while adopting the treatment of non-horizontal mergers included in the 1984 *Merger Guidelines*.[38]

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37. *See* §6.08 *below* for further discussion of preliminary government investigations.
38. Issued as *U.S. Department of Justice Merger Guidelines*, June 14, 1984, the discussion of non-horizontal mergers was contained in Section 4, "Horizontal Effect from Non-Horizontal Mergers." *See* §5.05, below.

Non-horizontal mergers are those between non-competitors and thus do not directly affect competition. Nevertheless, the agencies state that the indirect adverse effects on competition created by certain non-horizontal mergers can be enough to cause them concerns.[39]

§5.03 *The Joint Venture Guidelines*

In 2000, the FTC and the Antitrust Division of the DOJ released their long-awaited *Antitrust Guidelines for Collaborations Among Competitors*,[40] commonly referred to as the *Joint Venture Guidelines*. Many hoped the *Joint Venture Guidelines* would do for joint ventures what the *Merger Guidelines* have done for mergers, i.e., provide useful guidance to companies and their antitrust advisers anxious to know how the agencies would view a proposed joint venture collaboration. Given the incredible variety of potential combinations that fall under the heading joint venture, this was perhaps too much to hope for. Although the *Joint Venture Guidelines* provide a helpful review of well-established principles of antitrust law under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, they have not had the kind of impact that the *Merger Guidelines* did.[41]

The *Joint Venture Guidelines* expressly defer to the *Merger Guidelines* on how to analyze a proposed joint venture that has the earmarks of a merger:

> Nonetheless, in some cases, competitor collaborations have competitive effects identical to those that would arise if the participants merged in whole or in part. The Agencies treat a competitor collaboration as a horizontal merger in a relevant market and analyze the collaboration pursuant to the *Horizontal Merger Guidelines* if: (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period by its own specific and express terms.[42]

The *Joint Venture Guidelines* provide a useful overview of the antitrust law as it applies to joint ventures, which have become an increasingly important

39. 1984 *Merger Guidelines*, §4.
40. They can be found at http://www.ftc.gov/bc/guidelin.htm. *See generally* "Joint Venture Guidelines: Views from One of the Drafters," remarks by FTC Chairman Robert Pitofsky, Nov. 11 and 12, 1999. *Id*.
41. The applicability of Sherman Act, Section 1 to joint ventures is discussed in §3.09 *above*.
42. *Joint Venture Guidelines §1.3.*

form of economic combination. By allowing companies to share risks and obtain efficiencies without fully merging, joint ventures enhance flexibility and, ultimately, competition. At the same time, by providing a forum for competitors to meet and exchange information, they raise the specter of possible collusive behavior. Counsel for companies planning joint ventures should therefore consult these new *Joint Venture Guidelines* for assistance in advising their clients.[43]

§5.04 Merger Analysis in the Case Law

Although the *Merger Guidelines* and *Joint Venture Guidelines* provide a comprehensive format for merger and joint venture analysis, the case law cannot be ignored. Any litigated merger challenge will, at least in theory, be decided by testing the challenged transaction against precedent rather than against the *Merger Guidelines*.[44] What follows is a brief introduction to the leading Supreme Court decisions.

Although it has been almost fifty years since they were decided, two of the Court's most important cases on merger analysis remain *United States v. E.I. du Pont de Nemours & Co*.[45] and *Brown Shoe Co. v. United States*.[46] In *du Pont*, the Supreme Court decreed the importance of analyzing the merger within the context of a relevant market because "[s]ubstantiality [of the merger's effect on competition] can be determined only in terms of the market affected."[47] In addition, in *Brown Shoe*, the Court held that a market consisted of two components: the geographic market and the product market.[48]

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43. *See* §3.09 above for additional discussion on joint ventures. In June of 2000, the FTC held a two-day workshop to examine the workings, and possible competitive impact, of Internet-based business-to-business (B-to-B) exchanges. Organized by competing buyers and sellers of commercial supplies (or by third parties), these exchanges promise increased efficiency, and hence lower costs, in the purchase of everything from raw materials, to component parts, to office supplies. But they also offer increased antitrust risk to their participants, who should consult antitrust counsel in planning and executing their ventures. The FTC has published a useful study based on the workshop that is available at http://www.ftc.gov.
44. *See United States v. Englehard Corp.*, 970 F. Supp. 1463, 1467 (M.D. Ga.), *aff'd*, 126 F.3d 1302 (11th Cir. 1997) (citing 1992 *Merger Guidelines* ("the Guidelines are not binding on the Court")).
45. 353 U.S. 586 (1957).
46. 370 U.S. 294 (1962).
47. 353 U.S. at 593; *see also International Boxing Club v. United States*, 358 U.S. 242 (1959) (relevant product market defined as championship boxing contests); *United States v. Paramount Pictures*, 334 U.S. 131, 172–173 (1948) (relevant product market consisting of first-run showings of movies).
48. 370 U.S. at 324.

The Court also noted the possible existence of submarkets, either geographic or product, within the larger markets.[49]

For some time thereafter, the Court emphasized market shares and market concentration ratios as the primary, indeed sometimes the only, determinant of legality. In *United States v. General Dynamics Corp.*,[50] however, the Court expressed a willingness to look beyond market share for the presence of mitigating factors, like ease of entry, enhanced efficiency, and the possibility that the acquired firm or assets would otherwise leave the market, that could ameliorate the likely harm of an acquisition.[51]

[A] Defining the Product Market

Du Pont and *Brown Shoe* introduced the concept of cross-elasticity of demand as a way to determine the boundaries of the product market. In *du Pont*, the Court noted that how customers will react to price changes is crucial when determining the product market:

> If a slight decrease in the price of cellophane causes a considerable number of customers to switch to cellophane, it would be an indication that a high

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49. 370 U.S. at 325; *see also United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966) (extending submarket analysis to Sherman Act section 2 cases). The *Grinnell* Court also discussed the concept of "cluster markets," *i.e.*, markets composed of a series of related products and services handled together. *Id.* This concept has been used frequently in hospital and healthcare antitrust litigation. *See, e.g.*, *United States v. Long Island Jewish Med. Ctr.*, 1997–2 Trade Cas. (CCH) ¶ 71,960 at 80,688 (E.D.N.Y 1997).

    The Court's emphasis on market share resulted in some decisions that would unlikely be duplicated today, if only because it is unlikely that the government agencies would challenge the transactions involved. *See, e.g.*, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364 (1963) (enjoining merger to prevent a single bank from controlling at least 30 percent of the commercial bank market in the four-county Philadelphia metropolitan area); *see also United States v. Von's Grocery Co.*, 384 U.S. 270, 277–278 (1966) (declaring illegal the 1960 merger of Von's, the number three grocery store operator in the Los Angeles area with a 4.7-percent market share, and Shopping Bag, number six with a 4.2-percent share); *United States v. Aluminum Co. of Am.*, 377 U.S. 271 (1964) (denying Alcoa, which had a 28-percent share of a market in which the top-five firms shared 76 percent, the right to acquire a firm with one percent).
50. 415 U.S. 486 (1984).
51. *Id.* at 498–511 (citing *Brown Shoe*, above, 370 U.S. at 321–322 and *United States v. Continental Can Co.*, 378 U.S. 441, 458 (1964)) ("Market shares are the primary indicia of market power but a judgment under §7 is not to be made by any single qualitative or quantitative test"); *see also Citizen Publ'g Co. v. United States*, 394 U.S. 131, 136 (1969) (setting forth three-part test for party seeking to assert "failing firm defense" to §7 action: (1) grave probability of failure; (2) no alternative buyer; (3) dim or nonexistent prospects for reorganization); *International Shoe Co. v. Federal Trade Comm'n*, 280 U.S. 291, 301–303 (1930) (first establishing failing company defense to section 7 action).

> cross-elasticity exists between them; that the products compete in the same market.[52]

In *Brown Shoe*, the Court further explained how cross-elasticity, which it also referred to as reasonable interchangeability of use, delineates the product market:

> 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.[53]

Subsequent Supreme Court cases have illustrated the application of this analysis, which requires an in-depth and complex factual examination, but have added no major changes.[54] In *Eastman Kodak Co. v. Image Technical Service*,[55] however, the Court did acknowledge that product markets could be defined that consisted solely of the aftermarkets for service or replacement parts for a single company's products.[56]

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52. 351 U.S. at 400.
53. 370 U.S. at 325.
54. *Compare, e.g.*, *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 276 (1964) (product market narrowly defined to differentiate market for copper cable from that for aluminum cable) *with United States v. Continental Can Co.*, 378 U.S. 441, 455–457 (1964) (product market defined to include both metal cans and glass jars). *See also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356–357 (1963) (unique "cluster" of commercial banking products and services found to constitute a separate product market from those offered by other types of financial institutions); *United States v. Connecticut Nat'l Bank*, 374 U.S. 656, 664–666 (1974); *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 360–361 (1970); *United States v. Grinnell Corp.*, 384 U.S. 563, 572–575 (1966) (applying cluster concept to define market consisting of accredited central station protective services).
55. 504 U.S. 451 (1992).
56. *Id.* at 481–482. Early lower court decisions in the wake of *Kodak* were generally not sympathetic to plaintiffs. *See, e.g.*, *SMS Sys. Maintenance Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11 (1st Cir. 1999), *cert. denied*, 528 U.S. 118 (2000) (rejecting plaintiff's contention that the relevant product market was the aftermarket for servicing defendant's computers); *Elliot v. United Ctr.*, 126 F.3d 1003 (7th Cir. 1997), *cert. denied*, 523 U.S. 1021 (1998) ("Food sales within the United Center" does not describe a relevant market); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997), *cert. denied*, 523 U.S. 1059 (1998) (control over franchisees' continued enjoyment of rights and services under their franchise agreement is not a relevant product market); *PSI Repair Servs. v. Honeywell Inc.*, 104 F.3d 811, 815–821 (6th Cir. 1997), *cert. denied*, 520 U.S. 1265 (1997) (defining product market as the primary equipment market, not the secondary parts and services market, and upholding summary judgment for defendant Honeywell).

    Some more recent lower court decisions, however, have shown that under the right circumstances courts will allow a plaintiff to proceed on a *Kodak*-based aftermarket monopolization theory. *See, e.g., Newcal Industries v. Ikon Office Solutions*, 513 F.3d 1038, 1043–44 (9th Cir. 2008) *cert. denied*, 129 S.Ct. 2788 (2009); *Avaya, Inc. v. Telecom Labs, Inc.*, 2008–2 Trade Cas. (CCH) ¶ 76,345 (D.N.J. 2008); *Black Box Corp. v. Avaya, Inc.*, 2009–1 Trade Cas. (CCH) ¶ 76,640 (D.N.J. 2008).

In 1997, the FTC successfully challenged the proposed merger between the Staples and Office Depot office supply chains using a surprisingly aggressive product market definition.[57] The FTC alleged, and the district court accepted, a product market consisting of "the sale of consumable office supplies through office supply superstores."[58] Whether the agency and the court were correct in lumping together all consumable office supplies and in excluding other channels of distribution (such as other types of stores and catalog and internet outlets) from the market is an interesting and controversial question.[59]

The FTC was similarly aggressive in attacking the 2007 proposed acquisition of Wild Oats Markets by Whole Foods—claiming that the market consisted of premium, natural, and organic supermarkets. The FTC's attack led to protracted litigation that took almost two years to resolve. The U.S. District Court for the District of Columbia initially denied the FTC's June 2007 request for a preliminary injunction.[60] The FTC subsequently filed an emergency motion with the U.S. Court of Appeals for the District of Columbia asking that court to enjoin the merger pending appeal. The Court of Appeals denied the FTC's motion.[61] And so, even as the FTC's appeal of the district court's decision was pending before the Court of Appeals, Whole Foods and Wild Oats completed their merger on August 28, 2007.

On July 29, 2008, almost a full year after Whole Foods acquired Wild Oats, the Court of Appeals reversed the district court's decision denying the FTC's request for a preliminary injunction blocking the merger.[62] According to the Court of Appeals, the FTC had demonstrated a likelihood of success on the merits. Whole Foods thereafter petitioned for rehearing *en banc*, but the Court of Appeals denied its request on November 21, 2008. The case then moved to the FTC for administrative litigation.

On March 6, 2009, the FTC announced that it had reached a settlement with Whole Foods that required Whole Foods to "sell 32 premium natural and organic supermarkets" and "to divest related Wild Oats intellectual

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57. *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997); *see also FTC v. Heinz and Milnot,* 246 F.3d 708 (D.C. Cir. 2001) (enjoining proposed merger of two of top three competing baby food manufacturers). *But compare In re BP Amoco & Atlantic Richfield Co.*, FTC File No. 991–0192, http://www.ftc.gov.
58. *Staples*, 970 F. Supp. at 1073.
59. Other recently litigated agency challenges include: *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002) (FTC successfully challenges the proposed merger of two major glass-producing companies); *United States v. Oracle, Inc*., 2004 U.S. Dist. LEXIS 18063 (N. D. Cal., Sept. 9, 2004) (DOJ unsuccessfully challenges the proposed hostile takeover of one maker of systems software by another.).
60. *FTC v. Whole Foods Mkt.*, 502 F. Supp. 2d 1 (D.D.C. 2007).
61. *FTC v. Whole Foods Mkt.*, No. 07–5276 (D.C. Cir. Aug. 23, 2007).
62. *FTC v. Whole Foods Mkt.*, 533 F. 3d 869 (D.C. Cir. 2008), *amended and reissued* 548 F. 3d 1028 (D.C. Cir. 2008).

property, including unrestricted rights to the 'Wild Oats' brand, which retains significant name recognition and loyalty among consumers."[63]

[B] Defining the Geographic Market

In *Brown Shoe*, the Supreme Court explained that geographic market analysis is "pragmatic [and] factual," and is similar to that used to define the product market.[64] Thus, cross-elasticities of both supply and demand will be considered.[65] The Court added that the market could be the entire country or as small as a single metropolitan area.[66] In *United States v. Philadelphia National Bank*,[67] the Court stated that the geographic market consists of the "'area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.'"[68]

Because geographic market definition relies so heavily on "pragmatic, factual" considerations, it is difficult to make generalizations about the cases. The issue often goes undisputed in large, national transactions.[69] It plays a more important role in transactions involving smaller geographic areas, such as those involving combinations of healthcare providers or waste haulers.[70]

Geographic market definition recently played an important role in the DOJ's unsuccessful attempt to prevent one leading software producer, Oracle, from pursuing its proposed takeover of PeopleSoft, another major software producer.[71] The court agreed with Oracle that the government had

63. *See* materials collected at www.ftc.gov.
64. 370 U.S. at 336–339.
65. *Id*. at 336–339.
66. *Id*. at 336–337.
67. 374 U.S. 321 (1963).
68. *Id*. at 359 (quoting *Tampa Electric Coal Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)); *see also United States v. Marine Bancorporation*, 418 U.S. 602, 619 (1974) (geographic market for merger of large and small noncompeting banks defined as the seller's metropolitan area); *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 362–365 (1970) (geographic market for merger of two of three small competing banks defined as two-city area constituting 85 percent of their business); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 559 (1966) (Harlan, J., concurring in judgment) ("[I]n terms of the structure of beer marketing as reflected in sales statistics and brewery location the record supports the relevancy of Wisconsin as a distinguishable and economically significant market for the sale of beer"); *Standard Oil Co. v. United States*, 337 U.S. 293, 299, n.5 (1949) ("the narrower the area of competition, the greater the comparative effect on the area's competitors").
69. *See, e.g.*, *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997).
70. *E.g.*, *FTC v. Tenet Health Care Comp.*, 186 F.3d 1045 (8th Cir.), *reh'g denied*, en banc 1999 U.S. App. LEXIS 24855 (8th Cir. 1999); *Doctor's Hosp. of Jefferson v. Southeast Medical Alliance*, 123 F.3d 301, 311–312 (5th Cir. 1997); *California v. Sutter Health System*, 130 F. Supp. 2d 1109 (N.D. Cal. 2000); *United States v. Long Island Jewish Med. Ctr.*, 1997–2 Trade Cas. (CCH) ¶ 71,960 at 80,701 (E.D.N.Y. 1997).
71. *United States v. Oracle Corp.*, 331 F.Supp.2d 1098 (N. D. Cal. 2004).

failed to establish that the area of effective competition was limited to the United States. Relying on the Elzinga-Hogarty test, which examines shipping patterns and provides that an area with significant exports or imports is not a relevant geographic market, the court concluded that "the relevant geographic market in this case is global."[72]

§5.05 Vertical Mergers

Challenges to proposed acquisitions involving companies in vertical relationships, i.e., companies occupying different levels on the chain of distribution, are far less common than challenges to horizontal acquisitions. Although vertical acquisitions do not directly eliminate competition between horizontal competitors, they can be attacked on the theory that they may indirectly harm competition by eliminating a source of supply or demand from the competitors of one or both of the parties.[73]

The federal enforcement agencies have stated that they subscribe to this *foreclosure theory* and will use it when appropriate to challenge vertical acquisitions.[74] The agencies also assert that vertical acquisitions can harm competition (1) by facilitating collusion in either market,[75] or (2) by allowing regulated monopolies to evade regulation.[76]

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72. *Id.* at 1165.
73. *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 323–334 (1963) ("by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may . . . 'deprive . . . rivals of a fair opportunity to compete'") (quoting *Standard Oil Co. v. United States*, 337 U.S. 293, 314 (1949)).
74. 1984 *Merger Guidelines* §§4.21–24. The 1992 *Merger Guidelines* do not discuss non-horizontal mergers. Instead, they adopt the 1984 guidelines' treatment of this area. 1992 *Merger Guidelines* §0.1. *See, e.g.*, *Time Warner, Inc.*, 5 Trade Reg. Rptr. (CCH) 24,104 (FTC Sept. 12, 1996) (challenge alleging anticompetitive impact of vertical foreclosure); Silicon Graphics, Inc., 5 Trade Reg. Rptr. (CCH) ¶ 23,838 (FTC Nov. 14, 1995) (same).

    The FTC utilized this theory in September 2000 to attack the Boeing company's acquisition of GM's Hughes Aerospace satellite business. Boeing was a provider of launch services for Hughes' satellite. The combination was both vertical and conglomerate in that some satellite purchasers contract separately for launch services while others purchase a package from Hughes thereby allowing Hughes to contract for the launch vehicle. The matter was resolved via a consent decree in which Boeing agreed to extensive conduct remedies designed to prevent it from taking unfair advantage of its ownership of Hughes when competing for launch contracts. The relevant documents can be found at http://www.ftc.gov.
75. The 1984 *Merger Guidelines* suggest that an acquisition of a retailer by a producer may make it easier for the producer to control retail prices of its products since ownership of the retailer may give it access to information provided the retailer by the producer's competitors. 1984 *Guidelines* §§4.221–4.222.
76. *See* 1984 *Merger Guidelines* §4.23.

In addition, the FTC has stated that it will consider attacking vertical mergers that could increase entry barriers by requiring new entrants to simultaneously enter both levels of the chain of distribution affected by the proposed merger.[77]

§5.06 Conglomerate Mergers; Potential Competition; Entrenchment

Conglomerate mergers or acquisitions are those where the parties are neither direct (horizontal) competitors nor in a supplier-customer (vertical) relationship. In the distant past, there was some sentiment for challenging mergers solely on the basis of their size. From the Reagan administration through the second Bush administration, however, such a challenge would have been almost inconceivable. With the Obama administration's emphasis on antitrust enforcement in the area of single-firm conduct and renewed concern about whether companies should be allowed to become "too big to fail," such a challenge has once again become possible, especially if the products of the merging parties, although not direct competitors, are closely related and both parties dominate their respective fields.[78]

On a related note, the courts and the agencies have also recognized that transactions in which one or both of the parties is either a perceived or actual *potential* competitor of the other could harm competition.[79] The DOJ and the FTC have stated in their *Merger Guidelines* that they consider the elimination of perceived or actual potential competition grounds for a challenge.[80]

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77. Robert Pitofsky, Chairman, FTC, "Vertical Restraints and Vertical Aspects of Mergers—A U.S. Prospective," (Oct. 16, 1997), *archived at* http://www.ftc.gov.
78. For example, after an extended and widely monitored investigation, the FTC in 2000 cleared the merger of Time-Warner and AOL. The two companies were not direct competitors. But each was a leading player in one or more markets closely related to those of the other (Time-Warner: cable TV, film, publishing, recording; AOL: Internet services). Fears were raised that a combined entity could exploit these leadership roles to harm competition in multiple markets, including broadband Internet access and interactive television. The FTC attempted to placate these fears by imposing both structural and conduct conditions. The related documents can be found at http://www.ftc.gov.
79. *See* ABA Section of Antitrust Law Monograph No. 14, Non-Horizontal Merger Law & Policy (1988).
80. 1984 *Merger Guidelines* §§4.111–4.112.

[A] Perceived Potential Competition

In *United States v. Marine Bancorporation*,[81] despite upholding the lower courts' dismissal of the government's complaint, the Supreme Court recognized that the threatened elimination of perceived potential competition could form a basis for a successful merger challenge.[82] The Court stated that a claimant must prove: (1) substantial concentration in a relevant market; (2) that the acquiring firm has the "characteristics, capabilities, and economic incentive to render it a potential *de novo* entrant" into that market; and (3) that the acquiring firm's presence on the "fringe" of the market had "in fact tempered oligopolistic behavior" in the market.[83]

[B] Actual Potential Competition

Oddly, the Supreme Court has never formally recognized the validity of a claim based on the elimination of *actual*, as opposed to perceived, potential competition. The Court has twice expressly refused to decide whether the elimination of a company that was in fact likely, or in a position, to enter, could alone support a Section 7 violation.[84] Nevertheless, in *United States v. Marine Bancorporation*,[85] the Court did state that if it were to recognize the theory, it would do so only if the claimant could prove (in addition to the elements necessary to prove perceived potential competition): (1) that the entering company could have entered the market somehow other than through the challenged transaction; and (2) that this other method "offer[s] a substantial likelihood of ultimately producing deconcentration of that market or other significant pro-competitive effects."[86]

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81. 418 U.S. 602 (1974).
82. *Id.* at 624–631.
83. *Id.* at 624–625. Other Supreme Court decisions discussing perceived potential competition include: *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533–534 (1973); *Ford Motor Co. v. United States*, 405 U.S. 562, 567–568 (1972); *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 581 (1967); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 659 (1964); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 172–177 (1964).
84. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537–538 (1973) ("We leave for another day the question of the applicability of §7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under §7 only on the grounds that the company could, but did not, enter *de novo* or through 'toe-hold' acquisition and that there is less competition than there would have been had entry been in such a manner"); *United States v. Marine Bancorporation*, 418 U.S. 602, 639 (1978) ("We express no view on the appropriate resolution of the question reserved in Falstaff").
85. 418 U.S. 602 (1978).
86. *Id.* at 633.

The Court's failure to officially adopt the theory may simply be the result of never having been confronted with a situation that required a decision. In any event, because the federal enforcement agencies have embraced the theory and because the Supreme Court has never rejected the theory, it cannot be ignored.

[C] Entrenchment

In its 1967 decision in *FTC v. Procter & Gamble Co.*,[87] the Supreme Court accepted the FTC's theory that an acquisition of Clorox, a company with a dominant position in the market for household liquid bleaches, by Procter & Gamble, a non-competitor, could harm competition in that market and thereby violate Section 7 of the Clayton Act.[88] The FTC's theory was that the acquisition by the wealthy, marketing powerhouse P&G would "entrench" Clorox's already dominant market position.[89] The Court also accepted the FTC's contention that the merger eliminated P&G as "the most likely potential entrant," into the bleach market.[90] The Court's decision is something of a high-water mark in anti-merger jurisprudence. Although never officially overruled, it is hard to believe that today's Court would follow it. It is also unlikely that either agency would pursue a case based (or solely based) on the entrenchment theory.

§5.07 Interlocking Directorates

Clayton Act, Section 8 prohibits anyone from serving as a director or officer (elected or chosen by the board) of two competing companies.[91] Specifically, Section 8 applies if the two companies: (1) are engaged in commerce; (2) are

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87. 386 U.S. 568 (1967).
88. *Id.* at 578–581. Clorox had a market share of 48.8 percent nationally, with higher shares in some regional markets. The two-firm national concentration figure was 65 percent and the four-firm Figure 80 percent.
89. *Id.*
90. *Id.* at 580–581 ("It is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market."). This language arguably accepts an actual potential competition argument despite the Supreme Court's later statements that it had not yet formally accepted such a claim. *See* §5.06[B] above.
91. 15 U.S.C. §19. Interlocking directorates may also be attacked under Sherman Act, Section 1 and the FTC Act, Section 5.

    Section 8 also prohibits (with exceptions) any director, officer, or employee of any Federal Reserve member bank from also serving as a director, officer, or employee of any other bank. Although this aspect of Section 8 has not been repealed, interlocking bank directorates are now governed by the Depository Institutions Management Interlocks Act, 12 U.S.C. §§3201–3208.

competitors, such that "the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws;" and (3) each "has capital, surplus, and undivided profits aggregating more than $10 million (now $26,161,000 after required annual adjustments)."[92]

Section 8 exempts companies from its prohibitions if the competitive sales of: (1) *either* company is less than $1 million (now $2,616,100 after adjustments); (2) *either* is less than 2 percent of its total sales; or (3) *each* are less than 4 percent of its total sales.[93]

Section 8, which may be enforced by the FTC, the DOJ, and private parties, is rarely, and somewhat inconsistently, invoked. Remedies usually involve an injunction prohibiting the interlock. Although damages are theoretically available to an injured private party, they have apparently never been awarded.

The Supreme Court has looked at Section 8 twice. In *United States v. W.T. Grant Co.*,[94] it held that the resignation of the interlocking director does not render a Section 8 case moot unless the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated."[95] In *BankAmerica Corp. v. United States*,[96] the Court held that Section 8 would not apply if *either* corporation was among the types exempted from the section's coverage.[97]

92. 15 U.S.C. §19(a)(1).
93. 15 U.S.C. §19(a)(2).
94. 345 U.S. 629 (1953).
95. *Id.* at 632–633.
96. 462 U.S. 122 (1983).
97. *Id.* at 126, n.1, 128. Companies exempted from coverage include "banks, banking associations, and trust companies" (15 U.S.C. §19(a)(1)), as well as those that do not meet the size requirements.

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CHAPTER 6

Premerger Notification—The Hart-Scott-Rodino Act

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§6.01 Introduction

Congress passed the Hart-Scott-Rodino Antitrust Improvements Act (the Hart-Scott-Rodino Act or HSR Act) in 1976.[1] The HSR Act, which has a European Community (EC) analogue in the EC Administrative Regulation, was the United States (U.S.) Congress' effort to make merger enforcement more sensible and more efficient. Before the HSR Act, the federal agencies charged with merger enforcement, the Federal Trade Commission (FTC) and the Department of Justice (DOJ), would not learn of proposed mergers, acquisitions, or joint ventures until the transactions were publicly announced (if they were) and often well on their way to completion or already complete. Most merger enforcement thus involved either hasty races to enjoin imminent closings or after-the-fact attempts by the agencies to undo completed transactions. The process, which was both inefficient and highly adversarial, did not serve the interests of the enforcement agencies, those being regulated, or—most importantly—the public.

With the HSR Act, Congress sought to improve the process by requiring companies and individuals planning substantial purchases or sales of voting securities or assets to notify the agencies and wait thirty days before closing.[2] The act required that the parties file Hart-Scott-Rodino Premerger Notification and Report Forms (Premerger Notification) that described the parties, the proposed transaction, and the markets in which the parties operated. The act also required that the parties submit internal documents that analyzed the proposed transaction from a competitive standpoint.

Using this material, and, at times, additional information voluntarily and informally supplied by the parties, their customers, and competitors, one or the other of the agencies will, during the thirty-day period, take a first look at the proposed transaction to determine whether it raises competitive concerns. If not, the agency may terminate the waiting period early or simply take no action. The parties are free to close upon early termination or when the thirty-day waiting period expires.

The agency's grant of early termination, or its failure to act within the thirty-day period, does not, however, constitute a finding that the transaction is legal. Put another way, clearance does not provide antitrust immunity and does not constitute a waiver of the agencies' right later to further investigate or attack the combination. Nor does the fact that a transaction is not HSR reportable mean that it is immune from later investigation or attack by the agencies. Such post-closing attacks are rare, however.

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1. Clayton Act §7A; 15 U.S.C. §18a.
2. The statute recognized the need to expedite cash tender offers and provided a reduced waiting period of fifteen days.

If the investigating agency cannot satisfy its concerns about the transaction within the initial thirty days, the act allows it to make a formal Request for Additional Information, commonly known as a Second Request. A Second Request extends the waiting period until thirty days (ten days in the case of cash tender offers) after the parties have fully complied with the Second Request. If the agency is then convinced that the proposed transaction would violate the antitrust laws, and it is unable to work out an accommodation with the parties, the agency can file an action in federal court seeking to enjoin the parties from closing.

Preparing premerger filings and obtaining antitrust clearance has become an important part of private antitrust practice in the United States, one that requires considerable expertise. Anyone planning a merger, acquisition, or joint venture with a value approaching $65.2 million and in which any party has sales or assets in or into the United States should obtain the assistance of experienced U.S. antitrust counsel early to help determine whether HSR reporting is necessary and, if so, whether the proposed transaction is likely to raise antitrust concerns at the DOJ or FTC.

This chapter cannot replace such assistance. What it does provide is an overview of the HSR Act and the FTC's implementing rules; general guidance on practice and procedure under the act; and some practical thoughts for dealing with the government agencies.[3]

§6.02 The HSR Act and the Premerger Notification Rules—Overview

Practice and procedure under the HSR Act are governed by the act itself and by the Premerger Notification Rules (HSR Rules), both of which are outlined in this section.[4]

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3. Useful sources of information on practice and procedure under the HSR Act include the FTC's Hart-Scott-Rodino Guides and the FTC's *Statement of Bases and Purposes*, published by the FTC in connection with the passage of the Hart-Scott-Rodino Act; and the *Premerger Notification Practice Manual*, a collection of FTC opinions published by the ABA's Antitrust Section (4th ed. 2007). Additional and more current FTC opinions can be found on the FTC's website: www.ftc.gov. As a last resort, one can call the FTC's Premerger Notification Office (PNO), which can be reached at (202) 326–3100. This office has professionals on call throughout the business day who will answer questions about the act and rules, assist parties in determining whether a transaction is reportable, and even respond in writing to requests for opinions.
4. 16 C.F.R. §§801.1–803.90.

[A] The HSR Act—Overview

The HSR Act contains ten subsections.

Subsection (a) sets forth the size of the parties and size of the transaction tests that govern "reportability," i.e., which acquisitions of assets and voting securities are covered by the act.[5]

Subsection (b) explains the operation of the thirty-day waiting period, allows the government—at its sole discretion—to grant early termination of the waiting period, and provides definitions of certain terms and concepts.[6]

Subsection (c) provides a list of twelve types of transactions that are exempt from the reporting requirements of the act.[7]

Subsection (d) authorizes the FTC to issue implementing rules.[8]

Subsection (e) authorizes the enforcement agencies to extend the waiting period through the issuance of a Request for Additional Information.[9]

Subsection (f) provides for the expedition of suits filed by the agencies to preliminarily enjoin reported transactions that they believe violate Section 7 of the Clayton Act, Section 5 of the FTC Act, or Sections 1 or 2 of the Sherman Act.[10]

Subsection (g) imposes penalties of up to $11 thousand per day for noncompliance with the HSR Act's reporting requirements.[11]

Subsection (h) states that any information submitted to the agencies pursuant to the act shall be exempt from disclosure under the Freedom of Information Act (FOIA).[12]

Subsection (i) states that a failure to act by the agencies in response to a Premerger Notification does not prevent them from later attacking a transaction.[13]

Subsection (j) orders the FTC to report to Congress annually on the operation of the act.[14]

[B] The HSR Rules—Overview

Like Gaul, the HSR Rules are divided into three parts. The first, Section 801, contains rules relating to the coverage of the HSR Act.[15] Section 801 contains,

5. Clayton Act §7A(a) (15 U.S.C. §18a(a)); *see* §6.03[A]–[C], below.
6. Clayton Act §7A(b) (15 U.S.C. §18a(b)); *see* §§6.07, 6.08, below.
7. Clayton Act §7A(c) (15 U.S.C. §18a(c)) *see* §6.03[D], below.
8. Clayton Act §7A(d) (15 U.S.C. §18a(d)).
9. Clayton Act §7A(e) (15 U.S.C. §18a(e)) *see* §6.10, below.
10. Clayton Act §7A(f) (15 U.S.C. §18a(f)) *see* §§6.11, 6.12, below.
11. Clayton Act §7A(g) (15 U.S.C. §18a(g)) *see* §6.05, below.
12. Clayton Act §7A(h) (15 U.S.C. §18a(h)).
13. Clayton Act §7A(i) (15 U.S.C. §18a(i)).
14. Clayton Act §7A(j) (15 U.S.C. §18a(j)).
15. 16 C.F.R. §801.1–.90.

among other things, definitions of the key terms,[16] instructions on how to calculate the size of the parties and the size of the transaction for purposes of determining reportability,[17] special instructions relating to tender offers and joint ventures,[18] and a warning against structuring transactions solely to avoid having to report.[19]

The second part, Section 802, contains rules relating to the exemptions from the HSR Act's reporting requirements.[20] The third, Section 803, contains rules relating to the Premerger Notification Form itself,[21] the filing fee,[22] the waiting period,[23] requests for additional information,[24] and FTC interpretations of the rules.[25]

§6.03 Determining Reportability

Parties to a proposed merger, acquisition, or joint venture must first determine whether the transaction is reportable under the Hart-Scott-Rodino Act, i.e., whether they must submit Premerger Notification and Report Forms and observe the act's thirty-day waiting period. The following discussion is meant to provide general guidance only. Because transactions vary greatly, this discussion cannot substitute for careful analysis by U.S. antitrust counsel of the specific transaction with direct reference to the HSR Act and rules and the definitions they contain.[26] There is also a growing body of FTC opinions interpreting the act and rules available in book form and on-line.[27] When in doubt, the FTC premerger staff is available to answer questions. They will do so on a hypothetical or no-names basis.[28]

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16. 16 C.F.R. §801.1–.3.
17. 16 C.F.R. §801.4–.21.
18. 16 C.F.R. §801.30–.40.
19. 16 C.F.R. §801.90.
20. 16 C.F.R. §802.1–.71.
21. 16 C.F.R. §803.1–.8.
22. 16 C.F.R. §803.9.
23. 16 C.F.R. §803.10–.11.
24. 16 C.F.R. §803.20–.21.
25. 16 C.F.R. §803.30.
26. In determining reportability and the applicability of the various exemptions, it is particularly important to make reference to certain key definitions contained in the Rules, including the terms *person, ultimate parent entity, acquiring person, acquired person, issuer, voting security, annual net sales, total assets*, and *hold. See* 16 C.F.R. §§801.1–.2.
27. See, *Premerger Notification Practice Manual*, a collection of FTC opinions published by the ABA's Antitrust Section (4th ed. 2007) and opinions collected on the FTC's website www.ftc.gov.
28. The Staff of the FTC's Premerger Notification Office is available by telephone at (202) 326–3100.

The initial determination of reportability requires each party to answer three questions: (1) Does the transaction involve an acquisition of voting securities, non-corporate interests (such as partnership or LLC interests) or assets? (2) Do the parties meet the "size-of-the-parties" test?" (3) Does the acquisition satisfy the **$65.2** million "size-of-the-transaction" test? (See cautionary note below.)[29] If the answer to the first or last questions is *no*, the transaction is not reportable. If the answers are *yes* and the answer to the second question is *no* but the size of the transaction exceeds **$260.7 million** *or* if the answers to all three are *yes*, the transaction is reportable *unless* the transaction or the parties qualify for one or more of the specific exemptions from the HSR Act's reporting requirements.[30]

[A] Does the Transaction Involve an Acquisition?

The first question is whether there will be an acquisition, either of voting securities, non-corporate interests (such as LLC or limited partnership interests), or assets.[31] If the transaction does not involve an acquisition, e.g., if it involves only the formation of a partnership, there will be no need to file. Nor is there a need to file if the acquisition is of non-voting shares, an option, or options to purchase shares.[32] Reporting may be required, however, upon the conversion of shares to voting status or upon the exercise of options.

There is an important distinction between the treatment of acquisitions involving non-corporate interests and those involving voting securities or assets. Acquisitions of non-corporate interests are reportable only if all of the various tests are met *and* the acquisition will give the acquiring party *control* (as defined in Rule 801.1(b)) of the acquired party. Acquisitions of the voting

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29. Caution: The $65.2 million figure used for the size-of-the-transaction and other important figures shown below in boldface are subject to annual inflation adjustment. The figures shown here are the 2009 figures and will be adjusted next in early 2010.
30. One pitfall to be wary of is the so-called secondary acquisition. A secondary acquisition occurs when one company acquires another, which in turn owns a substantial, but noncontrolling (*i.e.*, less than 50 percent) stake in a third. The acquiring company and the third may be required to submit separate premerger filings if the secondary acquisition passes the size-of-the-parties and size-of-the-transaction tests and is not otherwise exempt. *See* 16 C.F.R. §801.4.
31. Definitions of voting securities, non-corporate interests, and assets are provided in §801 of the HSR Rules. *See* 16 C.F.R. §§801.1 and 801.10–801.21. Even with the rules' help, issues can arise as to what constitutes a voting security, non-corporate interest, or asset. The FTC Premerger Notification Office should be consulted if there are questions, since the agencies have developed positions on many frequently raised issues. For example, they generally treat the sale or grant of exclusive patent or trademark licenses as sales of assets but do not so treat non-exclusive licenses.
32. *See* 16 C.F.R. §802.31.

securities that meet the reporting tests are reportable without regard to whether the acquiring party will obtain control of the acquired party.

[B] Do the Parties Meet the Size-of-the-Parties Test?

The size-of-the-parties test is satisfied if one party to the transaction has annual net sales or total assets of at least **$130.3** million worldwide and another party to the transaction has annual net sales or total assets of at least **$13.0** million worldwide.[33] The same figures apply in the case of the formation of a joint venture or other corporation.[34] The rules provide definitions and guidance on how to calculate these figures for corporations, partnerships, other entities, and individuals and on their application for joint venture corporations.[35] Amendments to the HSR Act that became effective February 1, 2001, eliminated the size-of-the-parties test if the value of the transaction exceeded $200 million (now $260.7 million). In other words, if a transaction is valued at **$260.7** million or more, it is reportable without regard to the size of the parties.[36]

[C] Does the Transaction Meet the Size-of-the-Transaction Test?

The size-of-the-transaction test is satisfied if one or more of the parties will acquire **$65.2** million worth of the voting stock, non-corporate interests, or assets of another entity.[37] The rules contain guidance on how to value stock, non-corporate interests, and assets and on the aggregation of stock, non-corporate interests, and assets being acquired in the same transaction or in a series of transactions.[38]

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33. Clayton Act §7A(a)(2)(B) (15 U.S.C. §18a(a)(2)(B)).
34. *Id.*; *see also* 16 C.F.R. §801.40. The rules allow individuals to exclude their principal residence and personal property from their assets. 16 C.F.R. §801.11(d). The FTC has in the past taken the position that voting securities (at least those being sold in the transaction at issue) may be valued at acquisition price, rather than current market value. The FTC's ruling means that individuals who would pass the size-of-the-parties test if their securities were valued at market may value them at the lower acquisition price and may thus avoid having to report. Like all informal FTC rulings, this one should be confirmed with the FTC Premerger Notification Office (202–326–3100) before it is relied upon.
35. 16 C.F.R. §§801.1–801.40.
36. Clayton Act §7A(a)(2)(A) (15 U.S.C. §18a(a)(2)(A)).
37. Clayton Act §7A(a)(2) (15 U.S.C. §18a(a)(2)).
38. *See* 16 C.F.R. §§801.10–801.20.

[D] Exemptions

The HSR Act and Rules provide more than twenty exemptions from the premerger notification requirements for transactions that would otherwise be reportable.[39] Determining whether an exemption applies is very fact-specific. It should be made carefully, since an incorrect decision can expose the parties to the act's $11 thousand per day penalties for failure to file. It may be worthwhile to confirm a decision not to file with a call to the FTC's Premerger Notification Office (PNO).[40] As mentioned above, this can be done on a hypothetical or no-names basis if there is concern for confidentiality.

A detailed discussion of all the available exemptions is beyond the scope of this work. A few that occur frequently are discussed below.

[1] Acquisitions of Goods or Realty in the Ordinary Course of Business[41]

This exemption is described in the rules primarily through the use of examples, both of acquisitions that are in the ordinary course and those that are not.

[2] Acquisitions of Certain Real Property Assets and of Carbon-Based Mineral Reserves[42]

The rules exempt purchases of various types of real property (e.g., new and used facilities; unproductive property; office and residential buildings; hotels and motels; agricultural property; and recreational property) and of coal, oil, and gas reserves. These exemptions are strictly limited and should be analyzed carefully before being relied upon.

[3] Acquisitions of Voting Securities or Non-Corporate Interests of Entities Holding Certain Exempt Assets[43]

This covers certain transactions in which the acquired corporation or non-corporate entity holds assets that qualify for one of the other exemptions. If the acquired person's non-exempt assets do not exceed **$65.2** million, the transaction may be exempt.

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39. Clayton Act §7A(c) (15 U.S.C. §18a(c)); 16 C.F.R. §§802.1–802.71.
40. The telephone number for the FTC's Premerger Notification Office is (202) 326–3100.
41. Clayton Act §7A(c)(1) (15 U.S.C. §18a(c)(1)); 16 C.F.R. §802.1.
42. 16 C.F.R. §§802.2–802.3.
43. 16 C.F.R. §802.4.

[4] Acquisitions Solely for the Purposes of Investment[44]

This provision exempts acquisitions of voting securities made solely for the purposes of investment. It applies only if the acquiring person will end up holding less than 10 percent of the outstanding voting securities of the issuer whose securities are being acquired. The exemption does not apply if the acquirer will obtain a seat on the board of the issuer, if the acquirer plans to take a hand in the management of the issuer, or if the acquirer is actively considering merging with the acquired company.[45]

[5] Acquisitions of Voting Securities Not Meeting or Exceeding Greater Notification Threshold[46]

If a party files premerger notification in connection with the purchase of voting securities of an issuer it must specify which of five *notification thresholds*, i.e., the dollar value or percentage holding levels (e.g., securities of the acquired party valued at **$65.2** million or 50 percent of the voting securities of the acquired party) it intends to exceed.[47] Once an acquiring party has obtained clearance to pass the threshold, it need not file again if it makes an otherwise reportable purchase of the issuer's shares within the following five years *so long as its purchases will not take it across a higher threshold*.[48] Once an acquiring party receives clearance to exceed the 50 percent, or control threshold, it may continue to purchase without limitation.

[6] Intra-Person Transactions[49]

This section exempts certain transactions within the same corporate family, such as mergers of two wholly owned subsidiaries or the formation of a new wholly owned subsidiary. It does not, however, exempt the formation of joint venture subsidiaries by two or more independently owned companies.

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44. 16 C.F.R. §802.9.
45. *See, e.g., U.S. v. Smithfield Foods Inc.*, 2004–2 Trade Cas. (CCH) ¶ 74,614 (N.D. Va. 2004), in which Smithfield agreed to pay a $2 million penalty to settle charges by the DOJ that it had twice improperly relied on the investment only exemption to avoid filing. The DOJ charged that Smithfield's reliance on the exemption was improper because Smithfield was actively considering merging with the company whose stock it acquired in the two transactions.
46. 16 C.F.R. §802.21.
47. The five notification thresholds are defined in Rule 801.1(h), 16 C.F.R. §801.1(h).
48. For example, if party A received clearance to purchase 15 percent of company *B*'s shares, it could purchase an additional 9.99 percent over the next five years without refiling.
49. 16 C.F.R. §802.30.

[7] Corporations at Time of Formation[50]

If the rules have required the parties forming a joint venture or other corporation to report, this section exempts the newly formed corporation itself from filing.[51]

[8] Acquisitions of Foreign Assets or Foreign Voting Securities[52]

The rules exempt many, but not all, acquisitions of foreign assets and of the voting securities of foreign issuers. (Direct acquisitions of U.S. assets or voting securities by foreign persons must be reported if they satisfy the act's reporting requirements and are not eligible for some other exemption.) The following details the circumstances under which acquisitions of foreign assets or voting securities will be exempt.

[a] Acquisitions of Assets Located Outside the U.S.[53]

Acquisitions of assets located outside the United States are exempt unless the assets held by the acquiring person as a result of the acquisition generated sales in or into the United States of over **$65.2** million in the acquired person's most recent fiscal year.[54] Even if the assets did generate U.S. sales in excess of **$65.2** million, the transaction will be exempt if all four of the following criteria are met: (1) both the acquiring and acquired persons are foreign; (2) the aggregate sales in or into the United States of the acquiring and acquired persons were less than **$130.3** million in their most recent fiscal years; (3) the aggregate total assets of the acquiring and acquired persons located in the United States are less than **$130.3** million; and (4) the value of the transaction does not exceed **$260.7** million.[55]

50. 16 C.F.R. §802.41.
51. The reportability of the formation of joint venture and other corporations is governed by 16 C.F.R. §801.40.
52. 16 C.F.R. §§802.50 and 802.51; *see also* 16 C.F.R. §802.52 (exempting certain acquisitions by or from foreign governmental corporations) and 16 C.F.R. §802.53 (exempting certain foreign banking transactions).
53. 16 C.F.R. §802.50.
54. *Id. See* 16 C.F.R. §801.13 for a definition of *assets held as a result of acquisition*.
55. 16 C.F.R. §802.50; *see* 16 C.F.R. §801.1(e)(2)(i) for the definition of *foreign person*.

[b] Acquisitions of Voting Securities of a Foreign Issuer[56]

Acquisitions of voting securities of a foreign issuer by foreign persons are exempt unless the acquisition will confer control of the foreign issuer and the acquired issuer either: (1) holds assets located in the United States with an aggregate value of over **$65.2** million; or (2) made aggregate sales in or into the United States of over **$65.2** million in its most recent fiscal year.[57] Even if the **$65.2**-million threshold is exceeded, the transaction will be exempt from reporting if all four of the following criteria are met: (1) both the acquiring and acquired persons are foreign; (2) the aggregate sales in or into the United States of the acquiring and acquired persons were less than **$130.3** million in their most recent fiscal years; (3) the aggregate total assets of the acquiring and acquired persons located in the U.S. are less than **$130.3** million; and (4) the value of the transaction does not exceed **$260.7** million.[58]

[E] Who Must File

Once the parties have determined that the transaction is reportable, they must decide who will file and in what capacity. To answer these questions, the parties must consult the rules that define the "ultimate parent entity" and the acquired and acquiring person.[59] In most cases, *each* party to the proposed transaction must file a Premerger Notification. In some cases, a subsidiary may file on behalf of its ultimate parent.

In a typical two-party transaction, the ultimate parent entity (or an entity within the ultimate parent entity) of one party will file as the acquiring party and the ultimate parent entity of the other will file as the acquired party. In cases that involve exchanges of assets or voting securities, both parties may be required to file as both acquiring and acquired. As transactions become more complex, involving multiple parties or multiple acquisitions, more than two parties may be required to file and multiple filings may be required as well.

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56. 16 C.F.R. §802.51; *see* 16 C.F.R. §801.1(e)(2)(ii) for the definition of *foreign issuer*. An acquisition of voting securities of a foreign issuer by a U.S. person will also be exempt unless the foreign issuer: (1) holds U.S. assets valued in excess of $65.2 million; or (2) made sales in or into the U.S. in excess of $65.2 million in its most recent fiscal year. 16 C.F.R. §802.51(a).

57. 16 C.F.R. §802.51(b); *see* 16 C.F.R. §801.1(b) for the definition of *control*.

58. 16 C.F.R. §802.51(b); *see* 16 C.F.R. §801.1(e)(2)(i) for the definition of *foreign person*.

59. *See* 16 C.F.R. §§801.1–801.2. An ultimate parent entity can be an individual, a corporation, or a partnership. It is defined as "any entity that is not controlled by any other entity." 16 C.F.R. §801.1(a)(3). A person is defined as "an ultimate parent entity and all entities which it controls directly or indirectly." 16 C.F.R. §801.1(a)(1). Control is defined as either having 50 percent or more of a company's outstanding voting securities or the contractual right to designate 50 percent or more of a company's directors. 16 C.F.R. §801.1(b).

For example, although a newly formed joint venture corporation is not normally required to file, it might be required to if, as part of the overall transaction, it acquires assets or voting securities from an entity other than one of the forming parties.

§6.04 Preparing and Filing The Premerger Notification and Report

The HSR Premerger Notification and Report Form is the U.S. equivalent of the EC Form CO. Although the FTC instructions are quite helpful, questions invariably arise. These are best answered by consulting experienced counsel or calling the FTC's Premerger Notification Office (PNO).[60] The following discussion provides a general overview of what goes into a premerger form and how to complete a Premerger Notification.

[A] Information to be Furnished in the Premerger Notification Form

Companies or individuals filing a Premerger Notification Form for the first time may be surprised by the extent and nature of the information they must submit.[61] The form requires a detailed description of the transaction, as well as considerable information about the filing party's parents, affiliates, subsidiaries, holdings, financials, U.S. production and sales, and prior acquisitions. Certain documents must be submitted in connection with the form as well.[62]

Depending on the size of the parties and of the proposed transaction, the gathering of information and documents may take days, weeks or, in the case of conglomerates with substantial activities in the United States, even months. If the proposed transaction involves companies with large and complex corporate structures or with significant U.S. activities, it helps to assign company employees to assist counsel well before the planned filing date.[63]

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60. The telephone number for the FTC's Premerger Notification Office is (202) 326–3100.
61. Because of the historical nature of the information requested, counsel for companies should keep past Hart-Scott-Rodino Premerger Notification Forms readily available.
62. Clayton Act §7A(h) (15 U.S.C. §18a(h)).
63. In completing the Premerger Notification Form, there are certain *de minimis* exemptions. Nonetheless, if a party's corporate structure and holdings are extensive, and its activities in the United States are significant, the completion of this portion of the form may still be very cumbersome, especially for the acquiring company. The data that an acquired company must

Clients often ask whether the authorities will hold in confidence information and documents submitted with the Premerger Notification Form or in response to a Second Request (see below). The short answer is *yes, but*. Yes, because the HSR Act itself declares that information submitted pursuant to the act is exempt from disclosure under FOIA.[64]

The *but* comes from two major exceptions. Although the authorities may not disclose the information to private parties, they may use the information in a proceeding to block the proposed transaction.[65] The agencies must also disclose any information sought by Congress, although such requests have been rare. It is also worth remembering that, during the course of its investigation, the DOJ or FTC is likely to call or subpoena customers or suppliers of the parties to get their reaction to the likely competitive effects of the proposed transaction, thereby disclosing at least that the parties have filed and are pursuing a transaction.

[1] Description of the Transaction

The parties must provide a full description of the transaction, including the dollar value of the voting securities and/or assets to be acquired, and a statement of all approvals and steps necessary to complete the transaction. If the transaction is a joint venture, the parties must also report the contributions each partner will make to the joint venture (including guarantees of credit), a description of the consideration each venture partner will receive from the venture for its participation, and a description of the joint venture's proposed lines of business.

[2] Corporate Information

The required corporate information includes the identity of the filing company's ultimate parent and listings of the: (1) names and addresses of each of its subsidiaries and affiliated companies; (2) number of shares held and percentages of shares held by the parent company in its subsidiaries and affiliated companies; and (3) parent company's minority shareholdings (identifying the names, addresses, number of shares held, and percentages of stock represented by those holdings).

In addition, the company filing notification must furnish a list of all persons or entities that own 5 percent or more of its voting securities.

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furnish is generally limited to that relating to those assets or companies that are to be transferred as part of the proposed transaction.

64. Clayton Act §7A(h).

65. *See* §6.11 below.

[3] Sales Data

Each party must report current and historical sales figures for products or services manufactured or sold in the United States. Sales data must be categorized according to specific government product codes, known as NAICS Codes (short for North American Industry Classification System Codes).[66] Because companies do not always maintain their sales records according to NAICS categories, it is best to allow extra time to prepare this data. If a party is not being acquired in its entirety, it need only furnish NAICS data for those assets or subsidiaries that are being acquired.[67]

Each filing party must also provide information regarding products or services it sells that are also sold by any other party to the transaction. For each such overlap, the filing party must identify the geographic regions of the United States in which the product or service is produced and sold. The acquiring party must also describe every acquisition (over a specified size threshold) it has made within the last five years of any company in the overlapping product or service category.

[4] Documents to Be Submitted

Documents that must be submitted fall into three categories: (1) transaction documents; (2) government and financial documents; and (3) analytic, or 4(c), documents. If the documents to be submitted are not in English, there is no requirement that the parties provide translations. The parties should nevertheless consider submitting translations. Doing so allows the parties to ensure that the translations are accurate and may speed the process of obtaining clearance. Note also that if your client routinely prepares English translations of any required documents, such as its annual report, those translations must be submitted.[68]

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66. Use of the NAICS codes or categories was implemented on July 1, 2001. Until that time, the required data had to be submitted broken down by Standard Industrial Classification (SIC) categories. "The Numerical List of Manufactured and Mineral Products," which provides NAICS category information, may be found at http://www.census.gov/prod/ec97/97numlist.html. Additional information about the NAICS is available on the FTC Premerger webpage at http://www.ftc.gov/bc/hsr/hsr.htm.
67. Companies that are, or expect to be, active in the mergers and acquisitions arena are well advised to make a policy of regularly updating and maintaining NAICS data so that compiling this data does not delay premerger reporting.
68. 16 C.F.R. §803.8(a).

[a] Transaction Documents

Each party must submit with its filing a copy of the most recent version of the contract or agreement that is the subject of the filing. Parties need not submit attachments. If the final definitive agreement has not yet been signed, the parties may file on the basis of a signed letter of intent (LOI) or memorandum of understanding (MOU). The LOI or MOU can be as short as one or two sentences.

[b] Government/Financial Documents

Each filing entity must submit all recent Securities and Exchange Commission (SEC) filings made by the filing company or its parent or affiliated companies, the most recent annual reports of the filing party's parent, and the most recent regularly prepared balance sheets for each of the parent's unconsolidated subsidiaries. Individuals who file must also present a balance sheet.[69]

[c] Analytic or 4(c) Documents

Section 4(c) of the HSR form requires that the filing party submit all studies, analyses, reports and memoranda prepared "by or for any [of its] officer(s) or directors" that analyze the transaction from a competitive or antitrust standpoint.[70] Because these 4(c) documents may significantly influence the government's evaluation of the transaction, it is very helpful if management

69. Individuals who do not have a regularly prepared balance sheet may prepare one for the transaction. The rules allow individuals to exclude their residence(s) and personal property from their assets. 16 C.F.R. §801.11(d). The FTC has in the past taken the position that voting securities (at least those being sold in the transaction at issue) may be valued at acquisition price, rather than current market value. The FTC's ruling means that individuals who would pass the size-of-the-parties test if their securities were valued at market may not be required to do so and thus may avoid having to report.

70. "Instructions, Antitrust Improvements Act Notification and Report Form, Item 4(c)." *See* Appendix H. The full instruction for item 4(c) reads: "all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or experience into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document."

One issue that arises frequently for non-U.S. filers is how to interpret the term *officer(s) or director(s)*. Non-U.S. corporations often do not use those terms, or use them differently than do U.S. companies. In such cases, the foreign corporation, in consultation with antitrust counsel, must determine which individuals exercise functions comparable to those exercised by officers and directors in the United States.

cautions employees who create such documents that the documents may be subject to government review.

For example, 4(c) documents that celebrate the dominant market position the post-transaction company will enjoy can be harmful to the company's attempt to portray the transaction as pro-competitive. At the same time, 4(c) documents can, if they present the transaction's pro-competitive aspects, allay the authorities' fears and help them properly analyze the venture. It may, at times, be appropriate to direct documents discussing the antitrust aspects of the transaction to, or to have them prepared by, the party's attorneys. This may allow the parties to withhold documents from their filing under the attorney-client privilege.[71]

As noted above, parties need not submit translations of 4(c) documents written in languages other than English. But it may be advisable to prepare and submit your own translations rather than risk having the agencies draw unwarranted conclusions from their own possibly mistaken translations. Translating the documents yourself also allows company antitrust counsel to better understand the transaction and to work with identical documents to those being reviewed by the agencies.

An important caveat: The agencies treat the obligation to submit *all* 4(c) documents with extreme seriousness. The FTC will not hesitate to use its power to assess civil penalties of up to $11 thousand *per day* to punish the failure to timely submit 4(c) documents.[72] Employees charged with collecting the 4(c) documents should be told to search carefully and to err on the side of overinclusion. If appropriate, documents prepared by or for company counsel may be withheld as privileged. Any documents so withheld, however, must be identified on the form and the reason for withholding explained.[73]

It is also useful if the reporting parties go over their lists of 4(c) documents with each other before filing to help ensure that no 4(c) documents have been overlooked. Many 4(c) documents should be produced by more than one party, either because the documents were exchanged between the parties or because they were created jointly by the parties.

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71. The rules allow reporting parties to withhold privileged documents that would otherwise need to be submitted. But they require the parties to identify all withheld documents, and the reason for the withholding, on a Statement of Reasons for Noncompliance, to be filed with the Premerger Report. 16 C.F.R. §803.3.

72. *See United States v. Iconix Brand Group Inc.*, Civil Action No. 1:07-CV-01852 (D.D.C. 2007) (Iconix forced to pay civil penalties of $550 thousand for failure to submit 4(c) documents); *United States v. The Hearst Trust and The Hearst Corporation*, 2001–2 Trade Cas. (CCH) ¶ 73,451 (D.D.C. 2001) (Hearst forced to pay $4 million to settle charges that it failed to produce key 4(c) documents in connection with HSR filing; *see* http://www.usdoj.gov/atr for additional details); *see generally* §6.05, below.

73. *See* 16 C.F.R. §803.3.

[B] Signed Agreement a Prerequisite for Filing

Although the parties must have a signed agreement before they can file their HSR Forms, they need not have executed a definitive, final agreement. They may file on the signing of an LOI or an MOU. The LOI or MOU can be as short as one or two sentences. Each party must, however, submit an affidavit certifying its good-faith intention to complete the transaction.[74] There is no time limit for filing after a letter of intent or agreement has been signed.

The one exception to the signing and affidavit requirements occurs if the transaction involves a cash tender offer. There, the offeror must file an affidavit certifying its good-faith intent to carry out the offer and a shortened fifteen-day waiting period begins to run even if the offeree does not timely submit its filing.[75] The offeror must simultaneously notify the offeree of its intention to make the offer and certify that it has done so in its affidavit.[76] The offeree risks penalties if it does not timely file.

The signed agreement and affidavit requirements are designed to discourage parties from filing simply to obtain an advisory opinion from the agencies. Nevertheless, there is no requirement that the parties actually consummate the transaction. But if they do not do so within one year of receiving clearance, they must repeat the reporting process before closing.[77]

[C] Timing and Completion of the Filing; Filing Fees

A filing is considered complete, and the waiting period begins to run, only if (1) all of the filing parties have furnished the requisite number of copies of their Premerger Report Forms and attachments to the DOJ and the FTC;[78]

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74. 16 C.F.R. §803.5(b). An unsworn certificate may be substituted for the §803 affidavit if the declarant follows the form specified in 28 U.S.C. §1746, which allows the substitution of declarations whenever affidavits are required by federal courts, agencies, or laws. (*See* §2.12[A] *above* for the language required by section 1746.)

75. 16 C.F.R. §803.5(a). This rule was imposed to prevent offerees in hostile tender offers from delaying the offer by refusing to file HSR Reports.

76. *Id*.

77. 16 C.F.R. §803.7. Note: Post-reporting changes in the transaction can sometimes result in a need for the parties to file new or amended HSR Premerger Reports. 16 C.F.R. §803.7 and §803 generally.

78. In the case of a cash tender offer, the abbreviated fifteen-day waiting period begins to run upon completion of the acquiring party's filing. 16 C.F.R. §803.10. This prevents the target from hindering the progress of a hostile tender offer by withholding its filing.

In 2006, the agencies instituted a new system that permits electronic HSR filing. Filing parties now may choose between: (1) completing and submitting the HSR form and all attachments in hard copy; (2) submitting the form and all attachments electronically; or (3) submitting the form electronically while submitting all documentary attachments in paper copy.

and (2) the FTC has received a filing fee from each filing party acquiring voting shares or assets. Although the agency must receive the filing fee from the acquiring party, the parties may allocate responsibility for the fee among themselves in any way they choose. The filing fee, payable to the FTC, must be submitted in the form of a certified or cashier's check or by electronic wire transfer.[79]

The amount of the filing fee varies with the size of the transaction:

Size of Transaction	*Filing Fee*
$65.2 million–less than **$130.3** million	$45,000
$130.3 million–less than **$651.7** million	$125,000
$651.7 million and up	$280,000[80]

§6.05 Penalties for Failure to File

The FTC may penalize parties that fail to comply with premerger filing requirements by imposing civil penalties of up to $11 thousand for each day the violation continues.[81] In recent years, the FTC has imposed several substantial penalties on companies it believed deliberately sought to circumvent the rules.[82] The FTC may also impose penalties if it believes a transaction

79. Complete payment instructions may be found at <http://www.ftc.gov>. If payment is being made by electronic wire transfer, the filing party should so note in its cover letter accompanying its filing and the wire instructions should contain information (including the name of the paying bank and the transfer transaction number) sufficient to allow the FTC to match the payment to the transaction. Also, one should take care that the transferring bank does not subtract its transfer fee from the amount transferred leaving the filing fee short by that amount. *See also* 16 C.F.R. §803.9.
80. 15 U.S.C. §18a note (Assessment and Collection of Filing Fees); *see also* 16 C.F.R. §803.9.
81. 15 U.S.C. §18a(g)(1). The government takes the position that the penalties continue to run not simply until a proper filing is made, but until clearance is obtained. In most cases this adds at least thirty days to the penalty period.
82. *See, e.g.*, *United States v. Malhe Gmbh*, 1997–2 Trade Cas. (CCH) ¶ 71,868 (D.D.C. 1997) (imposing $5.6 million in penalties on parties for intentional failure to make HSR filings for a transaction the parties knew might violate U.S. antitrust laws); *U.S. v. Smithfield Foods Inc.*, 2004–2 Trade Cas. (CCH) ¶ 74,614 (N.D. Va. 2004) (Smithfield was fined $2 million for twice neglecting to file in improper reliance on the investment-only exemption); *United States v. ValueAct Capital Partners*, L.P., 2008–1 Trade Cas. (CCH) ¶ 75,998 (D.D.C.) ($1.1 million civil penalty after corrective filing since company had already used its "one free bite"); *United States v. ESL Partners, L.P.*, 2008–2 Trade Cas. (CCH) ¶ 76,421 (D.D.C. 2008) (two investment partnerships agree to pay $800,000 in civil penalties for acquiring shares without making HSR filings); *United States v. James D. Dondero*, 2007–1 Trade Cas. (CCH) ¶ 75,710 (D.D.C.) ($250,000 penalty for second failure to file).

has been structured for the purpose of avoiding premerger reporting requirements.[83]

§6.06 Inadvertent Failure to File

Parties occasionally discover that they have completed a transaction for which they should have filed Premerger Reports but did not. When this happens they still have an obligation to file their reports. To minimize both the risk and size of possible sanctions, such filings should be made promptly upon discovery of the oversight. The tardy Reports must include a *Statement of Reason for Noncompliance*, as specified by the HSR Rules.[84] They should also be accompanied by a cover letter from the party (not its attorneys) explaining why it failed to file, that the failure was inadvertent, and explaining steps it has taken to prevent such failures in the future.

The FTC has announced a one-free bite policy for inadvertent failures to file. If it is convinced that the failure to file was truly inadvertent, *i.e.*, not the result of gross negligence or reckless disregard of the HSR Act, and if it is the party's first offense, the FTC normally will not seek sanctions. It will, however, monitor future compliance. A second failure could result in sanctions being sought for the earlier failure as well.[85]

§6.07 The Thirty-Day Waiting Period

Once the parties have completed their premerger filings, they must wait thirty days before closing their transaction.[86] During that thirty-day waiting period, the FTC's Premerger Notification Office (PNO) first examines the Report Forms for errors. The PNO may require the correction of forms containing inconsistencies or technical mistakes. If the mistakes are serious enough, the PNO may even "bounce" the filing, i.e., refuse to allow the thirty-day waiting period to begin until the mistakes are corrected.

83. 16 C.F.R. §801.90

84. *See* 16 C.F.R. §803.3; *see also* Procedures for Submitting Post-Consummation Filings, *archived at* http://www.ftc.gov/bc/hsr/postconsumfilings.htm.

85. *See Premerger Notification Manual* ¶ 21 (ABA 4th ed. 2007). *See, e.g., United States v. Lonrho PLC*, 1988–2 Trade Cas. (CCH) ¶ 68,232 (D.D.C. 1988) (A $122 thousand civil sanction obtained against parties for failure to file Premerger Reports).

86. 16 C.F.R. §803.10. In the case of a cash tender offer, the waiting period is reduced to fifteen days. *Id.* If the end of the waiting period falls on a weekend or legal public holiday, the waiting period automatically extends to include the next regular business day. Clayton Act §7A(e)(2) (15 U.S.C. §18a(e)(2)).

After the PNO determines that the filings have been properly completed, it refers the filings to DOJ and FTC staff attorneys. In a process known as clearance, they decide whether further review is necessary, and, if so, which of the two agencies will conduct the substantive review. (The use of the term clearance to describe this stage of the process can be confusing, because most lawyers use the term clearance broadly to refer to permission to proceed with the transaction.)

If only one agency asks to review the transaction, it will receive clearance to do so. If both seek review authority, the decision as to which will conduct the review is made at the agencies' weekly meeting, usually held on Thursday. In cases in which review authority is being debated, the parties may sometimes receive calls informally requesting additional information from both agencies.

§6.08 Early Termination

If, during clearance or at any other time, the agencies agree that the proposed transaction poses no threat to competition, they *may* grant early termination of the waiting period.[87] The authorities may notify the parties that they have been granted early termination in as few as three days or as many as twenty-nine. Although early termination is purely discretionary, the agencies have lately been making an effort to grant more, faster early terminations.

The agencies do not automatically consider early termination. They will do so only if one or more of the parties has checked a box on the first page of the report form indicating that they request early termination. The FTC maintains both a telephone hotline and a web page that list recent early terminations.[88] This is the only publicly available information about HSR Premerger Filings and government investigations. Parties wanting to maintain confidentiality may therefore choose not to request early termination.

§6.09 Preliminary Investigation

If the agencies decide further review is necessary, a DOJ or FTC staff attorney will undertake a preliminary investigation. The purpose of this investigation is to obtain facts needed to analyze the transaction for competitive impact

87. 16 C.F.R. Rule 803.11(c).

88. The hotline is reachable through the Premerger Notification Office at (202) 326–3100 and the web page may be found at http://www.ftc.gov.

using the DOJ and FTC *Merger Guidelines*.[89] The staff attorney may informally request additional information about the proposed venture, or about the markets in which it will compete, from, among others, the parties, their competitors, their suppliers, or their customers. Typically, the reviewing agency will ask each party to supply market share data and lists of their largest customers. The agency may also ask to interview one or more company employees with in-depth knowledge of the affected market(s). Compliance with these requests is voluntary, but there is generally little to be gained from refusing.[90]

Equipped with this information, the staff attorney will, during the last ten days of the waiting period, make a recommendation to his or her superiors. The reviewing agency then decides whether to allow the proposed transaction to proceed. The authorities do not provide notice of the expiration of the thirty-day waiting period. They do, however, generally, send a letter to the parties upon completion of the filings stating the date when the waiting period will expire. If the parties have not heard from the authorities by close of business on the expiration date, they are permitted to assume that they have received clearance and may close the following day.

As noted earlier, neither early termination, nor the expiration of the thirty-day waiting period, constitutes a representation by the agencies that they have concluded that the transaction is legal. The agencies retain the option of later investigating and even attacking the resulting combination. Although such later investigations do occasionally occur, they are inconsistent with the goals of the HSR Act and are rare.

§6.10 Premerger Coordination and Gun-Jumping

Clients engaged in transactions frequently ask corporate antitrust advisers how far they are permitted to go in exchanging information (especially sensitive pricing, cost, and customer information) as part of due diligence or in coordinating with their prospective merger partner to lay the groundwork for their expected combination before they have obtained HSR clearance, or even

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89. The agencies' substantive review pursuant to the federal *Merger Guidelines* is described in greater detail in Chapter 5.

90. The DOJ has recently implemented new procedures aimed at streamlining the investigative and clearance process. These include increased inquiry during the initial thirty-day waiting period in an effort to dispose of more cases during that period as well as to narrow issues so that second requests can be better tailored and more efficient. Companies seeking to take advantage of these reforms may, however, have to provide substantial additional documents promptly during the initial waiting period. Further details may be found at www.usdoj.gov/atr.

after they have received clearance but have not yet closed. These questions are particularly sensitive because the FTC and DOJ have made it clear that they take a dim view of gun-jumping, i.e., parties behaving as if they have already completed an acquisition or merger before they have received HSR clearance to complete the transaction. The agencies have stated they may charge such companies not only with violations of the Hart-Scott-Rodino Act, but also Section 7 of the Clayton Act or even Sections 1 or 2 of the Sherman Act. The agencies also caution against companies going too far during the period between receipt of Hart-Scott-Rodino clearance and actual closing.

The questions are often difficult to answer. The agencies have not provided clear guidance about what they believe is and is not permissible at the various stages other than general statements that companies should continue to behave as if they were separate until they have closed. At the same time, the agencies have recognized that companies need to exchange information as part of due diligence and to undertake some advance planning if their combination is to have any chance of getting off to an efficient and successful start.[91]

Of some comfort is the fact that the cases the agencies have brought so far tend to involve extreme conduct, such as companies bidding together, rather than companies merely sharing information or discussing how they will operate once they merge. For example, in *U.S. v. Computer Associates International, Inc.*,[92] the DOJ charged Computer Associates (CA) and Platinum Technology International, Inc. with violating Section 1 of the Sherman Act and the Hart-Scott-Rodino Act in connection with CA's May 1999 acquisition of Platinum. The DOJ's complaint stated that the parties' merger agreement, entered on March 29, 1999, "contained extraordinary 'conduct of business' provisions that prevented Platinum from undertaking certain competitive activities during the HSR waiting period without CA's approval." These included determining the prices and terms Platinum would offer its customers: Platinum could not, without CA's prior approval, (1) offer discounts from list prices of more than 20 percent; (2) vary the terms of standard customer contracts; (3) offer computer consulting services for over thirty days at a fixed price; or (4) contract to provide Y2K remediation services. CA allegedly installed one of its officers at Platinum to oversee its compliance with these provisions during the government's HSR review.

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91. Some guidance as to the agencies' views may be found in *The Rhetoric of Gun-Jumping*, remarks of William Blumenthal, General Counsel, Federal Trade Commission (New York, November 10, 2005). Additional guidance can be found in the book *Premerger Coordination: The Emerging Law of Gun Jumping and Information Exchange* published by the American Bar Association's Section of Antitrust Law (2006).
92. 2002–2 Trade Cas. (CCH) ¶ 73,883 (D.D.C. 2002) (complaint filed 9/28/01 *archived at* http://www.usdoj.gov/atr/ cases).

The DOJ also alleged that during the HSR review CA reviewed competitively sensitive information about Platinum's customers and business strategy and made day-to-day business decisions for Platinum. CA ultimately paid civil penalties of $638,000 to settle the DOJ's charges. CA also agreed to restrictions on information that could be exchanged in future acquisitions.

More recently, in 2003, the DOJ obtained a $5.67 million fine from Gemstar and *TV Guide* for gun-jumping by the parties in connection with the merger of their interactive program guides.[93] And in 2006, the DOJ obtained $1.8 million in penalties from Qualcomm and Flarion Technologies.[94] Once again, according to the complaints, both cases involved clear-cut instances of the acquirer exerting "operational control" over the acquired company before closing.

In early 2009, the federal court for the Northern District of Illinois became the first court to issue an opinion addressing the exchange of competition-relevant information within the context of due diligence and negotiations. In *Omnicare, Inc. v. UnitedHealth Group, Inc.*,[95] the plaintiff pharmaceutical supplier accused two merging health insurance companies of conspiring to combine their purchase contracts to drive down the plaintiff's prices. For evidence of the conspiracy, Omnicare relied chiefly on disclosures and communications that occurred between the merging companies in the due diligence process.

The court granted the defendants summary judgment, finding that the exchange of information had the legitimate purpose of accomplishing a due diligence review. The opinion indicated that, though disclosing average pricing information may be permissible, disclosing customer-specific prices would be problematic. Additionally, although the parties had instituted a firewall around the due diligence teams, they consulted with other members outside the firewall; the court held this permissible as long as specific pricing information was not disclosed. Similarly, the disclosure of average discounts provided to customers was permissible, particularly as this information was disclosed in the later stages of the negotiation. The court observed, however, that once an agreement has been signed, a party's legitimate need for information (and consequently, its ability to exchange information within the limits of competition law) diminishes significantly.

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93. *U.S. v. Gemstar-TV Guide International, Inc.*, 2003–2 Trade Cas. ¶ 74,082 (D.D.C. 2003) (relevant papers *archived at* http://www.usdoj.gov/atr under the heading "Antitrust Case Filings").

94. *U.S. v. Qualcomm Incorporated and Flarion Technologies, Inc.*, 2006–1 Trade Cas. (CCH) ¶ 75,195 (D.D.C. 2006).

95. 594 F. Supp. 2d 945 (N.D. Ill. 2009).

§6.11 Second Requests

At any time before the expiration of the original thirty-day waiting period, if the reviewing agency remains concerned about the potential competitive impact of the proposed transaction, the agency may issue each of the parties a "request for additional information."[96] This is known informally as a Second Request. Issuance of a Second Request extends the waiting period until thirty days from the date the parties certify that they have submitted all materials necessary to comply with the Second Request, known as a certificate of substantial compliance.[97] If, before or after the parties complete their responses to the Second Request, the agency becomes satisfied that the acquisition does not threaten competition, it can terminate the waiting period immediately.[98]

Because a Second Request is the government's principal opportunity to obtain information from the parties, Second Requests are usually extraordinarily broad. A Second Request may require that the parties produce hundreds of thousands or even millions, of paper and electronic documents from their operations all over the world. Unlike the original Premerger Notifications, if the requested documents are not in English, the parties must prepare and submit translations.[99] In addition, the Second Request normally requires the filing party to respond to numerous, highly detailed interrogatories. The authorities may also ask for oral testimony or sworn written statements from party employees. Counsel can often negotiate limitations on these demands. Nevertheless, compliance with a Second Request often takes several months (or even more).[100]

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96. Clayton Act §7A(e); 15 U.S.C. §18a(e).
97. *Id.*; 16 C.F.R. §803.20(c)(2). For a cash tender offer the period is ten days. 16 C.F.R. §803.10.
98. Occasionally the investigating authority will find itself close to clearing a transaction on the basis of the parties' initial premerger filings but without time to do so within the original thirty-day waiting period. Rather than go to the trouble of issuing a Second Request, the government may suggest to the parties that they withdraw and refile their original premerger reports, thereby giving the government the extra time it needs to complete the investigation without issuing a Second Request.
99. 16 C.F.R. §803.8(b).
100. In response to increasing criticism from the antitrust bar about unnecessarily burdensome Second Requests, the DOJ and FTC in the early 2000's both installed measures aimed at reforming the process. These reforms were directed primarily at easing the burden on parties and at allowing parties greater ability to negotiate and appeal requests for modification of Second Requests, including the possibility of a "quick look," *i.e.*, highly targeted, Second Request. *See* "Report from the Bureau of Competition" April 7, 2000 (*archived at* http://www.ftc.gov); DOJ "Antitrust Division Announces Merger Review Process Improvements" April 6, 2000 (*archived at* http://www.usdoj.gov/atr). More recently, the DOJ implemented new procedures aimed at streamlining the investigative and clearance process. These include increased inquiry during the initial thirty-day waiting period in an effort to dispose of more cases during that period as well as narrow issues so that second requests can be better

While the parties are preparing their responses to the Second Requests, the reviewing agency normally expands its outside investigation. The agencies use both compulsory (civil investigative demands and document subpoenas) and voluntary requests addressed to customers, suppliers, and competitors of the parties, as well as to others with relevant information.

As cross-border transactions have increased, so have occasions when such transactions require premerger notification in multiple jurisdictions and, in some cases, provoke investigations by multiple competition law authorities. In 2002, in an effort to minimize the duplication and inefficiencies often associated with such situations, the FTC and DOJ issued, in conjunction with European Union (EU) competition authorities, guidelines containing "best practices" for coordinating merger reviews.[101]

§6.12 Government Challenges; Consent Decrees; Injunctions

After reviewing the parties' Second Request responses and whatever other information its investigation has revealed, the reviewing agency must decide whether it believes the proposed transaction would violate the antitrust laws. If its concerns have been satisfied, it may terminate the waiting period or allow it to expire without taking any action. The parties are then free to close.

If the agency decides the transaction as proposed would violate the antitrust laws, they will so inform the parties. This leaves the parties three basic options: (1) abandon the transaction;[102] (2) negotiate with the investigating agency to alter the transaction in a way that will eliminate the alleged

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tailored and more efficient. Further details may be found at http://www.usdoj.gov/atr. The agencies instituted additional reforms in 2006.

Congress has also acted. In amendments to the HSR Act that went into effect on February 1, 2001, it set up procedures that allow recipients of Second Requests to file petitions (1) seeking relief on the ground that a Second Request is "unreasonably cumulative, unduly burdensome, or duplicative," or (2) to seek a declaration that they have substantially complied with the Request. Clayton Act §7A(e)(1)(B)(1) (15 U.S.C. §18a(e)(1)(B)(1)).

101. *See* FTC press release: United States and European Union Antitrust Agencies Issue "Best Practices" for Coordinating Merger Reviews (October 30, 2002), *archived at* www.ftc.gov/opa/2002/10/euguidelines.htm.

102. For example, when the FTC filed suit seeking a preliminary injunction against the proposed merger of Mediq and UHS, the two largest firms renting durable, movable medical equipment, the parties abandoned the transaction rather than litigate. *See FTC v. Mediq, Inc.*, Civ. Act. No. 97–1916 (D.D.C. Aug. 22, 1997); FTC Press Release, "Mediq Informs FTC That It Will Abandon Merger with UHS in Face of Challenge" (Sept. 22, 1997); *see also Questar Corp./Kern River Gas Transmission Co.*, FTC File No. 961 0001 (preliminary injunction

violation; or (3) inform the investigating agency that they intend to go forward with the transaction.

If the parties elect to abandon the transaction at this point, that is usually the end of the matter. The following sections discuss what happens if they select either of the two remaining options.

[A] Negotiated Settlements; Consent Decrees

If the parties choose to negotiate, they may continue to try to persuade the agency that the transaction as planned will not violate the law. In all likelihood, however, the agency will insist either that the parties abandon the transaction or that they agree to "fix" it as a condition of obtaining agency consent.[103] There are two broad categories of fixes (or remedies) available: (1) conduct (or behavioral) remedies and (2) structural remedies.[104]

Conduct remedies regulate the future conduct of the merged entity. They may include requirements that the entity refrain from certain types of

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action authorized, Dec. 27, 1995); *FTC v. Questar Corp.*, No. 2:95CV 1137S (D. Utah 1995) (transaction abandoned).

103. Frequently, in disputed transactions, the government and the parties are unable to reach agreement before expiration of the extended Second Request waiting period. Because the parties are technically free to close on that expiration, the government may threaten to sue to enjoin the parties from closing. Faced with the threat of such a suit, parties may informally "consent" to refrain from proceeding until the government completes its investigation and takes a final position.

104. For a useful discussion of the FTC's position on the various available merger remedies and examples of their application, *see* Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, *archived at* http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm; *see also* Richard G. Parker & David A. Balto, *The Evolving Approach to Merger Remedies*, Antitrust Report (May 2000) and *archived at* http://www.ftc.gov.

The DOJ's Antitrust Division set forth its policies on merger remedies in its October 2004 "Antitrust Division Guide to Merger Remedies." After stating a number of "guiding principles" for the development of remedies in all Antitrust Division merger cases, the guide emphasizes the following important points: (1) Structural remedies involving the divestiture of physical or intangible assets are preferred to conduct remedies; conduct remedies are appropriate only in limited circumstances; (2) the divestiture must include all assets necessary for the purchaser to be an effective, long-term competitor, including critical intangible assets; (3) the divestiture of an existing business entity that possesses all of the assets necessary for the efficient production and distribution of the relevant product is preferred to a partial divestiture; (4) if the division believes the merger will result in a violation, the division will be willing to forego filing a case and accept instead a structural "fix" that the parties implement before the merger is consummated as long as it fully eliminates the competitive harm arising from the merger; (5) the division will ensure that remedies are completely implemented and will fully enforce its judgments. The guide can be found at http://www.usdoj.gov/atr.

conduct (such as tying or exclusive dealing); make certain facilities generally available; erect and maintain information "firewalls" between certain business units; or make certain types of information publicly available.[105]

The agencies generally dislike conduct remedies. Conduct remedies require ongoing attention from the agency. They also result in an undesirable involvement of the agency in the company's internal affairs and business decisions. Nevertheless, the agencies will accept conduct fixes in appropriate situations. Such situations most often arise if the proposed transaction involves potential vertical foreclosure that can be fixed by requiring the merged entity to continue dealing with other suppliers or customers.[106]

As their name suggests, structural remedies involve changes not to the parties' conduct but to their very structure. The most common structural remedy is divestiture. Divestiture involves the parties' agreeing to sell assets or one or more subsidiaries of the merged entity to third parties.[107] The object is to preserve competition by allowing the divested assets to continue to compete with the merged entity.[108] Another common structural remedy (which is actually something of a hybrid conduct-structural remedy) is requiring the parties to grant one or more licenses to third parties to make, use, and sell products in competition with the merged entity.

The agencies' preference for divestiture or other structural remedies over conduct remedies echoes the following statement by the Supreme Court in *United States v. E.I. du Pont de Nemours & Co.*:[109]

> Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should be in the forefront of a court's mind when a violation of §7 has been found.[110]

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105. *See, e.g.*, *United States v. Tele-communications, Inc.*, 1996–2 Trade Cas. (CCH) ¶ 71,496 (D.D.C. 1994); *United States v. AT&T*, 59 Fed. Reg. 44,158 (D.D.C. July 15, 1994); Silicon Graphics, 5 Trade Reg. Rep. (CCH) ¶ 23,838; *United States v. Raytheon Co.*, 62 Fed. Reg. 60,267 (1997); *Lockheed Corp., et al.*, FTC Docket No. C-3685 (Sept. 20, 1996) (consent decree imposing firewall and other conduct remedies).
106. *See generally* "Vertical Restraints and Vertical Aspects of Mergers—A U.S. Perspective," prepared remarks of FTC Chairman Robert Pitofsky (Oct. 16–17, 1997), *archived at* http://www.ftc.gov.
107. In August 1999, the FTC published "A Study of the Commission's Divestiture Process," which is archived at http://www.ftc.gov. Any parties considering a transaction that may require divestitures should consult this document.
108. FTC Chairman Robert Pitofsky provided useful insights into the administrative mindset in a February 17, 2000 speech entitled "The Nature and Limits of Restructuring in Merger Review," *also archived at* http://www.ftc.gov.
109. 366 U.S. 316 (1961).
110. *Id*. at 330–331. The Court made similar statements in *California v. American Stores Co.*, 495 U.S. 271, 285 (1990) (calling divestiture "the remedy best suited to redress the ills of an anticompetitive merger") and *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) (describing divestiture as "particularly appropriate" in merger cases).

Whether the remedies chosen are structural or conduct, the agency may demand that an interim trustee or auditor be appointed to supervise compliance. In the case of structural remedies, the trustee or auditor may be charged with overseeing an agreed-upon divestiture. In the case of conduct remedies, the trustee/auditor may be charged with monitoring ongoing compliance with firewall or disclosure requirements.[111] Trustees or auditors have frequently been used in situations in which the divestiture involves technology transfers.[112]

If the agencies and the parties reach agreement on a settlement involving conduct or structural remedies, the agency will generally file a complaint charging that the proposed transaction would violate the law. It will, at the same time, inform the court that the parties have agreed to settle the case. The settlement will be embodied in a judgment on consent (consent decree). The court must then approve the decree and allow for public notice and comment before entering the judgment.[113]

In the past, consent decrees normally gave the parties six months or a year to accomplish agreed-upon structural solutions. The consent decree generally ordered the parties to hold the offending assets separately (a hold separate order) so that the assets would not become an integral part of the merged entity. Lately, however, the agencies have imposed a "fix-it-first" policy. Claiming that there were too many failed divestitures under the old system, they now require the parties to complete—or at least sign contracts designed to effect—the divestiture or other solution before permitting them to close. The agencies have also become stricter about what must be divested and to whom—often requiring the divestiture of an entire business unit rather than isolated facilities.[114]

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111. One example of the use of such a trustee is in the September 2000 FTC consent decree entered into in connection with the Boeing company's proposed acquisition from General Motors of GM's Hughes Aerospace satellite business. A trustee was appointed to serve for ten years to ensure Boeing's compliance with disclosure, firewall, and other conduct remedies imposed as a condition of the FTC allowing the transaction to proceed. The relevant documents may be found at http://www.ftc.gov.

112. *See* Richard G. Parker & David A. Balto, *The Evolving Approach to Merger Remedies*, Antitrust Report (May 2000), *archived at* http://www.ftc.gov. Two recent DOJ divestiture cases involved General Electric's proposed acquisition of Instrumentarium and Dyno Nobel's acquisition of assets from El Paso, information about which may be found at http://www.usdoj.gov/atr.

113. *See* Chapter 2 for a discussion of the statute governing consent decree procedures.

114. In August 1999, the FTC published "A Study of the Commission's Divestiture Process," which is archived at http://www.ftc.gov. Among other things, the study explains the fix-it-first policy and the reasons that may require divestitures. FTC Chairman Robert Pitofsky also provided useful insights into the administrative mindset in a February 17, 2000 speech entitled "The Nature and Limits of Restructuring in Merger Review," *also archived at* http://www.ftc.gov.

[B] Injunction Actions

The agencies, authority to block a proposed transaction is not self-executing, i.e., they do not themselves have the power simply to order the parties to abandon the transaction. Instead, the challenging agency must rely on its powers of persuasion. If that fails the agency must sue in federal court and demand an injunction to block the transaction.[115] The agency's complaint normally asks the court to issue preliminary and permanent injunctions against the transaction. In addition, the DOJ or FTC typically asks the court to issue—or the parties will agree to the entry of—a temporary restraining order (TRO) barring the parties from closing until the government's application for a preliminary injunction has been decided.

The court may also order a period of expedited discovery to gather evidence for the preliminary injunction hearing. To obtain a preliminary injunction, the DOJ or FTC must persuade the court that it is likely ultimately to prevail. If the court agrees with the DOJ or FTC, the court will enjoin the transaction pending a full trial, a process that can easily take several years.

Examples of consent decrees entered under this new regime include: *In re Exxon/Mobil* (requiring "clean sweep" divestiture of Exxon's California refinery and all downstream assets); *In re BP/ARCO* (requiring premerger divestiture of $7 billion worth of Alaskan reserves); *In re Chevron/Texaco* (D.D.C. 2001) (requiring combined company to divest interests in two joint ventures, a natural gas pipeline, a fractionating plant, and aviation fuel business in fourteen states); *In re* Rite Aid/PJC (D.D.C. 2007) (requiring Rite Aid to divest twenty-three pharmacies to FTC-approved buyers as condition of allowing it to purchase Brooks and Eckerds chains); *In re Getinge/Datascope* (D.D.C. 2009) (requiring divestiture of Datascope's endoscopic vessel harvesting line of products)

115. On December 18, 2003, the FTC and DOJ jointly published a very helpful study entitled "Merger Challenges Data, Fiscal Years 1999–2003." The study tabulated the market share and concentration levels associated with decision to "challenge" mergers. They treat a merger as having been challenged by the FTC if the commission voted to challenge the transaction either in court or administratively and by the DOJ if it filed a complaint in court or issued a press release announcing that the transaction had been abandoned or restructured in response to DOJ concerns. The study can be found at either http://www.ftc.gov or http://www.usdoj.gov/atr.

Examples of recent litigated injunction actions include: *FTC v. Whole Foods Mkt.*, 533 F.3d 869 (D.C.Cir. 2008) *amended and reissued* 548 F.3d 1028 (D.C.Cir. 2008) (reversing district court's denial of FTC request for a preliminary injunction) (see discussion at §5.04[A], above); *United States v. Oracle,* Inc., 331 F.Supp.2d 1098 (N. D. Cal. 2004) (denying DOJ's request to enjoin proposed hostile takeover of one maker of systems software by another); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002) (enjoining the proposed merger of two major glass-producing companies); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001) (enjoining proposed merger of two of top three competing baby food manufacturers); *FTC v. Cardinal Health, Inc.* and *FTC v. McKesson Corp.*, 12 F. Supp. 2d 34 (D.D.C. 1998) (enjoining two mergers involving four largest drug wholesalers); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) (enjoining acquisition of one of the nation's three largest office supply superstore chains by another).

If the government does obtain a preliminary injunction, parties almost always abandon the proposed merger rather than accept the delay.[116]

This gives rise to an anomaly attributable to the dual jurisdiction of the DOJ and FTC. If the DOJ obtains a preliminary injunction and the parties then agree to abandon the transaction, that signals an end to the matter. The DOJ will not pursue it. In similar circumstances, however, the FTC has been known to continue with administrative proceedings against the "offending" parties. The FTC may seek, for example, an agreement, or ruling, that the parties not attempt a similar transaction in the future without first notifying the FTC even though the new transaction would not otherwise be HSR reportable. The effect on the parties can vary greatly depending solely on which agency happens to conduct the investigation and challenge. This is a plainly unfair situation that should be remedied by the agencies or Congress. The Antitrust Modernization Commission has recommended this very step.[117]

§6.13 Some Strategic Considerations

Strategic planning is important for parties to a proposed transaction that is likely to provoke antitrust concerns. Often, the source of such concerns will be obvious. At other times, they will only be revealed on a full analysis of the sort that will later be undertaken by the enforcement authorities. In either case, it is helpful if counsel can undertake such an analysis early. Having done so, counsel may be able to recommend measures that will minimize or eliminate antitrust concerns. At the very least, counsel may be able to help prepare contingency plans and help draft the parties' agreement to take such plans into account.

For example, the parties and their counsel may believe that the transaction is actually less problematic than might appear from their Premerger Notifications. If so, they might consider going to the authorities during the thirty-day waiting period—or even before reporting—with a written or oral "pitch," that is, a presentation describing why the venture should receive clearance. On the other hand, they might decide that a pitch would be counterproductive and serve only to highlight problems that could otherwise receive minimal scrutiny.

116. The decision of the district court on the preliminary injunction is subject to immediate appeal by the losing party. Normally, the court of appeals will expedite the handling of such an appeal, rendering a decision within one to two months after the district court rules. Although this appellate decision is subject to appeal to the Supreme Court, the Supreme Court rarely exercises its discretion to hear such appeals.

117. See Antitrust Modernization Commission Report and Recommendations, pp. iv, 132–37 (April 2007).

The parties may also want to consider whether they would be prepared to accept conduct or structural remedies to satisfy the authorities. If so, they may consider going to the authorities with a plan at the very beginning of the waiting period, or even before filing. Or they might decide that unless the authorities are prepared to clear the deal as planned, they are not interested in pursuing it.

In any event, the parties will probably also want to consider including an antitrust “out” in their agreement. Such an out allows one or both of the parties to walk away on the occurrence of some specified event such as the issuance of a Second Request, or, more commonly, the government’s filing of a motion for a preliminary injunction or the failure of the transaction to close by a specified date because of continuing antitrust review. Some agreements also specify which of the parties bears the antitrust risk, i.e., which one will be responsible for the cost of an investigation or challenge or the costs of abandoning the transaction.

CHAPTER 7

Price Discrimination—The Robinson-Patman Act

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§7.01 Introduction

Congress passed the Robinson-Patman Act in 1936 to reinforce the Clayton Act's strictures against price discrimination—the practice of selling the same product to different, but similarly-situated, customers at different prices. Congress feared that would-be monopolists were using the practice, as well as predatory pricing, to target and drive out of business weaker competitors. Congress also believed that price discrimination was being used to take unfair advantage of smaller customers, i.e., those with less leverage to demand price concessions.

The Robinson-Patman Act has been under attack virtually since its passage.[1] Opponents argue that discouraging sellers from giving price discounts makes no economic sense and is contrary to the underlying principles of antitrust. Most recently, the Antitrust Modernization Commission has recommended repeal of the act for those reasons and because the act "appears increasingly to be ineffective even in protecting small businesses" that were intended to be its beneficiaries.[2] For these reasons, and others, the federal enforcement authorities have all but abandoned enforcement of the act.

Despite all this, the act remains in place and the courts continue to enforce it in cases brought by private plaintiffs.[3] In addition, many of the states have passed "Little Robinson-Patman Acts" that outlaw price discrimination in terms sometimes more restrictive than those of the federal act. As such, United States (U.S.) antitrust practitioners must continue to help clients avoid potential problems when determining how to price and promote their products.

§7.02 The Act's Terms

Section 2(a) of the Robinson-Patman Act forbids sellers from selling, and buyers from inducing the sale of: (1) like "commodities;"[4] (2) to two or more similarly situated customers; (3) on different terms and conditions (such as prices, availability of discounts, rebates, allowances, or advertising

1. *See* Robert Pitofsky, et al., Trade Regulation: Cases and Materials, Chapter 11, and materials collected therein (5th ed. 2003).
2. *See* Antitrust Modernization Commission Report and Recommendations, Recommendation no. 55 (April 2, 2007) *available at* http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.
3. *See, e.g., Volvo Trucks N. Am. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).
4. Services are not commodities and hence not covered by the act. Services are, however, covered by some states' "Little Robinson-Patman Acts." The various state antitrust statutes are collected at 6 Trade Reg. Rptr. (CCH) ¶¶ 30,000, *et seq.*

assistance); (4) if the differential will result in harm to competition.[5] It forbids the sale of goods at lower prices in one part of the United States than in another for the purpose of destroying competition or eliminating a competitor. It also forbids predatory pricing, i.e., the sale of goods "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."[6] The act also provides (no longer invoked) criminal sanctions for its violation.[7]

The act contains several other prohibitions: Section 2(c) forbids a seller from paying or receiving from a buyer certain commissions, brokerage fees, or other compensation (*e.g.*, kickbacks, commercial bribes, and the like);[8] a seller may not provide or pay for a product's handling, promotion, or advertising unless he or she does the same for all similarly situated buyers;[9] and a buyer may not "knowingly" induce or receive an illegally preferential price or other treatment.[10]

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5. 15 U.S.C. §13(a) & 13a. *See generally J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (holding that proof of price discrimination does not entitle plaintiff to "automatic damages" in the amount of the price discrimination, but that actual damages attributable to the antitrust violation must be proved); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) (discussing harm to competition caused by "primary-line" price discrimination); *FTC v. Borden Co.*, 383 U.S. 637 (1966) (use of different brand names or labels does not necessarily mean goods are not of like grade or quality); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960) (price discrimination is merely a "price difference"); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947) (buyer may not use Robinson-Patman Act as a defense to seller's action on a note); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) (discount that is "theoretically" but not "functionally" available to similarly situated but much smaller purchasers held to violate the act).
6. *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220–227 (1993) (Act does not "ban all price differences charged to different purchasers of commodities of like grade and quality," rather, the act proscribes "price discrimination only to the extent that it threatens to injure competition.")
7. 15 U.S.C. §§13(a) and 13a. As described more fully in Chapter 8, the federal antitrust enforcement authorities confine their criminal antitrust prosecutions to instances of price-fixing, bid-rigging, and other "hard-core," unquestionably illegal, *per se* violations. This was not always the case, however. *See, e.g.*, *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 37 (1963) (upholding indictment charging seller-defendant with making sales below cost "without legitimate commercial objective and with the specific intent to destroy competition").
8. 15 U.S.C. §13(c); *But cf. Rotec Indus. v. Mitsubishi Corp.*, 348 F.3d 1116 (9th Cir. 2003)(court found it had no subject matter jurisdiction over a §2(a) kickback claim because the kickbacks took place entirely abroad and hence not in the stream of U.S. commerce).
9. 15 U.S.C. §13(d)–(e). In *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945) and *A. E. Staley Mfg. Co. v. FTC*, 324 U.S. 746 (1945), companion cases, the Supreme Court held that glucose manufacturers' practice of charging "phantom freight" constituted price discrimination. The use of phantom freight involved charging all customers freight from a single shipping point even though some shipments originated from different sites.
10. 15 U.S.C. §13(f).

In 2006, in *Volvo Trucks North America v. Reeder-Simco GMC, Inc.*,[11] in its first decision on the act in sixteen years, the U.S. Supreme Court (the Court) reaffirmed the validity of the act's basic prohibition against price discrimination. The Court nevertheless ruled that the defendant truck manufacturer was not liable under the act for selling to the plaintiff dealer on less favorable terms than to other dealers because the manufacturer had not discriminated between dealers competing to resell trucks to the same customers. The Court pointed out that the hallmark of the required competitive injury under the act is "the diversion of sales or profits from a disfavored purchaser to a favored purchaser."[12] The Court also observed that selective price discounting and other strategies that may reduce intrabrand competition are often essential to fostering the pricing flexibility that allows for greater interbrand competition—the primary focus of the antitrust laws.[13]

§7.03 The Primary, Secondary, and Third Lines

When seeking to determine whether price discrimination has harmed or threatens to harm competition, the courts look to three lines, or levels, of competition. Thus, the harm to competition may be found in the primary line (or the seller line), the secondary line (or the buyer line), or the third line (customers of the buyer). The primary line inquiry is whether the price discrimination has harmed or threatens to harm competition in the seller's market by driving the seller's competitors out of business.[14] The secondary line inquiry asks whether there is potential harm to competition in the buyer's market.[15] And the third line inquiry focuses on the effect on competition among the buyer's customers.[16]

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11. 546 U.S. 164 (2006).
12. *Id.* at 177.
13. *Id.* at 176–182.
14. *See Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).
15. *See, e.g., Volvo Trucks*, 546 U.S. 164 (2006), *supra* note 3; *Godfrey v. Pulitzer Publ'g Co.*, 276 F.3d 405 (8th Cir. 2002) (affirming summary judgment against plaintiff newspaper dealers because they did not show that they competed with the other dealers who allegedly received a better price); *Lycon Inc. v. Juenke*, 250 F.3d 285 (5th Cir. 2001), *cert. denied*, 534 U.S. 892 (2001) (distributors who paid more than end-users had no claim because the end-users did not compete with the distributors to resell the product).
16. The Supreme Court has even suggested that Robinson-Patman Act liability could be based on harm to competition in the fourth line of distribution. *See Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969).

§7.04 Promotional and Advertising Allowances

As noted above, Sections 2(d) and (e) of the Robinson-Patman Act forbid the discriminatory grant of promotional and advertising allowances, and similar merchandising payments and services. These sections apply to payments by sellers to competing customers for promotional services provided by the customers in connection with the resale of the seller's products.

These provisions cover the furnishing of or paying for items used by the customer to promote sales of the seller's products, including such items as cooperative advertising; handbills; demonstrators and demonstrations; catalogs; cabinets; displays; contests and contest-related materials; and special packaging or package sizes. Beware that, although the meeting competition defense applies to these provisions, the cost justification defense does not.[17]

§7.05 FTC Guides

Any seller who grants, buyer who receives, or third party who benefits from, such services—or their antitrust advisors—would do well to consult the FTC's *Guides for Advertising Allowances and Other Merchandising Payments and Services* (known as the *Fred Meyer Guides*).[18] Though it rarely uses it, the FTC has enforcement authority granted it by Section 5 of the FTC Act to enforce the Robinson-Patman Act. The FTC's guides provide a detailed explanation of the applicability of these provisions, definitions of the critical terms, and how to undertake the appropriate analysis. They also provide concrete examples that help the reader apply the theory to reality.

§7.06 Defenses

If a complaining buyer makes out a *prima facie* case of price discrimination, the act shifts the burden of proving a defense to the seller.[19] The act provides several defenses.

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17. *See* §7.06 below for a discussion of the various available defenses.
18. 16 C.F.R. pt. 240.
19. 15 U.S.C. §13(b).

[A] The Cost Justification Defense

A seller may charge different prices to different customers if it can show that the different prices are justified by differences in the manufacturing, sales, or delivery costs. Volume discounts fall under this exception only if justified by actual cost savings.[20]

Because cost justification, like the other defenses, is an affirmative defense, the burden of proof is on the party accused of price discrimination. Proof may be difficult because cost justification can—although it need not always—raise complex cost-accounting issues. Types of costs in which variations occur that could justify lower prices to a given customer include those for transportation, advertising, sales promotion, selling and technical services, warehousing, operations, sales accounting and credit, and sales management. In addition, the FTC has said that it expects to see contemporaneous documentation of the alleged savings, not after-the-fact attempts at reconstruction of costs.

The fact that overall costs may rise or fall with the addition of a new customer will not necessarily justify charging different prices to the new and old customers. For example, a seller may need to add new manufacturing capacity to supply a new customer. That, however, would not necessarily justify charging that customer more than existing customers, especially if the manufacturer will then be supplying both old and new customers from the same plants. Similarly, a lower price to a large customer might not be justified simply by showing that without sales to that customer the seller's costs per unit would be higher.[21]

If a manufacturer sells both to wholesalers who resell to retailers and directly to retailers, the manufacturer will often sell to the wholesaler at a lower price than to the retailer. This is known as a functional discount, because it reflects the different functions performed by the wholesaler and the retailer. Such discounts do not qualify for meeting competition protection. But in *Texaco v. Hasbrouck*,[22] the Supreme Court held that such discounts could survive Robinson-Patman challenge if they are reasonable and not anticompetitive.[23]

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20. 15 U.S.C. §13(a).
21. As mentioned above, savings in the cost of manufacture, sale, or delivery do not provide a defense to a charge of discrimination in the furnishing of promotional allowances or services.
22. 496 U.S. 543 (1990).
23. *Id.* at 561. *Compare, e.g., Schwartz v. Sun Co.*, 276 F.3d 900, 904–05 (6th Cir. 2002) (payment for services rendered not a functional discount) with *Lycon Inc.*, 250 F.3d 285 (5th Cir.) (distributors who paid more than end-users had no claim because the end-users did not compete with the distributors to resell the product).

[B] The Changing Conditions Defense

Price differentials are permitted "in response to changing conditions affecting the market for or the marketability of the goods concerned."[24] Examples include imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court order, or sales in good faith in discontinuance of business in the affected goods.[25]

[C] The Meeting Competition Defense

The act allows a seller to defend a claim of price discrimination by showing that the lower price (or other preferential treatment) was provided in good faith to meet an equally low price or similar treatment offered by a competitor. [26]

The meeting competition defense raises some difficult issues for antitrust advisers. Sales representatives armed with the knowledge that they can only give a discount to meet an equally low price offered by a competitor naturally want to call the competitor to verify the pricing. This is both risky and unnecessary. As explained in chapter 3 on Sherman Act, Section 1, and Chapter 8 on criminal antitrust enforcement, *any* contact between competitors about current or future prices can become evidence in a case charging the participants with price-fixing or other forms of anticompetitive collusion. All such contacts should be against company policy. It is simply too easy to spin evidence of a pattern of such contacts into a web of conspiracy to fix prices. Furthermore, antitrust prosecutors, judges, and juries greet with skepticism, at best, claims that sales representatives who discussed prices with their competitors were merely attempting to comply with the Robinson-Patman Act. Lawyers for antitrust claimants thrive on such evidence.

Just as importantly, the Supreme Court has made it clear that maintaining the defense does not require confirming the lower price with a competitor.[27] Good-faith reliance on a report from a customer followed by reasonable

24. 15 U.S.C. §13(a).
25. *Id.*
26. 15 U.S.C. §13(b).
27. *See FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759–760 (1945) ("Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's . . . We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."). *Accord U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 451 (1978); *see also Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726 (1945) (companion case to Staley, both holding that use of phantom freight constituted price discrimination and that meeting competition was no defense to that charge).

checking short of calling the competitor will usually suffice. The reasonableness of the seller's reliance may still be an issue, however. Once it is proved that the seller did in fact discriminate in pricing, the burden is on the seller to prove its good faith and reasonableness. It may well not be enough therefore merely to rely on a customer's assertion that he "can do better elsewhere."

As a result, many companies require their salespeople to document the reasons for providing lower prices on "meeting competition forms" that must be submitted to and cleared by company antitrust counsel or senior sales managers trained in Robinson-Patman compliance before the discount will be granted. These forms generally ask for a specific recital by the salesman of what he was told by the customer's representative and when. They also usually ask for available documentation, such as an invoice from the competing seller showing the price being met.

CHAPTER 8

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§8.01 Introduction

Enforcement of the antitrust laws is handled by four groups: (1) The Department of Justice (DOJ), which is the law enforcement arm of the executive branch; (2) the Federal Trade Commission (FTC), an independent regulatory and administrative body created by Congress; (3) the individual attorneys general of the fifty states; and (4) private (i.e., nongovernmental) civil litigants. Although there is substantial overlap in the areas of enforcement covered by these groups, each has its own particular jurisdiction and areas of specialization.

§8.02 The Department of Justice

Antitrust enforcement at the DOJ is the responsibility of the DOJ's Antitrust Division. The division is headed by the assistant attorney general for antitrust.[1] The Antitrust Division is based at DOJ headquarters in Washington, D.C., and operates field offices in New York City; Philadelphia, Pennsylvania; Atlanta, Georgia; Cleveland, Ohio; Chicago, Illinois; Dallas, Texas; and San Francisco, California.

The division's job centers on enforcing the criminal and civil provisions of Sections 1 and 2 of the Sherman Act (restraints of trade and monopolization) and Section 7 of the Clayton Act (anticompetitive mergers, acquisitions, and joint ventures).

[A] Criminal Enforcement

The DOJ has exclusive responsibility for criminal enforcement of the federal antitrust laws.[2] The Sherman Act states that all violations of the antitrust laws are criminal violations. In practice, however, the DOJ only investigates and prosecutes clear and purposeful violations involving plainly illegal activity, primarily "hard-core cartel activity such as price-fixing, bid-rigging, and market-allocation agreements."[3] The government's restraint is attributable in

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1. Additional and up-to-the-minute information about the Antitrust Division, its activities, guidelines, speeches, policy statements, and publications, can be found at the DOJ web site at http://www.usdoj.gov/atr.
2. *See generally*, Hammond, *Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program* (March 26, 2008) available at www.usdoj.gov/atr.
3. *Status Report: A Summary Overview of the Antitrust Division's Criminal Enforcement Program* (February 1, 2004), *archived at* http://www.usdoj.gov/atr). *See also* DOJ Antitrust Division Manual, Chapter III, Investigation and Case Development.

part to the United States (U.S.) Supreme Court's (the Court's) ruling, in *United States v. U.S. Gypsum Co.*,[4] that the government must prove criminal intent to obtain a criminal antitrust conviction.[5] Indictments charging antitrust violations often include parallel counts charging the defendants with mail fraud or wire fraud, obstruction of justice, or tax crimes.

Unlike other divisions within the DOJ, the Antitrust Division lawyers run their own grand juries and prosecute their own criminal actions, rather than refer cases to U.S. attorneys offices for prosecution. On occasion, however, the Antitrust Division will enlist the assistance of a local U.S. attorney. The division also utilizes the Federal Bureau of Investigation (FBI) in conducting its investigations.

Defending criminal antitrust charges is a complex and highly specialized area of legal practice all its own. Given the high stakes involved, those accused of, or who suspect they may be involved in, potentially criminal antitrust activity should seek experienced criminal antitrust counsel.[6] The following provides a brief overview of the process of a criminal investigation and highlights some of the important issues.

[1] Grand Jury Investigations

Federal antitrust investigations are conducted by the Antitrust Division working with grand juries. A grand jury is an investigative body charged with determining whether there is "probable cause" to believe an individual or corporation has committed a crime.[7] If it does, it may return an indictment charging the individual or corporation with that crime.[8] A grand jury is convened under the authority of a court and is run by a prosecutor. Federal grand juries investigating possible antitrust violations are generally run by a prosecutor from the Antitrust Division, although occasionally a local U.S. attorney may be involved.

A grand jury is composed of ordinary citizens selected from the same pool of citizens used to provide trial jurors. Its proceedings are secret.[9] No one other than the government attorney, the grand jurors, and the court

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4. 438 U.S. 422 (1978).
5. *Id.* at 435 ("[A] defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom.").
6. For those seeking additional information about criminal antitrust practice, the following references are especially helpful: *Antitrust Division Manual and Antitrust Division Grand Jury Practice Manual (Antitrust Division, U.S. Department of Justice*, http://www.usdoj.gov/atr); *Criminal Antitrust Litigation Manual* (A.B.A. Antitrust Section); *Model Jury Instructions in Criminal Antitrust Cases* (A.B.A. Antitrust Section); *Antitrust Grand Jury Investigations* (A.B.A. Antitrust Section).
7. *See generally* Fed. R. Crim. P. 6, "The Grand Jury."
8. *See generally* Fed. R. Crim. P. 7, "The Indictment and the Information."
9. *See* Fed. R. Crim. P. 6(e).

stenographer is permitted to be present.[10] The grand jury has the power to compel the production of documents and other things and to compel the attendance and—with limits imposed by the Fifth Amendment privilege against self-incrimination—the testimony of witnesses. The prosecutor presents evidence to the grand jurors in the form of testimony from witnesses and also documents and other physical evidence. He or she may then ask the grand jurors to return one or more indictments. Antitrust grand juries are usually empanelled for eighteen months. The panel may then be renewed for an additional eighteen months.

[a] Grand Jury Document Subpoenas

A grand jury document subpoena (or *subpoena duces tecum*) is a court order directing the recipient to produce the listed documents and objects.[11] It is compulsory. Failure to comply constitutes contempt of court and can result in a fine or even a jail sentence. Document subpoenas—which are often unnecessarily burdensome and overreaching or have unreasonably short return dates—are frequently negotiable. The prosecutor running the grand jury that issued the subpoena should be consulted immediately upon its receipt. He or she will then be in a position to negotiate an extension of time and limitations upon the documents demanded by the government.

It is also possible to move to quash or otherwise limit the subpoena. This, too, should be done promptly. Care should be taken in responding to be sure not to waive the attorney-client privilege by producing privileged documents. Care should also be taken to see that the recipient does not produce any documents not called for by the subpoena.

The Fifth Amendment privilege against self-incrimination does not apply to corporations. Nor does it allow the withholding of documents not covered by the attorney-client or other valid privilege.

Careful review of the subpoena and the documents to be submitted in response will provide clues as to what it is the grand jury is investigating and whether the recipient is the actual target of the investigation or has merely been subpoenaed to obtain evidence to be used to build the government's case against another. Further information may be gleaned by consulting the government attorneys conducting the grand jury and perhaps by conferring with attorneys representing other parties that have been subpoenaed. In the latter case, care should be taken to take full advantage of the joint defense privilege.

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10. *See* Fed. R. Crim. P. 6(d).
11. *See generally* Fed. R. Crim. P. 17, "Subpoena," and subsection (c), "Producing Documents and Objects."

One relatively recent development in the division's investigative strategy has been the use of FBI agents and search warrants to interview witnesses and obtain documents and other physical evidence from companies or individuals deemed likely to destroy evidence or otherwise fail to comply completely with a subpoena. The division is increasingly coordinating these searches with competition law enforcement authorities in other jurisdictions, conducting so-called "dawn raids" to obtain evidence against international price-fixing cartels.[12] The U.S. has entered into numerous mutual legal assistance treaties (MLATs) with other countries to make this kind of cooperation possible.[13]

[b] Grand Jury Testimonial Subpoenas for Individuals and Immunity

Any individual who receives a subpoena to appear and give testimony before a grand jury should consult an attorney immediately.[14] Once a company becomes aware that it is involved in a criminal antitrust investigation, it should notify all employees to contact someone in authority at the company immediately upon receipt of a subpoena. In some instances, it may be desirable that the individual be represented by the company's attorneys. If so, the company attorneys must take care not to violate ethical or legal rules against conflicts of interest.

A subpoenaed individual may be found in contempt of court if he or she fails to obey a grand jury subpoena. Equally important, if the individual obeys the subpoena and appears without first consulting an attorney, he or she risks waiving important constitutional rights—principally the Fifth Amendment right to be free from compelled self-incrimination. Although an individual may ultimately chose to waive such rights, it is not a step that should be taken without careful consideration.

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12. *See, e.g.*, Hammond, *Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program* (March 26, 2008) available at www.usdoj.gov/atr.
13. The U.S. also entered, in October 2004, into a supplemental Positive Comity Agreement with Canada under which the two countries agree that each will, at the request of the other, investigate and, if warranted, prosecute violations of its own competition laws that the requesting country claims are having adverse effects inside the requesting country.

    One noteworthy development in 2005 was the DOJ's first successful extradition of an antitrust criminal defendant from the U.K., which had recently criminalized price-fixing. It has historically been difficult for the DOJ to obtain extradition from nations that do not themselves treat antitrust violations as criminal. See, Hammond, *Charting New Waters in International Cartel Prosecutions* (March 2, 2006) archived at the Antitrust Division website.

    The DOJ has a section on its website containing information about its international operations and concerns as well as providing links to other useful websites. It may be found at http://www.usdoj.gov/atr/pubdocs.html.
14. The technical name is *subpoena ad testificandum. See generally* Fed. R. Crim. P. 17, "Subpoena."

The attorney can help the individual make this choice by explaining the various alternatives available, including the possibility that the witness may be a target of the government investigation. As a rule, the Antitrust Division will not subpoena an individual who is a target of an investigation without first issuing that person a "target letter."

The attorney will explain that even if the witness asserts his or her constitutional Fifth Amendment privilege, the government can compel the witness to testify. But it can do so only by first obtaining an immunity order that will prevent the prosecutors from thereafter using the individual's grand jury testimony against him or her. The prosecutor may demand that a witness seeking immunity provide a written or oral proffer, i.e., a description of the proposed testimony, before the prosecutor will agree to seek immunity. The government generally will not offer immunity to someone who has been named a target of the investigation.

The immunity statute allows federal prosecutors to compel trial or grand jury testimony from witnesses who assert their Fifth Amendment privilege against self-incrimination and refuse to testify.[15] The prosecutor's power is not self-executing. He or she must obtain an immunity order from the supervising federal judge.[16]

Statutory immunity—known as "use" immunity—is not absolute. The statute prevents the government from later using testimony obtained pursuant to the immunity order in a criminal case against the immunized witness.[17] In addition, it prohibits the use of information "derived" from the immunized witness's testimony.[18] However, the statute does not prevent the government from proceeding criminally against the witness with independently obtained evidence.[19] Nor does it prevent the government from prosecuting the witness "for perjury, giving a false statement, or otherwise failing to comply with the [immunity] order."[20]

The government may also offer a witness informal or letter immunity. Instead of a formal court order, the witness receives a letter agreement signed by the prosecutor stating the immunity terms. The decision whether to accept

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15. 18 U.S.C. §6002.
16. *Id.*
17. *Id.*
18. *Id.*
19. The government rarely brings such prosecutions. This is attributable in part to a concern that doing so could discourage others from cooperating.
20. 18 U.S.C. §6002; *see* 18 U.S.C. §1623 (perjury); 18 U.S.C. §§1501, *et seq.* (obstruction of justice). As evidenced by the government's 2004 high-profile prosecution of Martha Stewart, perjury and obstruction of justice charges, used either in conjunction with or even in the absence of substantive charges, are an important weapon for federal prosecutors. Potential jeopardy for these charges arises every time an individual speaks with a federal official, investigator, or prosecutor, so special care should be taken when doing so or deciding whether to do so.

such an agreement rather than demand a formal order is an important one that should be made in consultation with an attorney.

If the time comes for the witness to testify, his or her attorney will have explained grand jury procedure to the witness and helped him or her prepare to testify. The single best piece of advice the attorney can give the witness by way of preparation is to tell the truth. For witnesses other than targets of the investigation, their greatest risk is a charge of perjury for providing false grand jury testimony.

The attorney can accompany the witness to the grand jury room and remain immediately outside in the hallway, but the attorney cannot enter the grand jury room.[21] The witness can request a break to consult the attorney. The grand jury secrecy rules do not prohibit a witness (as opposed to the prosecutor or grand jurors) from disclosing what went on during his or her appearance. Thus, the witness' attorney can debrief the witness both during and right after his or her testimony, while the questioning and testimony are still fresh in the witness's mind. Debriefing allows the attorney to learn what the witness testified and gain a better understanding of what the prosecutor and grand jurors are after.[22]

[2] Indictments, Pleas, and Trials

Antitrust prosecutors generally follow a predictable pattern in pursuing an antitrust criminal investigation. After gathering documents with search warrants or grand jury document subpoenas, they begin by seeking interviews or testimony (granting immunity as necessary) from individuals, such as secretaries and other non-officers, at the lower levels of the corporate hierarchy. From there, they proceed up the corporate ladder, with the ultimate goal to indict and convict the highest-placed individuals at the company who were involved in the suspected antitrust conspiracy.[23]

As they work their way up, the prosecutors become less generous with immunity. Instead, they use the threat of increased charges and jail terms to "turn" or "flip" reluctant witnesses; i.e., they offer no or reduced charges, or a

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21. Fed. R. Crim. P. 6(d).
22. Fed. R. Crim. P. 6(d). Rule 6(e) prohibits only the prosecutor and the grand jurors from disclosing the proceedings.
23. An indictment is simply a written statement issued by a grand jury at the request of the prosecutor of the essential facts constituting the offense charged. Fed. R. Crim. P. 7. Because antitrust offenses are "felonies," *i.e.*, punishable by more than one year in prison, prosecutors must use grand jury indictments. For lesser offenses, prosecutors may use "informations," similar charging statements that do not require the imprimatur of a grand jury, but can be issued simply by the prosecutor. *Id.* A party accused of a felony may waive the right to an indictment and allow the prosecutor to proceed via information. *Id.* In either case, the charges are read to the accused at an arraignment, a hearing before a judge at which the accused enters a plea of guilty, not guilty, or *nolo contendere*. Fed. R. Crim. P. 11, 12.

promise to seek a light sentence, in exchange for guilty or *nolo contendere* pleas and testimonial cooperation.

A plea of *nolo contendere*, or no contest, is no different from a guilty plea at the defendant's sentencing or if the defendant has a criminal record.[24] It does, however, allow a defendant to tell the world he or she did not plead guilty. At least as important, unlike a guilty plea, it cannot be used as *prima facie* proof in a later civil damage action by victims of the conspiracy.[25] Nolo pleas are available to corporations as well as individuals. The government can, and often does, oppose the entry of a nolo plea. Whether to accept a nolo plea is up to the judge.

Once the prosecutors reach the highest corporate levels, they seek indictments and exert whatever pressure they can to induce guilty pleas from the indicted individuals and corporations. One method is the inclusion of multiple counts, both antitrust counts and counts charging the defendants with obstruction of justice, tax law violations, or using the mails or the telephone in furtherance of their conspiracy, i.e., mail or wire fraud. The additional antitrust counts can increase the size of the potential fines, while the non-antitrust counts can dramatically increase the potential jail time for individuals. The government will then "trade," i.e., drop, counts in exchange for guilty pleas on the core antitrust counts.[26]

[3] Sentencing

In 2005, in a decision with important implications for antitrust sentencing, the Supreme Court ruled that mandatory application of the *U.S. Federal Sentencing Guidelines* (*Sentencing Guidelines*) was unconstitutional. In *United States v. Booker*,[27] the Court reasoned that mandatory application of the *Sentencing Guidelines*, which allowed a judge to increase a defendant's sentence based on facts not found by a jury, violated a criminal defendant's right to a jury trial under the Sixth Amendment of the U.S. Constitution. The Court therefore held that the two provisions of the Sentencing Reform Act of 1984 (the SRA) that make the guidelines mandatory,[28] "must be severed and

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24. *See generally* Fed. R. Crim. P. 11, "Pleas," and Advisory Committee Notes thereto.
25. Section 5(a) of the Clayton Act, 15 U.S.C. §16(a), states that *prima facie* effect will be given to prior government judgments, but not to consent judgments. Although the Supreme Court has not decided whether guilty or nolo pleas constitute consent judgments, the lower courts have held that nolo pleas do but guilty pleas do not; the latter are thus given *prima facie* effect. *See* §§8.05[B] below and 2.03[E] above.
26. In an effort to come up with a compelling proffer, attorneys representing individual witnesses often put strong pressure on their clients to recall events that would implicate their superiors. Prosecutors tend to be skeptical of such proffers from those who are already implicated.
27. 543 U.S. 220 (2005)
28. *See* 18 U.S.C. §§3553(b)(1) and 3742(e).

excised" from the SRA. Thus, according to Court, the *Sentencing Guidelines* are now "effectively advisory" because the SRA, as modified, "requires a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well[.]" [29]

The Supreme Court's decision in *Booker* affects antitrust sentencing. For example, the statutorily prescribed maximum period of imprisonment for a criminal violation of Section 1 of the Sherman Act is a period "not exceeding ten years."[30] The guidelines implement the statutory penalty by requiring federal judges to impose a sentence in the range of ten to sixteen months for a jury verdict finding the defendant guilty of a basic Section 1 violation, and to increase the sentence based on the existence of relevant aggravating facts.[31] Thus, a jury's finding that the volume of commerce attributable to the defendant in the course of the antitrust scheme exceeded $1 million (an aggravating fact) would result in a sentencing range of fifteen to twenty-one months. Before *Booker*, a federal judge could have found the existence of this aggravating fact during the sentencing hearing even if the jury did not, and would have then been required to impose a sentence within the increased sentencing range. Now that *Booker* makes application of the guidelines advisory, the judge would not be required to impose increased sentences based on facts not found by the jury.

[4] Leniency Programs

The DOJ's Antitrust Division has adopted two programs designed to encourage the discovery and reporting of antitrust violations.[32] Known as leniency programs, they offer not to bring criminal charges against corporations and individuals who come forward and report illegal antitrust activity.[33]

[a] Corporate Leniency Program

The DOJ's corporate leniency program (also known as the corporate amnesty or corporate immunity program) offers lenient treatment to a corporation that comes forward and reports a violation before the DOJ has begun an

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29. *Booker*, 543 U.S. at 245-46. *See also Cunningham v. California*, 549 U.S. 270 (2007).
30. *See* 15 U.S.C. §1.
31. *See* United States Sentencing Commission, *Sentencing Guidelines Manual*, §2R1.1 and Ch. 5 Part A Sentencing Table.
32. Details of the DOJ's corporate leniency program are publicly available at the DOJ web site http://www.usdoj.gov/atr.
33. To enhance the leniency programs, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which increased the maximum penalties for antitrust criminal violations, also limited to single damages the civil antitrust liability of those who take advantage of the program. Those companies that do not receive amnesty remain liable for treble damages.

investigation if: (1) the DOJ has not already received information about the illegal activity from another source; (2) the corporation promptly and effectively ceased its participation in the activity; (3) the corporation reports fully and candidly and continues to cooperate; (4) the confession is truly a "corporate act" and not simply "isolated confessions of individuals executives or officials;" (5) the corporation makes restitution to injured parties "where possible;" and (6) the corporation was not the leader of the illegal activity and did not coerce others to participate.

Leniency may still be available even if the corporation does not come forward until after the DOJ has begun an investigation if: (1) it is the first one to come forward; (2) the DOJ does not already have evidence against it that is likely to lead to a "sustainable conviction;" (3) the corporation promptly and effectively ceased the illegal activity upon discovery; (4) the corporation reports fully and candidly and continues to cooperate; (5) the confession is truly a "corporate act" and not simply "isolated confessions of individuals executives or officials;" (6) the corporation makes restitution to injured parties "where possible;" and (7) the DOJ determines that granting leniency would not be unfair to others.[34]

The DOJ defines leniency as "not charging such a firm criminally for the activity being reported." If a corporation qualifies for leniency under the first set of factors, directors, officers, and employees who admit their involvement and cooperate will also receive leniency. If the corporation does not so qualify, directors, officers, and employees may still be eligible for immunity "on the same basis as if they had approached the [DOJ] individually."

The DOJ's corporate leniency program has been a tremendous success. It has led directly to the DOJ's successful prosecution of numerous major international price-fixing conspiracies resulting in the government recovering billions of dollars in fines and sending dozens of businessmen to prison.[35] Those convicted and serving jail time increasingly include foreign nationals, who are also subject to deportation if convicted of a criminal antitrust violation. Moreover, the DOJ is using border watches to detect foreign executives' entry into the U.S. and working more and more closely with foreign enforcers to obtain extradition of foreign individuals accused or convicted of antitrust violations—a relatively new development related in part to other countries' increasing criminalization of antitrust violations.[36]

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34. These conditions may also apply to those that report before discovery of the illegal activity by the DOJ.
35. *See* Hammond, *Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program*, (presented March 26, 2008); and Hammond, *Recent Developments Relating to the Antitrust Division's Corporate Leniency Program* (presented March 5, 2009) both archived at http://www.usdoj.gov/atr.
36. *Id.*

One vivid example of the leniency program at work is the DOJ's investigation and prosecution of commission rate-fixing by the two leading art auction houses, Sotheby's and Christie's. According to news reports, the investigation began when Christie's and one of its executives took advantage of the DOJ's leniency programs to report that it had entered illegal rate-fixing agreements with Sotheby's. With Christie's cooperation, the government eventually negotiated a plea agreement with the president of Sotheby's, who pled guilty to a single Sherman Act, Section 1 violation. She also agreed to provide testimony against Sotheby's billionaire chairman—who was ultimately convicted after trial—in the hope of obtaining more favorable treatment at sentencing. In addition, Sotheby's agreed to pay a $45 million fine. Christie's was spared criminal liability but both it and Sotheby's ultimately agreed to pay more than $500 million to settle the follow-on antitrust civil class actions.[37]

Another recent development of note was the DOJ's first, and so-far only, attempt to revoke a grant of leniency. The case involved the international shipping company Stolt-Nielsen. After granting Stolt conditional leniency for reporting its involvement in an international conspiracy to restrain trade in the parcel tanker industry, the DOJ concluded that the company had not been truthful about when it had terminated its part in the conspiracy. As a result, the DOJ withdrew its grant of leniency, and indicted the company and several company executives. The company moved to dismiss the indictment on the grounds that it had not breached the leniency agreement. The district court agreed with the company and dismissed the indictment.[38] The DOJ did not appeal the dismissal but continued to maintain that it had been in the right. At the same time, fearing that the revocation could make companies less willing to seek leniency, the DOJ took pains to announce that the revocation was exceptional.

In 2009, the DOJ released, for the first time, redacted versions of letters issued to leniency recipients under its leniency program. According to the DOJ, the redactions were designed to ensure the confidentiality of the identities of the recipients and of the information they provided. Before that time, the DOJ had released only a model letter. The release was the result of a holding by a U.S. court of appeals that the Freedom of Information Act (FOIA) did not prevent the DOJ from releasing the nonconfidential portions of the letters.[39]

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37. For an entertaining, novel-like retelling of the entire Sotheby's/Christie's saga, *see* Christopher Mason, *The Art of the Steal: Inside the Sotheby's – Christie's Auction House Scandal* (Putnam Publishing Group 2004).

38. *See United States v. Stolt-Nielsen S.A.*, 524 F. Supp. 2d 586 (E.D. Pa. 2007); and *United States v. Stolt-Nielsen S.A.*, 524 F.Supp.2d 609 (E.D. Pa. 2007).

39. *See Stolt-Nielsen Transportation Group Ltd. v. United States*, 534 F.3d 728 (D.C. Cir. 2008). The redacted leniency letters may be found at http://www.usdoj.gov/atr/foia/leniency_letters.htm.

[b] Individual Leniency Program

This program applies "to all individuals who approach the [DOJ] on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the [DOJ] has not previously been made aware."[40] Leniency again means no criminal charges and is subject to the following requirements: (1) the DOJ has not already received information about the illegal activity; (2) the individual reports fully and candidly and continues to cooperate; and (3) the individual was not the leader of the illegal activity and did not coerce others to participate. Individuals who do not qualify for leniency may still be eligible for statutory or informal (letter) immunity.

[B] Civil Enforcement

The DOJ also has the power to attack antitrust violations through civil enforcement. It uses this power to attack less serious, less clearly illegal, or harder to prove, activity than the hard-core activities against which it brings criminal actions.

[1] Civil Investigative Demands

In many instances, a party's first indication that it is the subject of a DOJ civil investigation will be the receipt of a civil investigative demand (CID). A CID is similar to a grand jury *subpoena duces tecum* or a civil discovery subpoena. The government's authority to issue CIDs is found in the Antitrust Civil Process Act.[41] The CID may seek testimony, documents, or answers to interrogatories. CIDs are often quite broad and the DOJ may be willing to negotiate limitations. If such negotiations are unsuccessful, the recipient may go to federal court and seek to have the CID modified or quashed.[42]

Although the DOJ may use information submitted in response to a CID in court, in grand jury and administrative proceedings, and in certain other strictly limited ways, it may not otherwise reveal information without the respondent's permission.[43] To this end, the act specifically exempts such information from FOIA disclosure.[44]

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40. Further information about the individual leniency program may be found at http://www.usdoj.gov/atr.
41. 15 U.S.C. §§1311–1314.
42. 15 U.S.C. §1314 (b)(2) (challenges may be "based upon any failure of such demand to comply with the provisions of this chapter, or upon any constitutional or other legal right or privilege of such person").
43. 15 U.S.C. §1313(c) and (d).
44. 15 U.S.C. §1314(g).

[2] Civil Complaints

Having obtained information through a CID, the DOJ may then file a civil complaint against the investigated party in federal court. The DOJ may seek injunctive orders to "prevent and restrain" violations of the antitrust laws.[45] It may seek dissolution and divestiture or other structural remedies designed to restore competition.[46] Or it may sue for damages on behalf of the United States as a purchaser of goods.[47] Unlike private damage plaintiffs, however, the government may recover only single (not treble) damages.[48]

[3] Consent Decrees

DOJ civil actions are rarely litigated to trial. Like private civil actions, they most often end in a settlement on terms negotiated between the parties. Settlement of a government civil action requires the entry of a formal consent judgment or "consent decree."[49] Entry of the consent decree requires the approval of the presiding judge, who must first determine "that the entry of such judgment is in the public interest."[50]

Before the judge can make that determination, the government must submit to the court both the proposed consent decree and a competitive impact statement (CIS).[51] The CIS must describe: (1) the nature and purpose of the action; (2) the alleged violation; (3) the terms of the proposed consent decree; (4) remedies available to private parties damaged by the alleged violation; (5) procedures available to modify the proposed decree; and (6) alternative remedies considered and why they were not employed.[52]

The consent decree and the CIS are then published in the *Federal Register*. The decree cannot become final until the expiration of a sixty-day public comment period. During that period, the government must make copies of "determinative" materials and documents available to the public for inspection.[53] Interested nonparties have occasionally been permitted to go beyond simply commenting and been allowed to formally intervene in the consent

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45. Sherman Act §4, 15 U.S.C. §4; Clayton Act §15, 15 U.S.C. §25.
46. *See, e.g.*, *Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 171 (1948); *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904); *United States v. Microsoft*, 87 F. Supp. 2d 30 (D.D.C. 2000). The DOJ's request that Microsoft be broken up rekindled the long-simmering debate over whether, even if it has proved a violation, the government should be entitled to seek such relief.
47. Clayton Act §4A, 15 U.S.C. §15a.
48. *Id*. Foreign governments may also sue for damages as purchasers. 15 U.S.C. §15(a)–(b).
49. *See* Antitrust Procedures and Penalties Act (Tunney Act), 15 U.S.C. §16(b)–(h).
50. 15 U.S.C. §16(e). *See generally* ABA Antitrust Section, *Antitrust Consent Decree Manual*.
51. 15 U.S.C. §16(b).
52. *Id*.
53. 15 U.S.C. §16(b)–(d).

decree process.[54] Also, not less than ten days after the government's filing of the consent decree and the CIS, each defendant must file a statement describing all communications with the government (other than those by their lawyers with the DOJ) relating to the matter.[55]

Consent decrees often prohibit the defendant from repeating practices alleged to violate the antitrust laws. Once in place, they eliminate the need for the government to institute a formal investigation and file a complaint if the defendant resumes the forbidden activity. Instead, they allow the government simply to demand that the court exercise its contempt power to issue sanctions for violating a court order.

Many consent decrees contain provisions stating that they will automatically expire after a specified time. If not, one or more of the parties may return to court and seek termination. To obtain termination, the party must demonstrate a substantial change in circumstances from those prevailing when the decree went into effect. The parties also may seek modification of the consent decree in lieu of termination. A defendant attempting to modify or terminate a decree over the government's objection faces the difficult hurdle of showing that new, unforeseen circumstances have created a "grievous wrong."[56]

[C] Merger Enforcement

As noted above, the DOJ shares merger enforcement duties with the FTC.[57] The two agencies divide responsibility for investigating proposed mergers, acquisitions, and joint ventures. Their investigatory responsibilities include, but are not limited to, transactions about which they receive notice under the Hart-Scott-Rodino Antitrust Improvements Act (the Hart-Scott-Rodino Act or the HSR Act).[58] Neither the DOJ nor the FTC has the power on its own to stop a proposed transaction. If either agency wants to block a transaction, it can do so only by filing a complaint in federal court and persuading the court to preliminarily enjoin the transaction. If the DOJ wants to pursue the matter further, i.e., to seek a permanent injunction, it must proceed in federal court.[59]

As a practical matter, the threat of such a suit, or the filing of the complaint, is often enough to dissuade parties from proceeding at all. Or it may cause them to negotiate a compromise with the DOJ, such as reducing the size

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54. *See, e.g.*, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).
55. 15 U.S.C. §16(g).
56. *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).
57. This topic is dealt with in greater depth in Chapters 5 and 6 above.
58. *See* §§6.07, 6.08, 6.09, above.
59. *See* §§6.11, 6.12, 6.13 above.

of the transaction, divesting offending assets, or granting licenses to allow additional competition.[60]

If the DOJ does obtain a preliminary injunction, the parties virtually always abandon the transaction rather than litigate for the several years such actions normally last. This usually spells the end of the matter, since the DOJ rarely, if ever, seeks additional remedies.[61]

[D] Business Review Letters

In response to a written request outlining a party's proposed business conduct, the Antitrust Division has the authority to issue a "business review letter," stating the its "present enforcement intention," regarding that conduct.[62] A party seeking such a letter must provide a detailed description of the planned activity along with relevant documents.[63] In response, the division may or may not state its present enforcement intention, or it may "take such other position or action it considers appropriate."[64]

Parties are often reluctant to use the business review procedure. There are several reasons: (1) the division has no deadline to respond to the request;[65] (2) both the request and the business review letter are made public when the letter issues;[66] and (3) the letter states only the government's present intention—it does not prevent the division from later acting inconsistently with its stated position.[67] Parties not put off by these considerations, and for whom the procedure may provide useful guidance and comfort, often include those, like trade associations, that wish to collect and distribute pricing and other antitrust-sensitive industry data.

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60. *Id.*
61. The DOJ's position can be contrasted with that of the FTC, which does at times seek additional relief through administrative proceedings. *See* §6.12[B] above. The Antitrust Modernization Commission has recommended that this disparity be eliminated. *See Antitrust Modernization Commission Report and Recommendations*, pp. iv, 132–37 (April 2007).
62. 28 C.F.R. §50.6. Unlike the FTC, the DOJ will *not* issue advisory opinions. *See* §8.03[D] below. Further information about the business review process and copies of recently issued opinions may be found at the DOJ website at http://www.usdoj.gov/atr/public/busreview/letters.htm.
63. 28 C.F.R. §50.6(1), (4), (5).
64. 28 C.F.R. §50.6(8).
65. In their joint policy statement on healthcare, the DOJ and FTC have committed to review respond to requests in thirty or sixty days depending upon the nature of the request and the completeness of the information provided with the request. *See* Appendix G.
66. 28 C.F.R. §50.6(10)(a).
67. 28 C.F.R. §50.6(9).

§8.03 The Federal Trade Commission

Unlike the DOJ, which is part of the executive branch, the FTC is an independent regulatory agency.[68] It is led by five commissioners, appointed by the President for seven-year terms. The FTC has three bureaus: Competition, Consumer Protection, and Economics. Like the DOJ, it is headquartered in Washington, D.C. The FTC also has seven regional offices.[69]

The FTC's role is to administer the Federal Trade Commission Act (FTC Act), principally Section 5, which broadly outlaws "unfair methods of competition," and "unfair or deceptive acts or practices."[70] The FTC also has the power to enforce the Clayton and Robinson-Patman Acts. Although it does not have the power directly to enforce the Sherman Antitrust Act (Sherman Act), it may do so indirectly under Section 5's broad mandate. The FTC may also act against unfair and deceptive practices that resemble but do not rise to the level of antitrust violations.[71] (Section 5 also gives the FTC broad powers and responsibilities in the area of consumer protection.) Finally, the FTC shares responsibility with the DOJ for merger enforcement and is responsible, with input from the DOJ, for promulgating and enforcing the premerger notification rules that implement the HSR Act.[72]

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68. Additional information about the FTC, its activities, and its publications, can be found at its web site at www.ftc.gov. Once in the web site, click on "Antitrust & Mergers."
69. The seven regional offices are in New York City (the Northeast Region, covering New York, New Jersey, and New England); Cleveland, Ohio (the East Central Region covering Delaware, D.C., Maryland, Michigan, Ohio, Pennsylvania, Virginia, and W. Virginia); Atlanta, Georgia (the Southeast Region, covering Alabama, Florida, Georgia, Mississippi, North and South Carolina, and Tennessee); Chicago, Illinois (the Midwest Region covering Illinois, Indiana, Iowa, Kansas, Kentucky, Nebraska, North and South Dakota, Minnesota, Missouri, and Wisconsin); Dallas, Texas (the Southwest Region, covering Arkansas, Louisiana, New Mexico, Oklahoma, and Texas); Seattle, Washington (the Northwest Region, covering Alaska, Idaho, Montana, Oregon, Washington, and Wyoming); and San Francisco, California (the Western Region, covering Arizona, California, Colorado, Hawaii, Nevada, and Utah).
70. In addition to providing the FTC's antitrust enforcement powers, Section 5 and the FTC Act give the FTC broad powers in the area of consumer protection.
71. *See, e.g.*, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972) ("Section 5 empower[s] the [FTC] to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953) ("[T]he Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act—to stop in their incipiency acts and practices which, when full blown, would violate those Acts." (citations omitted)); *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948) (allowing concurrent proceedings by FTC under Section 5 and DOJ under Sherman Act, Section 1 and stating that "a conclusion that respondents' conduct constituted an unfair method of competition does not necessarily mean that their same activities would also be found to violate §1 of the Sherman Act"); *accord FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454–55 (1986); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966).
72. The Hart-Scott-Rodino Rules are discussed in Chapter 6 above.

[A] FTC Remedial Powers

As an independent agency, the FTC has the power to issue cease and desist orders for violations of the FTC Act, an authority contained in Section 5(b) of the act.[73] The FTC also has the power to: (1) issue trade regulation rules;[74] (2) file suits for civil penalties for violations of FTC rulings involving other parties;[75] (3) file consumer redress suits against those committing dishonest or fraudulent practices;[76] and (4) file suits for preliminary injunctions.[77]

[B] FTC Enforcement Procedures

FTC enforcement procedures begin with an investigation, followed by the filing of an administrative complaint and an adjudicatory hearing before an administrative law judge (ALJ).[78]

[1] Investigatory Procedures

The FTC Act empowers the FTC to use various compulsory means (including subpoenas and CIDs) to obtain information for its investigations.[79] The FTC must go to federal court, however, to obtain an order requiring a recalcitrant party to comply with an FTC investigative demand.[80] Failure to obey the court order is punishable as contempt of court.[81] The FTC is required to treat information produced in response to FTC compulsory process as confidential and such information is exempt from FOIA disclosure.[82]

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73. 15 U.S.C. §45(b).
74. FTC Act §18, 15 U.S.C. §57a. Rulemaking procedures are governed by the rules set forth in the Administrative Procedure Act, 5 U.S.C. §553 and by Section 18 of the FTC Act, 15 U.S.C. §57a(b).
75. FTC Act §5(l)–(m); 15 U.S.C. §45(l)–(m). Section 5(l) of the act authorizes the FTC to sue in federal court to seek civil penalties for violations of cease-and-desist orders. Section 5(m) authorizes such actions for violations of FTC trade regulation rules.
76. FTC Act §19, 15 U.S.C. §57b.
77. FTC Act §13(b), 15 U.S.C. §53(b).
78. *See generally FTC Operating Manual*.
79. The FTC may require the filing of annual or special reports, 15 U.S.C. §46(b). It may issue access orders that allow it to inspect documents on-site, 15 U.S.C. §49. It may issue subpoenas. *Id*. In addition, it may issue civil investigative demands (CIDs), 15 U.S.C. §57b-1(c).
80. FTC Act §9, 15 U.S.C. §49.
81. *Id*.
82. FTC Act §21(f), 15 U.S.C. §57b-2(f).

[2] Adjudicatory Procedures

Procedures for FTC adjudications are governed by Section 5 of the FTC Act,[83] the Administrative Procedure Act,[84] and the FTC's own Rules of Practice for Adjudicative Proceedings.[85] Adjudicatory hearings are conducted before an ALJ, an FTC official who is not permitted to have taken part in the investigation.[86] Discovery is available to the parties.[87] Intervention is available at the FTC's discretion upon a showing of good cause.[88]

At the hearing, the FTC's complaint counsel bears the burden of proving the FTC's case by a preponderance of the evidence.[89] The ALJ is not bound to adhere to the formal rules of evidence, but may exclude irrelevant or unduly repetitious evidence.[90]

[3] Settlement Procedures

Settlements, in the form of consent orders, may occur either before or after the FTC issues a complaint. Once a consent order has been agreed upon, the matter is submitted to the full commission (i.e., all five commissioners) for consideration. If the FTC provisionally approves, the consent agreement and order are published in the *Federal Register*. There is then a thirty-day public comment period, followed by final FTC approval or disapproval.[91] Once a consent order has been entered, it can be modified upon an FTC finding that conditions have changed or the public interest requires modification.[92]

[4] Judicial Review

A party seeking judicial review of an FTC order must do so within sixty days after final issuance of the order.[93] Review may be sought in any federal circuit court of appeals in which the petitioner resides or does business, or the forbidden conduct occurred.[94] Appellate courts are required to be deferential to

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83. 15 U.S.C. §45.
84. 5 U.S.C. §554.
85. 16 C.F.R. pt. 3.
86. 5 U.S.C. §554(d).
87. 16 C.F.R. §3.31.
88. FTC Act §5, 15 U.S.C. §45(b); 16 C.F.R. §3.14 (a); *FTC Operating Manual* §10.16. The FTC may also accept *amicus curiae* briefs from nonintervenors. 16 C.F.R. §3.52(j).
89. 5 U.S.C. §556(d); 16 C.F.R. §3.43(a).
90. 5 U.S.C. §556(d); 16 C.F.R. §3.43(b).
91. *See* 16 C.F.R. §§2.31, 2.32, 2.34, 3.25; *FTC Operating Manual* §§6.3, 6.7.
92. FTC Act §5(b), 15 U.S.C. §45(b); 16 C.F.R. §2.51(c)–(d).
93. FTC Act §5(c), 15 U.S.C. §45(c).
94. *Id.*

FTC findings of fact.[95] In addition to reviewing the FTC's findings of fact and legal conclusions, the appellate court may review, and, if warranted, modify the remedy ordered by the FTC.[96]

[C] Merger Enforcement

As noted above, the FTC shares merger enforcement responsibility with the DOJ.[97] Although both the FTC and the DOJ receive copies of every Hart-Scott-Rodino Premerger Notification Form (HSR Premerger Notification or Premerger Notification), the FTC is primarily responsible for administering the premerger notification program. The FTC, with input from the DOJ, promulgates, interprets, and enforces the Hart-Scott-Rodino Premerger Notification Rules (HSR Rules).[98] The HSR Rules explain, amplify, clarify, and interpret the HSR Act. Among other things, the HSR Rules provide definitions, describe exemptions to the reporting requirements of the HSR Act, and describe the reporting procedures to be followed.[99]

The FTC maintains a Premerger Notification Office (PNO) staffed with full-time professionals who are available to answer questions and provide both formal and informal interpretations of the HSR Act and the HSR Rules.[100] The FTC may also punish violations of the rules, such as a failure to timely notify the agencies of a proposed transaction, through administrative procedures.[101]

After the parties to a proposed transaction have filed their Premerger Notifications with the FTC and the DOJ, the two agencies undertake a procedure called *clearance* to determine which agency will review the proposed transaction.

Like the DOJ, the FTC does not have the power on its own to block a proposed merger—it, too, must go to federal court to seek preliminary injunctive relief. If preliminary relief is granted, however, the procedures diverge. Unlike the DOJ, which must continue in federal court, the FTC then may pursue an administrative proceeding before an FTC administrative law tribunal.

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95. *Id.* ("The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.").
96. *Id.*; *see also* 5 U.S.C. §704.
97. This topic is dealt with in greater detail in Chapters 5 and 6 above.
98. 16 C.F.R. §§801–803.
99. *See* §§6.03–6.10 above.
100. The telephone number is (202) 326-3100. The FTC also has an extremely useful web site at http://www.ftc.gov (follow the "Antitrust & Mergers" link). Among other things, the website contains a searchable database of formal and informal FTC opinions and interpretations on HSR issues.
101. Chapters 5 and 6 above discuss merger enforcement and the HSR Act in greater detail.

Although the DOJ almost never seeks additional remedies once it has obtained a preliminary injunction and the parties have abandoned the transaction, the FTC has been known to do so.[102] For example, it might demand that the parties provide advance notice of future acquisitions that would not otherwise be reportable under the HSR Act.[103]

[D] Advisory Opinions and Policy Statements

Unlike the DOJ, the FTC will issue advisory opinions.[104] But it does so only about proposed courses of action that involve previously undetermined questions of law or fact or a significant public interest.[105] The proposed course of action must not be hypothetical and it must not be the subject of an FTC investigation or proceeding.[106]

The FTC also periodically issues policy statements and guidelines on topics within its enforcement powers. Parties planning transactions or other actions that come within the agency's purview are well advised to consult the relevant statements or guidelines before proceeding. Copies of all such statements and guidelines are archived at the FTC's web site.[107]

§8.04 State Attorneys General

The powers and responsibilities of the state attorneys general vary depending upon the antitrust laws of their respective states.[108] Some are empowered to bring criminal prosecutions under their own state's antitrust laws, while others are not. All have the authority, granted by Section 4C of the Clayton Act, to bring *parens patriae* actions for civil damages for violations of the federal antitrust laws on behalf of all of the citizens of their state.[109] In addition to acting separately, groups of state attorneys general have taken to banding together to obtain added influence and achieve common goals.

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102. *See, e.g.*, *In re Coca Cola Co.*, 117 F.T.C. 795 (1994). *See* §6.12 above. The Antitrust Modernization Commission has recommended that this disparity be eliminated. *See Antitrust Modernization Commission Report and Recommendations,* pp. iv, 132–37 (April 2007).
103. *Id.*
104. 16 C.F.R. §§1.1–1.4. *Compare* §8.02[D] above, dealing with DOJ business review letters.
105. 16 C.F.R. §1.1(a).
106. 16 C.F.R. §1.1(b).
107. *Available at* http://www.ftc.gov.
108. The various state antitrust laws are collected at 6 Trade Reg. Rptr. (CCH) ¶¶ 30,000, *et seq.*
109. 15 U.S.C. §15c.

For example, several state attorneys general worked together and with the DOJ in pursuing monopolization charges against Microsoft.[110]

§8.05 Private Litigants

The final antitrust enforcement weapon is the private civil litigant.[111] The federal antitrust laws' automatic award of treble damages and attorney's fees to successful private antitrust plaintiffs provides a strong incentive. Many landmark antitrust decisions have come in private rather than government-instituted actions. Indeed, in many instances, government action against an antitrust violator has followed or been provoked by evidence developed or verdicts obtained in civil litigation.[112]

At the same time, many major civil litigations are *follow-on* or *piggyback* actions—actions based on convictions or civil verdicts obtained by government enforcers. Follow-on actions are especially common if the government has successfully attacked a company or companies for price-fixing or bid-rigging. Victims of such schemes are entitled to use the conviction as *prima facie* evidence that the defendant took part in the illegal scheme and thus have only to prove that they were damaged by the scheme.[113] Such cases are especially attractive, and plaintiffs' attorneys are often eager to handle them on a

110. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001). In addition, several states have filed class-action lawsuits against the company for violations of state antitrust laws. *See* Microsoft.com: Consumer Class Action Settlement Information, *at* http://www.microsoft.com/about/legal/consumersettlements/default.mspx.

    Other recent examples of state antitrust enforcement include the New York Attorney General's suit against Intel for monopolization filed in October 2009 and: *New York v. Salton, Inc.*, 265 F. Supp. 2d 310 (S.D.N.Y. 2003) (resale price maintenance action brought by 47 states against a maker of barbecue grills), *In re Compact Disc Minimum Price Antitrust Litigation*, 216 F.R.D. 197 (D. Me. 2003) (action brought by state attorneys general and private plaintiffs charging resale price maintenance in connection with CD retailers minimum advertised price policy); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241 (3d Cir. 2009) (antitrust action by twelve states against insurers and brokers for bid rigging in the property and casualty insurance industry); *U.S. v. JBS S.A.*, No. l:08-cv-05992 (N.D. Ill. filed Oct. 28, 2008) (action by thirteen states and the United States to block merger in the meat packing industry with parties eventually abandoning the transaction).

111. The elements of proof required to establish the various claims that may be brought under the antitrust laws are discussed above, as are the available defenses. Although treated briefly below, issues relating to the maintenance of class actions are better addressed by consulting the many treatises on the subject. So too, are issues relating to the use of expert witnesses.

112. Private litigants may pursue actions under state analogues to the Sherman and Robinson-Patman Acts (often called "Little" Sherman Acts or Robinson-Patman Acts) for conduct that is insufficiently interstate to invoke federal jurisdiction.

113. Clayton Act §5(a), 15 U.S.C. §16(a); *see* §§2.03[E], 8.02 above and 8.05[B] below.

contingency fee basis, i.e., for a share of the plaintiff's recovery. The attractiveness of such cases is further enhanced when the criminal activity includes widespread price-fixing on commodities or other readily available products, making the potential damages large and relatively easy to prove.

As noted above, many states have passed antitrust statutes that reach farther than the federal statutes. These statutes are often more favorable to private enforcement than are the federal statutes not just in substantive terms but in procedural areas such as standing or the statute of limitations.

Private antitrust litigation, including antitrust class actions, shares much with other intentional tort litigation. Antitrust litigation does, however, have several unique features that must be kept in mind when considering whether to bring an antitrust case and when advising a client that must defend one. These features include: (1) nationwide service of process and universal venue; (2) the use of prior convictions as *prima facie* evidence; (3) joint and several liability and the absence of a right of contribution; (4) tax issues raised by payments of antitrust judgments; (5) insurance coverage for those accused of antitrust violations; (6) the calculation of attorney's fees for successful antitrust plaintiffs; and (7) whether a successful antitrust plaintiff is entitled to prejudgment interest.

[A] Service of Process and Venue

Section 12 of the Clayton Act provides relaxed service and venue requirements for antitrust suits against corporations.[114] It states that process in any suit brought against a corporation under the antitrust laws may be served in any district "of which it is an inhabitant, or wherever it may be found."[115] It also states that a corporation may be sued in any district in which a corporation is an inhabitant or where it may be found or transacts business.[116]

[B] *Prima Facie* Effect of Prior Government Judgments

As noted above, Section 5(a) of the Clayton Act allows an antitrust civil plaintiff to use a prior judgment in a government action as *prima facie* evidence against the defendant.[117] To qualify for *prima facie* treatment, the judgment must be

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114. 15 U.S.C. §22.

115. *Id.* Several federal courts have interpreted this provision as allowing personal jurisdiction over foreign corporations in any federal district so long as the corporation has sufficient contacts with the United States as a whole to satisfy due process. *See* §3.08[B] above.

116. *Id.*

117. 15 U.S.C. §16(a); *see, e.g., Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 484 (1968) (giving *prima facie* effect to prior judgment in government civil monopolization case).

final, it must have been the result of a criminal or civil suit brought by the federal government under the antitrust laws, and it may not be a consent judgment or decree entered before any testimony was taken.[118] A plaintiff making use of such a judgment is "entitled to introduce the prior judgment to establish *prima facie* all matters of fact and law necessarily decided by [the government action]."[119]

The Supreme Court has not decided whether *prima facie* effect should be given to guilty or *nolo contendere* pleas as opposed to convictions obtained at trial. The lower appellate courts have generally held that a conviction entered after a plea of guilty will be given *prima facie* effect.[120] They have consistently held that a conviction based on a plea of *nolo contendere* will not.[121]

[C] Injunctive Relief

Sections 15 and 16 of the Clayton Act allow anyone *threatened* with loss or damage from a violation of the antitrust laws to seek injunctive relief in federal court.[122] An injunction may be available in the absence of actual antitrust injury—but the threatened injury still must be "of the type the antitrust laws were designed to prevent."[123] Courts have generally held that the target of a takeover attempt has standing to seek an injunction against the takeover if it can establish the elements necessary to obtain an injunction: irreparable

118. 15 U.S.C. §16(a)

119. *Emich Motors Corp. v. General Motors Corp.,* 340 U.S. 558, 569 (1951); *see also Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 102 (1954) ("final judgments or decrees in Government antitrust actions are admissible under §5 of the Clayton Act as *prima facie* evidence only of issues actually determined in the prior adjudication"); *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 542–44 (1954) (affirming propriety of jury instruction that prior government decree could not alone support a judgment for plaintiff on claim that went well beyond scope of decree).

120. *See, e.g.*, *Armco Steel Corp. v. North Dakota*, 376 F.2d 206, 208–10 (8th Cir. 1967) (guilty plea given *prima facie* effect); *General Elec. Co. v. City of San Antonio*, 334 F.2d 480, 485–87 (5th Cir. 1964) (same); *City of Burbank v. General Elec. Co.*, 329 F.2d 825, 834–36 (9th Cir. 1964) (same); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F.2d 412, 415–17 (7th Cir.), *cert. denied*, 376 U.S. 939 (1963) (same); *but see Department of Water & Power of Los Angeles v. Allis-Chalmers Mfg. Co.*, 32 F.R.D. 204, 207 (S.D. Cal. 1963) (treating guilty plea as consent judgment and thus refusing to give it *prima facie* effect).

121. *See, e.g.*, *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 n.12 (3d Cir. 1973); *Armco Steel Corp.*, 376 F.2d at 208–10; *City of Burbank*, 329 F.2d at 834–36; *Commonwealth Edison Co.*, 323 F.2d at 415–17.

122. 15 U.S.C. §§25–26.

123. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 and n.6 (1986) ("[U]nder both §16 and §4 the plaintiff must still allege an injury of the type the antitrust laws were designed to prevent."); for a discussion of the concept of antitrust injury and related standing doctrines, *see* §3.06 above.

harm, likelihood of success on the merits, balance of hardships tipping in its favor, and issuance of the injunction would be in the public interest.[124]

In *Cargill, Inc. v. Monfort of Colorado, Inc.*,[125] however, the Court overturned an injunction that had been granted to a company seeking to block the merger of two of its competitors.[126] The Court found that the only threatened loss or damage shown by plaintiffs was that attributable to increased competition and thus that they had not shown the necessary "antitrust injury."[127] At the same time, the Court refused to rule out the possibility that a competitor could prevail in such an action, if, for example, it could show that the merged entity was likely to engage in predatory pricing.[128]

In *California v. American Stores Co.*,[129] the Supreme Court held that a private plaintiff suing under Sections 7 and 16 of the Clayton Act could seek divestiture in appropriate cases.[130] The Court added that such relief would not necessarily be available as broadly as it is to the federal government.[131]

[D] Summary Judgment

At one time, it was thought, in part because of the complex and highly fact-intensive nature of most antitrust cases (and perhaps because of the importance of private suits for enforcing the antitrust laws), that the Supreme Court had erected higher than normal barriers to the use of summary judgment in antitrust cases.[132] However, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[133] and a series of subsequent cases, the Supreme Court made it clear that the standard for obtaining summary judgment is no different in antitrust cases than in any other.[134] That is, a defendant may obtain summary judgment if it can demonstrate "that there is no genuine issue as to

124. The standards for obtaining a preliminary injunction vary somewhat from circuit to circuit.
125. 479 U.S. 104 (1986).
126. *Id.* at 113–22.
127. *Id.* at 122.
128. *Id.* at 120–22.
129. 495 U.S. 271 (1990).
130. *Id.* at 280–82.
131. *Id.* at 295.
132. One source of this belief was the Supreme Court's statement in *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962) that "[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." See §X.03[A][4], above.
133. 475 U.S. 574 (1986).
134. *Id.* at 585–588; *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468 and cases collected in note 14 (1992); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[S]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

any material fact and that the moving party is entitled to a judgment as a matter of law."[135]

[E] Class Actions

The class action is a tool unique to American civil litigation and one that is frequently used in private antitrust treble damage litigation. Class action procedures are extraordinarily complex and the subject of numerous treatises. The following highlights some of the issues that can arise during antitrust class action litigation.

[1] Initiating a Class Action

The class action was created to provide an efficient method of litigating actions for which there exists a large "class" of plaintiffs (or defendants) with similar claims (or defenses). A class action eliminates the requirement that each "class member" bring suit separately—something that might be prohibitively expensive if, as is often true in cases involving the fixing of prices on consumer goods, the individual claims are relatively small but the total injury to the class is large. Instead, the Federal Rules of Civil Procedure (F. R. Civ. P.) allow one or more "class representatives" to bring suit on behalf of the entire class.[136] As a result, the class action has proved an effective, if controversial, vehicle for litigating large consumer actions based on allegations of nationwide price-fixing conspiracies.

The lawyer for the would-be class representative starts a class action by filing a complaint in federal court. In addition to the usual allegations describing the representative's own claims against the defendant(s), a class action complaint will contain "class allegations." These allegations describe the class of individuals the representative hopes to represent and explain why the purported representative believes the action should be allowed to proceed as a class action.

[2] Motions to Dismiss

Often, the defendant(s) will first move to dismiss the complaint for failure to state a claim or on procedural grounds, such as a lack of personal jurisdiction, lack of subject matter jurisdiction, *forum non conveniens*, or statute of limitations. If successful, such a motion would result in the complaint being

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135. Fed. R. Civ. P. 56 (c); *see also* Advisory Committee Notes thereto. *But see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
136. *See generally* Fed. R. Civ. P. 23 and Advisory Committee Notes thereto.

dismissed without the court ever deciding whether the action was properly brought as a class action. In antitrust cases, defenses such as lack of standing, indirect purchaser, and lack of injury or of antitrust injury are commonly raised via motion to dismiss.[137]

[3] Motions for Class Certification

If the plaintiff's complaint survives any motions to dismiss, the plaintiff will make a motion for *class certification*. The court must then decide whether to "certify" the action as a class action, i.e., whether the plaintiff should be permitted to maintain the action as a class action.[138] The court first looks to see whether the proposed action meets four prerequisites: (1) the class must be so large that it would be impractical to join all possible members as individual parties to the action; (2) there must be questions of law and fact common to all members of the class; (3) the claims of the would-be representative must be typical of those of the members of the alleged class; and (4) the would-be representative must be able to fairly and adequately protect the interests of the members of the alleged class.[139]

If the court finds that even one of the four prerequisites is not met, it must deny the motion. But the inquiry does not end even if all four are met. The court must then determine which type of class action the action is. Although there are three types of class action, most antitrust class actions fall in the category known as (b)(3) class actions.[140]

Before a court will allow a plaintiff to maintain a (b)(3) class action, the court must find that: (1) questions of law or fact common to the alleged class members predominate over any questions that affect only individual members; and (2) a class action is the best method to obtain a fair and efficient result.[141] The federal rules instruct the court to consider the following four factors in making those two determinations: (1) whether, and to what extent, the individual class members have an interest in controlling the litigation of their claims; (2) whether other litigation already exists over the same issues and if so the extent and nature of that litigation; (3) whether it is desirable to confine the litigation of the class claims to the particular forum; and (4) what difficulties are likely to be encountered in administering and managing the class action.[142]

The court's class certification decision is a critical point in the case. If the court denies the motion, the plaintiff will be left with only his own

137. These defenses are discussed in §3.06 above.
138. Fed. R. Civ. P. 23(c)(1).
139. Fed. R. Civ. P. 23(a).
140. Fed. R. Civ. P. 23(b)(3).
141. *Id.*
142. *Id.*

claims—claims that may not be large enough to justify proceeding with his action. If the court grants the motion, however, the plaintiff will be permitted to maintain the action on behalf of the class certified by the court. That class may be smaller or otherwise different than the class originally defined by the plaintiff in his or her class action complaint. There may be subclasses. Or the court could even order that the action be maintained as a class action only for certain specified issues.[143]

[4] Class Notice

If the court certifies a (b)(3) class, it then tells the plaintiff's attorneys to notify the class members of the existence of a class action. The federal rules require that the notice be distributed in the best way "practicable under the circumstances," and requires personal notice for anyone "who can be identified through reasonable effort."[144] For class members who cannot easily be identified, notice by publication (e.g., in the *Wall Street Journal*) may be sufficient.

The notice must tell the class members that (1) they have the right to "opt out" of the class if they would rather not participate or they would prefer to bring their own actions; (2) if they do not opt out, they will be bound by the result of the action; and (3) if they do not opt out, they may choose to be represented by their own lawyer in the class proceedings.[145]

[5] Settlement of Class Actions

To ensure fair treatment for the class members, any settlement of a class action must be approved by the court.[146] The parties may agree to settle before litigating the issue of class certification. If so, the parties must agree both on the definition of the class and on the terms of settlement. They can then file a joint motion for class certification and approval of the settlement. If there are multiple defendants, one defendant can settle even though the others have not.

Notwithstanding all these hurdles for the purported class representative, the class action remains a serious threat. The magnitude of potential damages, especially after trebling, is so great that class actions are often settled shortly after certification or during the process of seeking certification.

143. Fed. R. Civ. P. 23(c)(4).
144. Fed. R. Civ. P. 23(c)(2).
145. *Id.*
146. Fed. R. Civ. P. 23(e).

[F] The Judicial Panel on Multidistrict Litigation

The Judicial Panel on Multidistrict Litigation (JPML) is a panel composed of seven senior federal judges designated by the Chief Justice of the Supreme Court.[147] The JPML sits in Washington, D.C. (and elsewhere around the country from time to time). The JPML was created by federal statute for the purpose of overseeing the federal courts' handling of complex, multidistrict litigation.[148] The JPML is empowered to transfer "civil actions involving one or more common questions of fact [that] are pending in different districts," to a single district "for coordinated or consolidated pretrial proceedings."[149] The JPML has ordered the transfer and coordination or consolidation of numerous antitrust cases over the years, especially those involving multiple actions alleging similar nationwide price-fixing conspiracies.

[G] Arbitrability

Although arbitration is a preferred dispute resolution method throughout the world, and is increasingly so in the United States, arbitration has not so far played an important role in U.S. antitrust enforcement. This is in part attributable to the fact that, at one time, it was widely accepted that parties could not agree to submit U.S. antitrust claims to arbitration, i.e., that antitrust claims were not "arbitrable." The leading case on the subject was *American Safety Equipment Corp. v. J.P. Maguire & Co.*[150] There, the Second Circuit based its decision against arbitration of antitrust claims on the public interest in enforcing the antitrust laws, the potential bias and limited expertise of arbitrators in antitrust matters, the complexity of the antitrust laws, and the procedural differences between trials and arbitrations.[151]

But in 1985, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[152] the Supreme Court held that arbitration clauses covering antitrust claims in *international* agreements were enforceable.[153] The Court expressly left open

147. 28 U.S.C. §1407.
148. *Id*. The statute sets out the procedures for seeking transfer and consolidation of complex cases. Additional guidance may be found in the *Manual for Complex Litigation*, available at http://www.fjc.gov/, and the *Rules of the Judicial Panel on Multidistrict Litigation*, available at http://www.jpml.uscourts.gov/.
149. 28 U.S.C. §1407(a).
150. 391 F.2d 821 (2d Cir. 1968).
151. *Id*. at 826–27.
152. 473 U.S. 614 (1985).
153. *Id*. at 629–37.

whether purely *domestic* arbitration clauses would be enforced.[154] The issue remains open at the Supreme Court level but several circuits have since found (or suggested) that domestic antitrust claims are arbitrable, at least if the arbitration clause clearly covered antitrust claims.[155]

[H] Joint and Several Liability and No Right of Contribution

Defendants who have been found civilly liable for conspiring with each other to violate the U.S. antitrust laws are jointly and severally liable for the plaintiff's damages.[156] This means that a successful plaintiff may collect his entire judgment from any one or more of the defendants. In *Texas Industries, Inc. v. Radcliff Materials, Inc.*,[157] the Supreme Court held that an antitrust defendant that pays more than its share of a judgment against multiple defendants has no right to seek contribution from the others.[158] However, if one or more defendants settle with the plaintiff, the amount of the settlement will be deducted from any judgment against the non-settling defendants.

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154. Support for an argument that domestic arbitration clauses would be enforceable can be found in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), in which the Court rejected the *American Safety* considerations and the distinction between domestic and international, and held that securities claims could be arbitrated.
155. *Prestige Ford v. Ford Dealer Computer Services*, 324 F.3d 391, 397 (5th Cir. 2003) (upholding arbitration antitrust award), *overruled on other grounds by Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Saipem America v. Wellington Underwriting Agencies*, No. 08-20247, 2009 U.S. App. LEXIS 12673, at *6–8 (5th Cir. June 9, 2009); *Seacoast Motors of Salisbury, Inc. v. Daimler Chrysler Motors Corp.*, 271 F.3d 6, 11 (1st Cir. 2001) (holding private antitrust claims arbitrable and rejecting the premise that the public interest in antitrust enforcement precludes arbitration of such claims; "[w]e think time has passed by the *American Safety* doctrine and so hold"); *Empire State Ethanol & Energy, LLC v. BBI Int'l*, No. 1:08-CV-623, 2009 U.S. Dist. LEXIS 23701, at *19–23 (N.D.N.Y Mar. 20, 2009) (arbitration of antitrust claims in domestic realm is not against public policy); *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006) (enforcing an antitrust mandatory arbitration clause in a domestic dispute); *Xerox Corp. v. Media Scis., Inc.*, 609 F. Supp. 2d 319, 328 (S.D.N.Y. 2009) (allowing arbitration in lawsuit between two domestic corporations); *HCI Techs., Inc. v. Avaya, Inc.*, 446 F. Supp. 2d 518, 525 (E.D. Va. 2006) (arbitration agreements in antitrust, including those without international implications, are arbitrable).
156. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).
157. *Id.*
158. *Id.* at 640–646.

[I] Taxability and Deductibility of Payments in Response to Antitrust Suits

As a general rule, those portions of a plaintiff's antitrust recovery that are meant to compensate it for items, such as lost profits, that would have been ordinary income, as well as any punitive portion, are taxable as ordinary income.[159] Portions attributable to overcharges, however, may be at least partially tax-free.

A defendant's payment to settle a civil antitrust case or to satisfy a civil antitrust judgment is generally deemed a tax-deductible business expense.[160] There is one major exception. If the civil action relates to an action in which the defendant was convicted of, or pled guilty or *nolo contendere* to, a criminal charge of violating the antitrust laws, the defendant may deduct only one-third of its payment in settlement or satisfaction of the judgment.[161]

[J] Insurance Coverage

Whether a defendant in a civil suit alleging antitrust violations is entitled to claim defense or liability benefits under its comprehensive general liability insurance policy is a function of the terms of the particular policy. As a general rule, however, such policies do not provide liability benefits for defendants found to have committed intentional torts, which includes most antitrust violations.[162]

[K] Attorney's Fee Awards

The right of a successful antitrust plaintiff to recover attorney's fees is absolute, regardless of the size of his damage recovery.[163] Moreover, an antitrust plaintiff who "substantially prevails" in an injunction proceeding may recover fees, even if the plaintiff did not obtain a permanent injunction.[164]

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159. *Comm'r of Internal Revenue v. Glenshaw Glass Co.*, 348 U.S. 426 (1955) (punitive portion).
160. *See generally* 26 U.S.C. §162(a) (deductibility of business expenses).
161. 26 U.S.C. §162(g).
162. *See, e.g., Upsher-Smith Labs., Inc. v. Federal Insurance Co.*, 67 Fed. Appx. 382 (8th Cir. 2003) *per curiam* (no insurance coverage for antitrust claim); *RLI Ins. Co. v. Maxxon Southwest, Inc.*, 265 F. Supp. 2d 727 (N.D. Tex. 2003) (no coverage).
163. *See* Clayton Act §4, 15 U.S.C. §15(a).
164. *See* Clayton Act §16, 15 U.S.C. §26.

[L] Pre-Judgment Interest and Punitive Damages

Section 4 of the Clayton Act allows, but does not require, the court to award a successful antitrust plaintiff simple interest on the amount of single damages beginning from the date of the filing of the complaint.[165] The court may do so only in specified circumstances involving abuse or delay by the defendant.[166]

Successful antitrust plaintiffs have not been permitted to recover prejudgment interest dating back to when they incurred their damages. In some cases, such as those involving a determination that the defendant(s) engaged in bid-rigging, however, the plaintiffs may also obtain a judgment on an overlapping state law contract or fraud claim that would allow them to collect such interest or even punitive (or "exemplary") damages.[167] If the tolling of the statute of limitations has resulted in a plaintiff being entitled to recover for damages incurred long ago, the value of prejudgment interest could far exceed that of trebling; so could punitive damages. Most courts have held, in antitrust and similar cases, that the plaintiff must choose between the two recoveries, i.e., select either the treble damages plus attorney's fees it is entitled to under the antitrust laws or the single damages plus prejudgment interest, or punitive damages, awarded pursuant to the state law claim.[168]

165. 15 U.S.C. §15(a).
166. *Id*.
167. Punitive or exemplary damages are sums awarded by the court or jury in a civil suit over and above damages designed to compensate the successful plaintiff for actual financial losses. Punitive damages are meant to punish (or make an example of) defendants where their conduct is deemed especially outrageous, egregious, or blameworthy.
168. *See, e.g.*, *Cyrak v. Lemon*, 919 F.2d 320, 326–27 (5th Cir. 1990) (giving plaintiff choice of recovery under overlapping federal securities law claim or state punitive damage claim); *Kelco Disposal, Inc. v. Browning Ferris Indus. of Vermont, Inc.*, 845 F.2d 404, 410–11 (2d Cir. 1988), *aff'd*, 492 U.S. 257 (1989) (plaintiff who chose state punitive damage remedy over federal treble damage remedy not permitted to recover attorney's fees that would have gone with federal remedy); *Grogan v. Garner*, 806 F.2d 829, 839 (8th Cir. 1986) ("When a federal securities claim overlaps with a pendent state law claim, the plaintiff is entitled to the maximum amount recoverable under any claim."); *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 219 (3d Cir. 1992) (antitrust plaintiff may only recover once for compensatory damages, electing between tort law punitive damages or antitrust trebled damages).

APPENDIX

The United States Federal and Judicial Systems

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To those without a basic understanding of the United States federal and judicial systems, much of this book's contents will be, if not totally incomprehensible, at least occasionally mysterious. This chapter is for those people, and contains the information necessary to understand the rest of the book. It first describes the United States federal system and the three-branch, or tripartite, federal government created by the U.S. Constitution.[1] Next, it outlines the legal decision-making process. It follows with a description of how a case proceeds through the federal court system, from its initiation through its ultimate resolution. The chapter concludes with an explanation of the U.S. legal citations used in the footnotes throughout. This citation system not only tells readers how to find the original source material, but also provides important information about the judicial opinions being cited.

§A.01 The U.S. Constitution and the Three-Branch Federal Government

The U.S. Constitution was completed in September 1787 and ratified by the states in June 1788. The Constitution established a federal system of government in which power is distributed between a national government and the individual state governments.[2] The U.S. government, as established by the Constitution, legally began to function in March 1789.[3]

With the enactment of the Constitution, the founding states created a federation. The central, national government known as the *federal government*, was given responsibility for issues of national concern, such as national defense and the regulation of commerce among the states and with other nations. The federal government is said to be a government of limited and enumerated powers because it can only exercise those powers granted to it (expressly or implicitly) by the Constitution.[4] The Constitution reserved to the states those powers not delegated to the national government and not expressly denied to the states by the Constitution. The states therefore

1. This chapter is an introduction to a subject on which countless volumes have already been written, with countless more undoubtedly to come. For those who would like to pursue the subject further, the following will provide a helpful start: Richard H. Fallon, Henry Melvin Hart, Herbert Wechsler, et al., *The Federal Courts and the Federal System* (5th ed., Foundation Press 2003); Arthur R. Miller and Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed., Thomson West 2008) ("Wright & Miller").
2. The Constitution is cited, taking as an example the "Commerce Clause," (Article 1, Section 8, Clause 3): U.S. Const. art. I, §8, cl. 3. For an amendment, for example, Amendment 16: U.S. Const. amend. XVI.
3. *Owings v. Speed*, 18 U.S. 420, 423 (1820).
4. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

exercise power in matters of state and local concern, such as local criminal law enforcement and the administration of the laws governing marriage and ownership of property.[5]

The federal government, based in Washington, D.C., consists of three branches: the legislative, the executive, and the judicial. The Constitution assigned each branch specific powers and responsibilities, and created a system of checks and balances designed to prevent any one branch from predominating.[6] The nation's founders amended the Constitution shortly after it was enacted, adding a Bill of Rights that guaranteed certain rights and freedoms to the people.[7]

[A] The Legislative Branch

Article I of the Constitution created the legislative branch, consisting of the two houses of Congress: the Senate and the House of Representatives.[8] Each state in the federation—originally thirteen, now fifty—was assigned two senate seats, with senators elected every six years on a staggered basis.[9] Seats in the House of Representatives were allotted on the basis of population, with all positions up for election every two years.[10] Congress was given the power, among others, to make laws in furtherance of the powers of the national government, to levy and collect taxes and duties, to declare war, and to create federal courts other than the Supreme Court.[11] As a check on Congress' legislative power, Article I required that the President approve legislation before it takes effect.[12] If he does not, i.e., if he "vetoes" the legislation, Congress may still enact the legislation if two-thirds of the members of each house vote to override the President's veto.[13]

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5. The states may legislate in areas, such as antitrust, also covered by federal law so long as their laws do not conflict with federal law. Although many states do have their own antitrust laws, the vast majority of antitrust cases have been brought and decided under federal law, which is the focus of this book. *See* chapter 8.
6. U.S. Const. arts. I-III.
7. U.S. Const. amend. I - X.
8. U.S. Const. art. I, §1.
9. U.S. Const. art. I, §3.
10. U.S. Const. art. I, §2.
11. U.S. Const. art. I, §8.
12. U.S. Const. art. I, §7.
13. U.S. Const. art. I, §7.

[B] The Executive Branch

Article II of the Constitution vested executive power in the President of the United States who, together with the Vice-President, is elected every four years.[14] The President is charged with ensuring that the laws of the United States are "faithfully executed."[15] In addition, Article II makes the President the commander in chief of the U.S. armed forces and gives him the power, with "the Advice and Consent [i.e., approval] of the Senate," to make treaties and to appoint the judges of the Supreme Court, Ambassadors and "all other officers of the United States."[16]

The powers of the President to enforce the laws and to appoint the officers of the United States and of Congress to make laws in furtherance of the national government have led to the creation of a vast array of federal departments, commissions, and regulatory and administrative agencies.[17] Among these are two with special relevance to antitrust, the Department of Justice (DOJ) and the Federal Trade Commission (FTC).

The DOJ is headed by the Attorney General of the United States, a cabinet-level presidential appointee. The DOJ has primary responsibility for enforcing, i.e., investigating and prosecuting violations of, federal criminal law, including the antitrust laws. Antitrust enforcement within the DOJ is handled by a specialized group of lawyers and others called the Antitrust Division.[18]

The FTC, an administrative and regulatory commission created by Congress and charged with responsibility for consumer protection, also has antitrust regulatory and law enforcement authority. Though the FTC does not have the power to bring criminal prosecutions, it does have the power, unlike the DOJ, to issue and enforce regulations and to conduct administrative trials.[19]

[C] The Judicial Branch

Article III of the Constitution establishes the third branch of the federal government, the judicial branch, which contains the nation's federal court system. Article III itself created, and vested judicial power in, only one court,

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14. U.S. Const. art. II, §1.
15. U.S. Const. art. II, §3.
16. U.S. Const. art. II, §2.
17. For more information about this important part of the federal government, a good starting point is: Richard J. Pierce, Jr., *Administrative Law Treatise*, (4th ed., Aspen Law and Business 2002).
18. *See* §8.02 for a more detailed description of DOJ antitrust enforcement activities.
19. For a more complete discussion of the antitrust enforcement authority and regulatory activities of the FTC, *see* §8.03.

the Supreme Court. Congress subsequently created a comprehensive system of trial level, appellate, and specialty courts. As specified in Article II, the President, with the advice and consent of the Senate, appoints all federal judges, from the trial level up through the Supreme Court.[20] To insulate the federal judges from partisan political pressures, the Constitution specified that they "shall hold their Offices during good Behaviour," i.e., for life.[21]

Despite, or perhaps because of, the Constitution's provision of lifetime judicial tenure, the nomination and confirmation of federal judges has become highly politicized at all levels of the federal judiciary. This is particularly true at the Supreme Court level, with the identities and political leanings of a presidential candidate's likely Supreme Court nominees having become important and contentious issues during presidential election campaigns.

[1] The Judicial Power (Subject Matter Jurisdiction)

The Constitution declared that the judicial power, also known as subject matter jurisdiction, of these federal courts extended to the decision of all cases arising under the Constitution and the federal laws and treaties of the U.S.[22] This is commonly referred to as federal question jurisdiction.[23]

The Constitution also gave the federal courts subject matter jurisdiction to decide controversies that arise between states; between a state and a citizen of another state; between citizens of different states; and between a state or a citizen of a state and any foreign state, or foreign citizen or subject.[24] This additional grant of subject matter jurisdiction is known as diversity jurisdiction. The drafters of the Constitution provided diversity jurisdiction to protect states, citizens, and foreign states and individuals from the potential prejudice they might face if forced to litigate in another state's courts.[25]

Although the plaintiff decides whether to bring a case in federal or state court, the ability to have a qualifying case litigated in federal court also extends to defendants via the process of removal. If a plaintiff files a case in a state

20. U.S. Const. art. II, §2.
21. U.S. Const. art. III, §1.
22. U.S. Const. art. III, §2.
23. In addition to the Constitution, Congress specifically provided for federal question jurisdiction by passing a federal statute that may be found at 28 U.S.C. §1331 (2006). As more fully discussed below, all cases brought under the U.S. antitrust laws may be brought in federal court under federal question jurisdiction and without regard to the amount of money at issue. *See* §§2.03[B], 8.05.
24. U.S. Const. art. III, §2.
25. Congress passed a series of measures designed to implement, clarify, and limit diversity jurisdiction that can be found at 28 U.S.C. §1332. For example, Congress limits cases that may be brought in federal court under diversity jurisdiction to those in which the "amount in controversy" exceeds $75,000. *Id*. This limit does not apply to cases brought pursuant to federal question jurisdiction and so does not apply to antitrust cases.

court that would qualify for federal jurisdiction under either federal question or diversity jurisdiction, the defendant may "remove" the case to the appropriate federal court.[26]

[2] The Power of Judicial Review

Perhaps the most important—and frequently most controversial—power of the federal courts does not appear in the Constitution at all, at least not in so many words. That is the power to interpret the Constitution and, when appropriate, to declare that a law enacted by Congress or a state legislature, or that other action taken by a federal or state government, violates the Constitution and is therefore null and void. Put another way, it is the power to declare such laws or actions unconstitutional. In its 1803 decision in *Marbury v. Madison*,[27] the Supreme Court declared that this power, known as the power of judicial review, was implicit in the Constitution's grant to the federal courts of the power to decide cases and controversies that arise under the Constitution.[28]

[D] The Bill of Rights

The Bill of Rights comprises the first ten amendments to the Constitution. It was proposed during the meeting of the first Congress and ultimately adopted and added to the Constitution by the states. The Bill of Rights provides certain rights and freedoms to individuals, such as freedom of speech and the right against unreasonable searches and seizures by the government. Although the founders enacted the Bill of Rights as a check on the power of the federal government, the state governments are also required to abide by most, though not all, of its provisions.

Although all ten amendments are important, Amendments Five and Ten are most relevant to antitrust law and enforcement. The pertinent parts of the Fifth Amendment state that: (1) individuals may be prosecuted for "capital or

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26. 28 U.S.C. §§1441, *et seq.*
27. 5 U.S. 137 (1803).
28. *Id*. at 178. For interesting discussions of *Marbury v. Madison* and its significance, *see* Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 Cal. L. Rev. 1 (2003); Larry D. Kramer, *A Bicentennial Celebration of Marbury v. Madison: Marbury as History: Marbury And The Retreat From Judicial Supremacy*, 20 Const. Comment. 205 (2003); Philip Hamburger, *Marbury and its Legacy: A Symposium to Mark the 200th Anniversary of Marbury v. Madison: Foreword: Law and Judicial Duty,* 72 Geo. Wash. L. Rev. 1 (2003); *Marbury v. Madison: Documents and Commentary* (Mark A. Graber and Michael Perhac, eds., CQ Press, 2002); William E. Nelson, *Marbury v. Madison: the Origins and Legacy of Judicial Review.* (University Press of Kansas 2000).

otherwise infamous crime[s]," which include antitrust violations, only after review of the charges by a grand jury; (2) no one may be tried more than once for the same crime, a right known as the privilege against double jeopardy; (3) no one may be compelled to be a witness against himself, a right known as the privilege against self-incrimination; and (4) no one may "be deprived of life, liberty, or property, without due process of law," a guarantee that has been held to include, among other things, that a criminal defendant may not be convicted unless the government proves beyond a reasonable doubt that the defendant committed the crime charged.[29]

The Tenth Amendment states that any powers not assigned to the federal government by the Constitution "are reserved to the States respectively, or to the people."[30] Hence, as noted above, the states retained the responsibility for and power over local matters, while the federal government's authority extended only to those matters of national concern as enumerated in the Constitution, such as interstate commerce. This explains why the federal antitrust laws expressly limit their coverage to matters involving interstate commerce.[31]

§A.02 The Federal Courts and the Common Law Process

In the years since the adoption of the Constitution, Congress has exercised its constitutionally granted power to create a nationwide network of trial, appellate, and specialty courts.[32] Cases brought in those courts, whether under federal question or diversity subject matter jurisdiction, are decided by reference to the Constitution, federal and state statutes and regulations, and the body of judicial opinions known as the common law.

29. *In re Winship*, 397 U.S. 358, 364 (1970). *See* §8.02, for a discussion of criminal prosecution and practice under the antitrust laws, including a discussion of the importance of the rights guaranteed to defendants and other individuals by the Fifth Amendment.
30. U.S. Const. amend. X.
31. In practice, the limitation to matters involving interstate commerce will only rarely stop a plaintiff seeking to sue under the federal antitrust laws. An able plaintiff's lawyer can almost always find a way to persuade a federal court that a modern commercial transaction has an interstate component. *See* §§2.02 and 3.05.
32. U.S. Const. art. III, §1.

[A] The Federal Court System

Most cases, including most antitrust cases, begin in a trial court. In the trial court, a single judge presides over the case, and that judge, or a jury composed of randomly chosen ordinary citizens, makes the initial decision in the case. The federal trial courts are officially titled United States District Courts—district courts, or simply districts, for short. There are ninety-four districts. Each state has at least one district. None of the districts crosses a state line.[33]

Appeals from decisions of the district courts go to one of thirteen circuit courts of appeal, officially titled United States Courts of Appeals—circuit courts or simply circuits, for short. With the exception of the Court of Appeals for the Federal Circuit whose jurisdiction is subject-matter based, each circuit's jurisdiction is geographically based, with the court responsible for handling appeals from cases brought in the district courts within several states.[34] Appeals from the circuit courts go to the United States Supreme Court, or the Supreme Court for short.

There is an additional federal judicial mechanism created to deal with situations in which, as often happens with large antitrust matters, several similar cases have been brought more or less simultaneously in different districts. The mechanism is known as the Judicial Panel on Multidistrict Litigation. This panel decides when such cases could be more efficiently handled by a single court through a process called consolidation. It has its own rules, known as the Rules of Procedure of the Judicial Panel on Multidistrict Litigation (J.P.M.L.R.).[35]

[B] Legal Decision-Making and the Common Law Process

The decision of any case involves applying a set of legal or equitable principles to a set of facts.[36] Federal judges determine these principles by working through a hierarchy of legal sources. At the top of the hierarchy is the Constitution.

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33. The state of New York, for example, which is heavily populated, has four districts. The state of South Dakota, on the other hand, is sparsely populated and has only one district. *See* §A.04 below for a complete listing of the federal district courts.
34. A complete list of the circuit courts of appeal and the districts that make up each circuit may be found at §A.04.
35. The J.P.M.L.'s rules are codified at 28 U.S.C. §1407.
36. At the trial, or district court level, the fact-finding is done by a jury, or, if the parties have waived the right to a jury trial, by the judge. In a jury trial, the district court judge determines what the applicable law is and then instructs the jurors as to what that law is and how it should be applied. If the parties have chosen a bench (i.e., non-jury) trial, then the judge performs all of these functions him- or herself. *See* §A.03[A][5], for a more detailed discussion of trial procedures.

Because the Constitution is the supreme law of the land, judges must look to it first. If the Constitution contains language that clearly resolves the issues raised by the facts, then the court will look no further.

Next, in descending order of importance, are federal statutes and treaties. Again, if a statute or treaty plainly covers the situation, the court need look no further. This assumes, of course, that the statute or treaty itself does not violate the Constitution.[37]

[1] The Common Law

Frequently, however, situations arise that are not covered by the Constitution or a statute, or the meaning of the Constitution or a statute is unclear, either on its face or as applied to the facts. In such situations, courts will look to legal opinions of other courts for guidance.[38] Some areas of the law, such as vast areas of contract and tort law, have no governing statutes. Such areas are covered entirely by legal principles developed over the years through the common law process of courts looking to each other for precedent. Even areas such as constitutional law and federal antitrust law, which are covered by the Constitution or statutes, have evolved dramatically through this process.

[2] The Hierarchy of Precedent

As with the Constitution and federal statutes, the courts work their way down a hierarchy when using judicial opinions for guidance. Most important are decisions of the Supreme Court. Like a federal statute, a Supreme Court opinion is binding on any lower federal court—if the opinion clearly covers the factual situation before the lower court, the lower court must follow the rule set forth in the opinion. Next, in descending order, are the rulings of the federal circuit courts of appeals. These rulings are binding on all federal courts within their respective circuits, but carry only advisory weight in other circuits. Rulings of district courts are not binding on any other court. They do, however, carry heavy weight (i.e., have strong precedential value) within the same district. They carry somewhat lesser weight with other district courts within the same judicial circuit, and the least weight in district courts outside their circuit. Higher courts may also look to decisions of lower courts for guidance, although those opinions are not binding.

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37. *See* §A.01[C][2] on the courts' power of judicial review, which allows them to decide the constitutionality of federal statutes or treaties and other government actions.
38. Courts may also look to the recorded deliberations of the framers of the Constitution or of Congress to determine what they intended when drafting the provision in question.

One informal exception to this order of weighting occurs if judges in a particular district have developed a reputation for expertise in a particular area of law. For example, because Manhattan is the center of the U.S. financial and securities industries, the financial and securities law opinions of judges from the U.S. District Court for the Southern District of New York may carry more weight than they would otherwise. Federal judges presiding in cases brought under diversity subject matter jurisdiction often have to decide issues of or based on state law and so must look to state constitutions and statutes and to published decisions of the courts of that state for guidance and precedent.

Other factors also affect the precedential value of a judicial opinion. For example, more recent decisions generally carry more weight than older ones on the same topic. The more closely the facts in the case being decided resemble those in the case whose opinion is being consulted, the more weight that opinion will be given. And the more closely the language relied on relates to the central ruling(s) (or holding) in the opinion, the more weight it will receive. Conversely, language in an opinion that is unrelated, or unnecessary, to the holding—language known as *obiter dicta* or simply *dicta—may* be given little weight. Given the importance of Supreme Court rulings, that Court's *dicta* is often carefully scrutinized for indications about how it, or the individual Justices, feel about an issue.

§A.03 How a Case Proceeds In the Federal Courts[39]

With few exceptions, cases that qualify for federal subject matter jurisdiction must first be filed in one of the ninety-four district courts. Civil cases filed in the district courts proceed pursuant to the Federal Rules of Civil Procedure.[40] There are eighty-six numbered rules. Criminal cases proceed according to the sixty Federal Rules of Criminal Procedure.[41] In addition, each of the district courts publishes its own special local rules of procedure for civil and criminal cases.[42]

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39. A leading multivolume treatise on federal practice and procedure is Wright and Miller, *supra* n.1. It is organized numerically by rule number and is quite accessible. For a useful single volume text, try Charles Alan Wright and Mary Kay Kane, *Law of Federal Courts* (8th Ed. West Publishing Co. 2002).
40. The Federal Rules of Civil Procedure are codified at 28 U.S.C. Rule x.
41. The Federal Rules of Criminal Procedure are codified at 18 U.S.C. Rule x.
42. District court local rules can be found on-line by following the links to each circuit to be found at http://www.uscourts.gov/allinks.html#1st.

[A] District Court Proceedings

A case begins when the plaintiff(s) files a complaint with the district court and serves a summons and the complaint on the defendant(s).[43] The summons is simply a short document notifying the defendant that an action has been started against it and telling it when, where, and how it must respond or face consequences for failure to respond, known as default.[44] The complaint, on the other hand, contains formal written notice of the claims being asserted by the plaintiff.

[1] The Plaintiff's Complaint

Though complaints are often long and involved, a complaint in reality need only contain a brief statement of the factual and legal basis of plaintiff's grievance against the defendant and a demand for relief.[45] The relief sought may include one or all of the following: (1) the payment of money damages (also known as legal relief); (2) a court order (injunction) directing the defendant to act or refrain from acting (also known as injunctive or equitable relief);[46] or (3) a judgment declaring the legal rights and obligations as between the plaintiff and defendant (also known as a declaratory judgment.)[47]

Injunctive relief, an equitable remedy, may take several forms. If the plaintiff believes that the defendant is about to take some action that will result in "irreparable harm" to plaintiff, i.e., harm that cannot be compensated later by the payment of money damages, he may seek a temporary restraining order (TRO).[48] A court may issue a TRO on very short notice and having reviewed relatively little evidence. The TRO temporarily maintains the status quo while

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43. *See* Fed. R. Civ. P. 3–5. The propriety and validity of service of the summons and complaint on the defendant, and the question whether the court has power to compel the defendant to appear and defend (the latter known as *personal jurisdiction*) may form the basis for a defendant's motion to dismiss the complaint. *See* §A.02 [A][1].
44. Fed. R. Civ. P. 4. The standard time to respond is twenty days. Fed. R. Civ. P. 12. The time to respond can be and often is extended by agreement of the parties or by court order.
45. *See* Fed. R. Civ. P. 7–11.
46. Fed. R. Civ. P. 8. At one time, there were separate courts of law and of equity and the distinction between legal and equitable remedies mattered more than today. Law courts employed juries, while in courts of equity the judge decided all issues. One important remnant of the old system is that, as a general matter, jury trials are available only when the relief sought is legal in nature. Judges alone still handle those cases or issues classified as equitable.
47. *See* Fed. R. Civ. P. 57 and 28 U.S.C. §§2201, 2202. The foregoing permit federal judges to "declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought*." *Id.* (Emphasis added.) In other words, parties may obtain such a declaration even if they are not seeking monetary damages or injunctive relief.
48. *See* Fed. R. Civ. P. 65

the plaintiff seeks to persuade the court to issue a preliminary injunction (PI).[49] A TRO usually lasts only a few days or weeks or until a formal hearing on the plaintiff's motion for a preliminary injunction.

Although a court may issue a preliminary injunction without a full trial, it will require a greater showing than when being asked to issue a TRO. A plaintiff seeking a preliminary injunction generally must show that he will be irreparably harmed unless the injunction is granted, that he is more likely than not to win at trial, and that the hardships he will endure if the injunction is denied will be greater than those the defendant will face if the injunction is granted. If granted, the preliminary injunction maintains the status quo pending the outcome of the trial. If the plaintiff wins at trial, he may be granted a permanent injunction.

Courts usually insist on holding an evidentiary hearing before ruling on a preliminary injunction motion. Preliminary injunction proceedings are of particular interest in the antitrust arena because it is at this stage that government challenges to allegedly anticompetitive mergers and acquisitions usually rise or fall.[50]

[2] The Defendant's Response: Answer or Motion to Dismiss

A defendant served with a summons and complaint has two options: it may (1) answer the allegations of the complaint; or (2) move to dismiss the complaint.[51] In its answer, the defendant either admits or denies the individual allegations of the complaint, raises any defenses it may have to the claims in the complaint, and asserts any claims it may have against the plaintiff (counterclaims) or related claims it may have against other defendants (cross-claims) or non-parties (third-party claims).[52]

The defendant can postpone—or perhaps even completely avoid—answering by instead moving to dismiss. In a motion to dismiss, the defendant asks the district court judge to throw the case out of court on the ground that, on its face, the complaint will not support a finding that the plaintiff is entitled to relief from the defendant. Two of the most common grounds for seeking dismissal (and the two most relevant here) are that (1) the complaint will not support a finding that the court has personal jurisdiction over the

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49. *Id.*
50. *See* §6.11.
51. A third option is simply to ignore the summons and complaint. In such cases, the court may enter a default money judgment in favor of the plaintiff, which the plaintiff may then seek to enforce. *See* Fed. R. Civ. P. 55. This option is sometimes exercised by foreign defendants who believe they have been wrongly sued, who have no or minimal assets or interests in the U.S., and who believe their foreign-based assets are safe from the reach of a plaintiff with a U.S. judgment.
52. Fed. R. Civ. P. 7–15.

defendant; and (2) even if the judge assumes the truth of all the facts alleged in the complaint, the complaint does not state a legally recognized claim.[53]

If the judge grants the motion to dismiss, the plaintiff may appeal, or, if permitted to do so in the judge's dismissal order, may file a new amended complaint that attempts to cure the shortcomings of the original.[54] If the judge denies the motion, the defendant must then answer and the case proceeds to the next phase, discovery.

[3] Discovery

Discovery consists of an exchange of information between the parties designed to allow all sides to fully understand the factual and legal issues.[55] The goal of discovery is to increase efficiency and fairness by promoting settlements, eliminating needless issues, and preventing unfair surprise at trial (trial by ambush).[56]

During discovery, the parties exchange information both voluntarily and via responses to requests for documents or other physical evidence and responses to written interrogatories. Parties may also take depositions of their opponents, their own employees, non-parties (sometimes confusingly referred to as third parties), and the other party's expert witness[es].[57] In a deposition, lawyers for the parties question and cross-examine the witness outside of court. The examination is recorded either stenographically or on audio or video for possible later use at trial or in connection with a motion for summary judgment (see below).

The discovery phase can be extremely time-consuming. Disputes requiring court resolution often arise about the permissible scope of written discovery or about the appropriateness of deposition examination. Discovery in cases

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53. Fed. R. Civ. P. 11, 12. Motions to dismiss for lack of personal jurisdiction are of special interest for non-U.S. parties. The basis of such a motion is that, because the defendant has no or minimal contact with the United States, it would be unfair to force it to defend itself in the U.S. courts. *See, e.g.*, *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574 (1999); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962). As further discussed below, however, the U.S. courts have been reluctant to grant such motions if the defendant is a non-U.S. company charged with conspiring with others to do acts that would violate the U.S. antitrust laws and that produce anti-competitive effects in the U.S. *See* §3.08[B][2].
54. If the judge dismisses "without prejudice," the plaintiff is free to try again. If the dismissal order states "with prejudice," plaintiff may not.
55. The rules governing discovery are Fed. R. Civ. P. 26–37. *See generally* Wright & Miller at §§2001–2293.
56. *See* Advisory Committee Explanatory Notes to Fed. R. Civ. P. 26–37.
57. Unless there is a problem of international comity, party witnesses can be compelled to appear and testify on deposition simply by notifying the party of your intention to do so. Fed. R. Civ. P. 30. Non-parties can also be compelled to testify by the issuance of a subpoena, a court order issued by the requesting lawyer that requires the witness to appear. Fed. R. Civ. P. 45.

involving non-U.S. parties can raise particularly troublesome issues. Non-U.S. litigants are often surprised and dismayed when confronted with the scope of disclosure that is expected of them. They often seek to rely on home country blocking statutes or other measures to protect themselves from having to produce documents or live testimony. Although some U.S. courts are sympathetic, others are not, and often offer the non-U.S. party the option of producing or facing a default. This is more likely to occur in cases where the resisting party is the plaintiff, i.e., the party that initiated the matter in the U.S. court.[58]

[4] Summary Judgment

From very early in the case, but most commonly after discovery is complete, the parties may seek summary judgment on all or part of the case.[59] A motion for summary judgment asks the district court judge to find for the moving party, whether it be plaintiff or defendant, on the grounds that the undisputed facts found through discovery or in sworn statements produced by the parties require such a finding.[60] If the judge agrees, he or she will then enter a judgment in favor of the moving party on those issues or claims covered by the motion. If the judgment covers the entire case, the losing party may then appeal.[61]

[5] Trial

If the summary judgment does not cover the entire case, or if the judge denies the motion, the case will then proceed to trial.[62] The trial is an adversarial proceeding designed to resolve disputes over factual issues and determine the rights and obligations of the parties based on those fact-findings. If the parties have chosen a jury trial, a jury comprised of a panel of randomly

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58. *See generally* Wright & Miller at §2005.1.
59. Fed. R. Civ. P. 56. A defendant may seek summary judgment at any time, while a plaintiff must wait until at least twenty days after starting the action. *Id. See generally* Wright & Miller at §§2711–2742.
60. Summary judgment is far more often sought by defendants than by plaintiffs. The reason is that the plaintiff has to show that the undisputed facts (including testimony that the jury could not disbelieve) require a finding that the defendant is liable, whereas a defendant has only to show that the plaintiff has not produced evidence that, if believed, would form the basis for a claim.
61. As a general rule, parties may not appeal from rulings of federal district courts until the entire case has been decided and judgment entered, whether after a motion to dismiss, a motion for summary judgment, or a trial. Exceptions, known as interlocutory appeals, are permitted from rulings on motions for injunctions or where fairness or efficiency so require. *See* 28 U.S.C. §1292.
62. Rules 38–53 of the Federal Rules of Civil Procedure govern the conduct of trials.

chosen U.S. citizens who reside in the district will listen to the evidence and the lawyers' arguments.[63]

A district court judge presides at the trial. The judge is responsible for ensuring that the trial proceeds expeditiously and fairly. The judge rules on the admissibility of evidence offered by the parties and on the propriety of questions and arguments proffered by the parties' attorneys. The judge also referees disputes that arise during the course of the trial and generally makes sure that the attorneys stay within the bounds of accepted conduct.[64] Although it is not the usual practice, some judges themselves pose questions to witnesses and may hire experts to assist the court in understanding complex factual issues such as medical, scientific, or economics issues.[65]

Lawyers representing the parties usually begin by making opening statements about what they intend to show. They then present evidence, consisting of the testimony of fact and expert witnesses, deposition transcripts, physical evidence including documents, and demonstrative materials.[66] The plaintiff presents his evidence first. The defendant follows and the plaintiff is then permitted to present rebuttal evidence.

A lawyer's questioning of his or her own witness is called direct examination. Once the direct examination is complete, the opponent's lawyer is also permitted to examine the witness, a process known as cross-examination. Cross-examination often consists of an attempt to show that the witness lied or was mistaken during his or her direct examination. The attorney who called the witness is then permitted a redirect examination to clarify matters raised on cross and perhaps to "rehabilitate" a witness whose credibility was called into doubt.

After all the evidence has been presented, the lawyers make closing arguments about the meaning of the evidence, its legal significance, the truthfulness

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63. The decision whether to insist on a jury trial is often a difficult one, especially for non-U.S. parties engaged in litigation against U.S. parties. It is made more difficult in federal court than in some state courts because it must be made very early in the proceedings. Fed. R. Civ. P. 38. Considerations include whether you are the plaintiff or defendant, whether you believe the jury pool is likely to contain individuals who may be prejudiced for or against one side or the other, whether you believe your witnesses will play better to a jury or to the judge, an assessment of the abilities and possible prejudices of the judge, and more.
64. Issues of what is and is not admissible evidence are decided by the judge using standards set forth in the Federal Rules of Evidence (usually cited as F.R.E. or Fed. R. Evid.), which can be found under "Rules" at 28 U.S.C.
65. Expert witnesses, whether presented by the parties or hired by the court, often play important roles in antitrust trials. For example, parties frequently present testimony from economics experts on critical issues such as what constitutes the relevant product and geographic market (*i.e.*, what products compete with each other and where) and the nature and extent of the plaintiff's damages.
66. As during discovery, the lawyers may issue subpoenas requiring individuals to appear and give testimony. Fed. R. Civ. P. 45.

of the witnesses, and why their clients should prevail. Once they are finished, the judge will instruct the jury about what the governing law is and how they are to go about reaching a decision. The jury then goes into private session (known as deliberations) where they resolve the factual disputes, apply the law to the facts pursuant to the judge's instructions, and determine a winner. If the parties have not chosen a jury trial, the judge alone will decide the factual issues, decide what the governing law is, apply the law to the facts, and determine a winner.

If, at any time before the judge submits the case to the jury for decision, either party believes the other has been fully heard and has not provided "a legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue," the first party may make a motion for judgment as a matter of law.[67] If the judge grants the motion, none of the issues covered by the motion will be submitted to the jury.[68] If the judge denies the motion, or simply declines to rule, the contested matters will be submitted to the jury.[69]

[6] Post-Trial Proceedings and Judgment

Once the trial is complete, the losing party may make a motion to the trial judge seeking a new trial or renewing a denied or undecided motion for judgment as a matter of law.[70] Once the judge has ruled on such motions, and assuming he or she has not granted a new trial, the judge will order the entry of judgment in favor of the prevailing party.[71] Once this occurs, the proceedings in the district court are over and either party may appeal the outcome.

[7] District Court Opinions

District court judges may, although they need not, issue written opinions explaining their reasoning in connection with any ruling on any issue submitted to them by the parties. Thus, there often exist written opinions explaining, for example, rulings on motions to dismiss, rulings on preliminary injunctions, rulings on discovery disputes, rulings on motions for summary or declaratory judgment, rulings on evidentiary issues, and rulings on motions for a new trial or for judgment as a matter of law. These opinions form an important part of the body of precedent used in the common law process.

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67. Fed. R. Civ. P. 50.
68. *Id.*
69. *Id.*
70. *Id.*
71. *See* Fed. R. Civ. P. 54, 58.

[B] Proceedings in the Circuit Courts of Appeal

Once a final judgment has been entered by a district court, any party has the right to appeal all or part of the judgment, and any prior rulings in the case, to the court of appeals for the circuit in which the district court is located.[72] As a general rule, parties may not appeal from rulings of federal district courts until the entire case has been decided and judgment entered, whether after a motion to dismiss, a motion for summary judgment, or a trial. Exceptions, known as interlocutory appeals, are permitted from rulings on motions for injunctions or where fairness or efficiency so require.[73]

[1] Issues on Appeal

The issues on appeal are generally confined to matters that were raised in the district court; appellate courts only rarely allow parties to raise new matters or present new evidence. For the most part, appellate courts confine their review to questions of law, i.e., to examining whether the district judge erred in choosing and applying the law when ruling on motions, on the admission of evidence, or in instructing the jury. Occasionally, an appellate court will find that a judge or jury was mistaken in making a factual determination, but it will do so only in cases of extreme and obvious error. More often than not, if an appellate court believes there has been a factual mistake made, it will send the case back to the district court for further fact-finding rather then issue a ruling based on its own fact-findings.

[2] Briefing the Appeal

Proceedings in the courts of appeal are much simpler than those in the district courts.[74] Once one or both parties have filed notices of appeal and the record in the court below has been transferred to the appellate court, the appellate court will set a briefing schedule.[75] Normally, the party bringing the appeal, or appellant, is instructed to serve and file an opening brief. The party defending the result below, or appellee, is then given a date by which it must file a responding brief. The appellant is usually given the opportunity to file a

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72. *See* Fed. R. App. P. 3–5; see also §A.04 for a complete list of the district courts and the circuits in which they are located.
73. *See* 28 U.S.C. §1292.
74. As with the district courts, there is a set of rules that governs procedures, known as the Federal Rules of Appellate Procedure (abbreviated F.R.A.P. or Fed. R. App. Pro.), which are codified at 28 U.S.C. *See generally*, Wright & Miller at §§3945–4000. Also, like the district courts, each of the circuit courts has issued its own additional rules. These can be found on-line by following the appropriate links at http://www.uscourts.gov/courtlinks.
75. *See* Fed. R. App. P. 3–5, 10–12, 28, 31, 32.

rebuttal brief, called a reply brief. The parties are also required to submit an appendix containing excerpts from the record below—such as important documents, relevant portions of the trial transcript, etc.—upon which they rely in their briefs.[76]

[3] Oral Argument

In most cases the appellate court will then schedule an oral argument to give the parties an opportunity to present their cases in person.[77] Three judges normally hear the oral argument, although in exceptional cases the entire court may sit *en banc.*[78] Oral argument can last anywhere from a few minutes to more than an hour. The appellant's lawyer speaks first. The appellee's lawyer responds, and the appellant may rebut. The judges commonly interrupt with questions. Occasionally, at the end of the argument the court will issue its ruling from the bench. More often, the judges will reserve judgment and sometime later issue a written ruling, usually accompanied by an opinion.

[4] The Court's Ruling

The court's ruling may take several forms and may or may not be accompanied by an opinion explaining its ruling.[79] Most often, the appellate court simply affirms the judgment of the district court. In some instances, the court may reverse the judgment of the lower court and enter judgment for the appellant. More often, if the court reverses, it will remand the case to the district court with instructions to hold a new trial or take other actions to correct the errors that led to reversal. The court may also affirm part(s) of the judgment while reversing other part(s).

[5] The Parties' Post-Ruling Options

Once the appellate court has ruled, the parties basically have three options. One, they may simply accept the ruling and proceed accordingly. Two, if one party or the other believes the three judges somehow misconstrued its position or overlooked an important matter, it may ask for a rehearing before those three judges,[80] or it may seek rehearing *en banc*, that is, before the entire court.[81] Rehearing is rarely granted; rehearing *en banc* is even rarer. Third, one or both may seek to appeal the ruling to the Supreme Court.

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76. *See* Fed. R. App. P. 30, 32.
77. *See* Fed. R. App. P. 34.
78. Circuit courts usually have anywhere from 6 (First Circuit) to 28 (Ninth Circuit) judges.
79. *See* Fed. R. App. P. 36, 39, 41.
80. *See* Fed. R. App. P. 40.
81. *See* Fed. R. App. P. 35, 40.

[C] Proceedings in the U.S. Supreme Court

Unlike the courts of appeals, the Supreme Court is not required to hear most appeals.[82] A few special classes of matters may be appealed as of right, or brought directly, to the Supreme Court. In most cases, however, including virtually all antitrust cases, the Court has discretion whether or not to accept the case for appellate review.

Parties who would have the Court exercise that discretion must proceed by formally petitioning the Court for a writ of *certiorari*.[83] The court will grant the writ and hear the appeal only if convinced the matter is of sufficient importance. The Court will not normally grant the writ to review claims of factual error or that the appellate court has misapplied a properly stated rule of law.[84] The three situations that most often lead to the granting of *certiorari* in antitrust and other commercial cases occur if: (1) two or more different circuit courts of appeal have issued conflicting rulings on the same important issue; (2) a circuit court has decided an important question of federal law that has not been but should be decided by the Supreme Court; or (3) a circuit court has decided an important question of federal law in conflict with earlier Supreme Court decisions.[85]

If the Court does grant the writ, the procedures followed are similar to those in the circuit court, with the filing of opening, responding, and reply briefs and an appendix, followed by oral argument.[86] Unlike a circuit court, however, most oral arguments are held before all nine judges of the Supreme Court. Once the argument is complete, the Supreme Court may, like a circuit court, rule in any one of several ways, from affirming, to reversing and entering judgment, to reversing and remanding, or to affirming in part and reversing in part.

Because of the Supreme Court's position as court of last resort and ultimate arbiter of the meaning of the Constitution and federal laws, Supreme Court arguments and opinions are closely watched by the press, Congress, and the legal, academic, and business communities, as well as the nation at large. Court rulings and opinions need not be unanimous; a simple majority vote of five of the nine justices is sufficient. As a result, in addition to the

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82. The Supreme Court's Rules (Sup. Ct. R.) are codified at 28 U.S.C. *See also* 28 U.S.C. §§1251–1259, 2101–2113.
83. *See generally* Sup. Ct. R. 10–16.
84. *See* Sup. Ct. R. 10.
85. *Id.* The odds are heavily against any given case actually being accepted for review by the Supreme Court. According to its most recent statistics, covering the 2007 term, there were 8,241 cases filed with the Court but only 75 argued, 72 disposed of, and only 67 signed opinions. *See* Supreme Court of the United States, 2008 Year-End Report on the Federal Judiciary *available at* http://www.supremecourtus.gov/publicinfo/year-end/year-endreports.html.
86. *See* Sup. Ct. R. 24–28.

majority opinion explaining the ruling of the Court, there may also be one or more dissenting opinions in which the justices who voted against the ruling explain why. There may also be separate concurring opinions in which justices who voted in favor explain why, especially if their reasoning is different from that in the majority opinion. Some justices may even concur in part and dissent in part. It all makes for a fascinating, if sometimes confusing, drama.

§A.04 The U.S. Legal Citation System

For the common law process to work effectively, judges, lawyers, scholars, and others need a commonly understood system for citing to and finding the Constitutional provisions, statutes, treaties, and legal decisions that form the law. The system that has developed does not only that, but also provides additional useful information, such as the level of the court, the date of its ruling, whether the ruling was subject to appeal and, if so, what happened on appeal.

What follows is a brief and highly simplified introduction designed to provide an understanding of most of the citations used here. It only scratches the surface of a citation and research system that encompasses, and allows access to, literally billions of pages of information.[87]

[A] Citations to the Constitution and Federal Statutes

The U.S. Constitution is normally cited using the following, or some similar, format: U.S. Const. art. I, §9, cl. 2.[88] All federal statutes, which includes the federal antitrust laws, are part of the United States Code, which is universally abbreviated U.S.C. The code is divided into fifty chapters, each of which is subdivided into sections. Citations to the official U.S. government publication of the code use the following format: chapter number, followed by U.S.C., followed by the section sign (§), followed by the section number. For example, Section 1 of the Sherman Antitrust Act is cited as 15 U.S.C. §1. The act as a whole is cited either as 15 U.S.C. §1, et seq., or 15 U.S.C. §§1–7.[89]

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87. For those seeking further guidance, *see* Robert C. Berring and Elizabeth Edinger, Berring and Edinger's *Legal Research Survival Manual* (West 2002).
88. The text of the Constitution can be found in many publications or on-line at http://www.conell.edu/constitution.overview.html.
89. You may also see citations to the code that read U.S.C.A. These refer to the *United States Code Annotated*, an unofficial but reliable and very useful publication of West Publishing. In addition to the text of the Constitution and the code itself, this reference work contains short

[B] Citations to Court and Evidentiary Rules

As discussed above, there are several important sets of rules governing procedure in the federal courts. Although many have been codified in the United States Code, they are cited not to the code, but by number. Hence, cites to the Federal Rules of Civil Procedure read F. R. Civ. P., or Fed. R. Civ. P., followed by the rule number. Additional abbreviations are:

Federal Rules of Criminal Procedure	F.R. Crim.P. or Fed. R. Crim. P.
Federal Rules of Evidence	F.R.E. or Fed. R. Evid.
Federal Rules of Appellate Procedure	F.R.A.P. or Fed. R. App. P.
Rules of the Supreme Court of the United States	Sup. Ct. R.
Rules of the Judicial Panel on Multidistrict Litigation	J.P.M.L.R.

[C] Citations to Federal Agency Rules and Regulations

Federal rules and regulations are issued by federal agencies and commissions. The agencies or commissions typically issue such regulations, which have the force of law, to further interpret legislation they are responsible for enforcing. Of special interest to antitrust lawyers are regulations issued by the FTC to implement and clarify the Hart-Scott-Rodino Antitrust Improvements Act's premerger notification provisions.[90] The text of federal rules and regulations can be found in the Code of Federal Regulations, which is normally cited C.F.R. The citation format is similar to that used for statutes, e.g., 16 C.F.R. §803.2.[91]

[D] Citations to Federal Judicial Opinions

American legal publications, judicial opinions, and lawyers' briefs use a more or less uniform system for citing to judicial opinions. The first part of the cite is the name of the case, e.g., *Smith v. Jones Co*. If there are multiple parties on either side, usually only the first of the listed plaintiffs or defendants is identified, sometimes followed by *et al.* (and others), e.g., *Smith, et al. v. Jones Co., et al.* The cite then identifies, in abbreviated form, where the opinion may be found, the court that issued the opinion, the date of the opinion, and, if appropriate, subsequent appellate action.

descriptions of opinions that interpret each section of the code as well as citations to those opinions.

90. *See* Chapter 6.

91. Published by: the Office of the Federal Register, National Archives & Records Administration.

[1] Supreme Court

The official source of Supreme Court opinions is called United States Reports, which is abbreviated simply U.S. Hence, Supreme Court opinions are cited as follows: *Parker v. Brown*, 317 U.S. 341 (1943).[92] The first number (317) represents the volume of U.S. Reports in which the opinion appears and the second (341) indicates the page on which the opinion begins. If the second number is followed by a comma and then additional numbers, e.g., 317 U.S. 341, 345–47, the additional number(s)—often called jump cites or pin cites—indicate the page(s) within the opinion that contain the specific material upon which the author is relying. The final number in parentheses is the date the opinion was issued. Because it is understood that the U.S. Reports contains only Supreme Court opinions, there is no need to indicate the identity of the court.

[2] Circuit Courts of Appeal

As mentioned above, there are thirteen federal circuit courts of appeal; the United States Court of Appeals for the Federal Circuit; the United States Court of Appeals for the D.C. Circuit; and the United States Courts of Appeal for the First through Eleventh Circuits. The Court of Appeals for the Federal Circuit, which is abbreviated Fed. Cir. in citations, sits in Washington, D.C. It primarily handles appeals from cases involving disputes over patent rights. The Court of Appeals for the D.C. Circuit handles appeals from the United States District Court for the District of Columbia and is abbreviated *D.C. Cir.*

The numbered circuits each handle appeals from district courts in several states or territories:

Circuit	*States*
First (1st Cir.)	Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island
Second (2d Cir.)	Connecticut, New York Vermont
Third (3d Cir.)	Delaware, New Jersey, Pennsylvania, U.S. Virgin Islands
Fourth (4th Cir.)	Maryland, North Carolina, South Carolina, Virginia, West Virginia
Fifth (5th Cir.)	Louisiana, Mississippi, Texas
Sixth (6th Cir.)	Kentucky, Michigan, Ohio, Tennessee

92. There are several other sources for Supreme Court opinions, some of which publish new opinions before the official U.S. Reports does. These include: Westlaw, a computerized database; the Supreme Court Reporters (S.Ct.), published by West Publishing Co.; and the Lawyers Edition (L.Ed.), published by The Lawyer's Co-operative Publishing Co. (Rochester), or Bancroft-Whitney Co. (San Francisco).

Circuit	*States*
Seventh (7th Cir.)	Illinois, Indiana, Wisconsin
Eighth (8th Cir.)	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota
Ninth (9th Cir.)	Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Washington
Tenth (10th Cir.)	Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming
Eleventh (11th Cir.)	Alabama, Florida, Georgia

Official versions of the circuit court opinions are published in a series of volumes published by West Publishing and entitled Federal Reporter.[93] West is now on its third thousand-volume series of Federal Reporters, which are abbreviated, respectively: F.; F.2d; and F.3d. Citations to circuit court opinions take the following form: *Image Technical Services v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). This citation indicates that the opinion may be found beginning at page 1195 of volume 125 of the third series of the federal reporter and that it was issued by the Court of Appeals for the Ninth Circuit in 1997. *Cert. denied*, is an abbreviation for *certiorari* denied.[94] It indicates that in 1998 the Supreme Court refused to hear an appeal from the decision of the Court of Appeals for the Ninth Circuit and thus that the Ninth Circuit's ruling stands as the law of that case.[95]

[3] Federal District Courts

Opinions of the ninety-four district courts are published by West in two series of official reporters, the Federal Supplement (F.Supp.) and Federal Rules Decisions (F.R.D.) Citation format is the same as for the higher courts—volume number followed by abbreviated reporter name, followed by first page number and any jump cites. Next, in parentheses, is the abbreviated

93. The contents of the *Federal Reporters* are available on-line through Westlaw. Another useful source for antitrust-related judicial opinions and other materials is the *Trade Regulation Reporter* published by Commerce Clearing House (CCH).
94. As discussed more fully above, the primary way a party seeking to appeal a ruling of a circuit court to the Supreme Court does so is by seeking a writ of certiorari. If the Court had granted the writ but had not yet decided the appeal, the citation would have so indicated. Similarly, if the Supreme Court had decided the appeal, the citation would have so indicated and provided the citation to the Supreme Court's decision.
95. If there is no date in the parentheses containing the identity of the circuit court, that means that both the circuit court ruling and the Supreme Court's denial of the writ occurred in the year that is indicated in the Supreme Court citation.

court name followed by the date the opinion issued. Last come indications of subsequent appellate activity in the case, if any.

Here are the names of and citation abbreviations for each of the district courts, presented by circuit:

Circuit	*District Court(s)*
D.C.	District of the District of Columbia (D.D.C.)
First	District of Maine (D. Me.)
	District of Massachusetts (D. Mass.)
	District of New Hampshire (D.N.H.)
	District of Puerto Rico (D.P.R.)
	District of Rhode Island (D.R.I.)
Second	District of Connecticut (D. Conn.)
	Eastern District of New York (E.D.N.Y.)
	Northern District of New York (N.D.N.Y.)
	Western District of New York (W.D.N.Y.)
	Southern District of New York (S.D.N.Y.)
	District of Vermont (D. Vt.)
Third	District of Delaware (D. Del.)
	District of New Jersey (D.N.J.)
	Eastern District of Pennsylvania (E.D. Pa.)
	Middle District of Pennsylvania (M.D. Pa.)
	Western District of Pennsylvania (W.D. Pa.)
	District of the Virgin Islands (D.V.I.)
Fourth	District of Maryland (D. Md.)
	Eastern District of North Carolina (E.D.N.C.)
	Middle District of North Carolina (M.D.N.C.)
	Western District of North Carolina (W.D.N.C.)
	District of South Carolina (D.S.C.)
	Eastern District of Virginia (E.D. Va.)
	Western District of Virginia (W.D. Va.)
	Northern District of West Virginia (N.D. W. Va.)
	Southern District of West Virginia (S.D. W. Va.)
Fifth	Eastern District of Louisiana (E.D. La.)
	Middle District of Louisiana (M.D. La.)
	Western District of Lousiana (W.D. La.)

Circuit	*District Court(s)*
	Northern District of Mississippi (N.D. Miss.)
	Southern District of Mississippi (S.D. Miss.)
	Eastern District of Texas (E.D. Tex.)
	Western District of Texas (W.D. Tex.)
	Northern District of Texas (N.D. Tex.)
	Southern District of Texas (S.D. Tex.)
Sixth	Eastern District of Kentucky (E.D. Ky.)
	Western District of Kentucky (W.D. Ky.)
	Eastern District of Michigan (E.D. Mich.)
	Western District of Michigan (W.D. Mich.)
	Northern District of Ohio (N.D. Oh.)
	Southern District of Ohio (S.D. Oh.)
	Eastern District of Tennessee (E.D. Tenn.)
	Middle District of Tennessee (M.D. Tenn.)
	Western District of Tennessee (W.D. Tenn.)
Seventh	Central District of Illinois (C.D. Ill.)
	Northern District of Illinois (N.D. Ill.)
	Southern District of Illinois (S.D. Ill.)
	Northern District of Indiana (N.D. Ind.)
	Southern District of Indiana (S.D. Ind.)
	Eastern District of Wisconsin (E.D. Wis.)
	Western District of Wisconsin (W.D. Wis.)
Eighth	Eastern District of Arkansas (E.D. Ark.)
	Western District of Arkansas (W.D. Ark.)
	Northern District of Iowa (N.D. Iowa)
	Southern District of Iowa (S.D. Iowa)
	District of Minnesota (D. Minn.)
	Eastern District of Missouri (E.D. Mo.)
	Western District of Missouri (W.D. Mo.)
	District of Nebraska (D. Neb.)
	District of North Dakota (D.N.D.)
	District of South Dakota (D.S.D.)

Circuit	*District Court(s)*
Ninth	District of Alaska (D. Alaska)
	District of Arizona (D. Ariz.)
	Central District of California (C.D. Cal.)
	Eastern District of California (E.D. Cal.)
	Northern District of California (N.D. Cal.)
	Southern District of California (S.D. Cal.)
	District of Guam (D. Guam)
	District of Hawaii (D. Haw.)
	District of Idaho (D. Idaho)
	District of Montana (D. Mont.)
	District of Nevada (D. Nev.)
	District of the Northern Mariana Islands (D. N. Mar.)
	District of Oregon (D. Or.)
	Eastern District of Washington (E.D. Wash.)
	Western District of Washington (W.D. Wash.)
Tenth	District of Colorado (D. Colo.)
	District of Kansas (D. Kan.)
	District of New Mexico (D.N.M.)
	Eastern District of Oklahoma (E.D. Okla.)
	Northern District of Oklahoma (N.D. Okla.)
	Western District of Oklahoma (W.D. Okla.)
	District of Utah (D. Utah)
	District of Wyoming (D. Wyo.)
Eleventh	Middle District of Alabama (M.D. Ala.)
	Northern District of Alabama (N.D. Ala.)
	Southern District of Alabama (S.D. Ala.)
	Middle District of Florida (M.D. Fla.)
	Northern District of Florida (N.D. Fla.)
	Southern District of Florida (S.D. Fla.)
	Middle District of Georgia (M.D. Ga.)
	Northern District of Georgia (N.D. Ga.)
	Southern District of Georgia (S.D. Ga.)

[E] Citations to Federal Trade Commission Opinions

In addition to its rule-making and enforcement powers, the FTC also has adjudicatory powers.[96] Its opinions can be found in a series of volumes entitled *Federal Trade Commission Decisions*, which are cited as F.T.C., e.g., 120 F.T.C. 1 (19).

[F] Common Explanatory Terms and Abbreviations

The following are some common explanatory terms and abbreviations found in U.S. legal citations:

Affirmed (aff'd): The cited decision was upheld on appeal.
Affirmed in part, reversed in part (aff'd in part, rev'd in part): The cited decision was partially upheld and partially reversed on appeal.
Appeal pending: One or more of the parties has appealed but no decision has yet been reached by the appellate court.
Cert. denied: The Supreme Court denied a request for a writ of certiorari, i.e., refused to entertain an appeal from the cited decision.
Cert. granted: The Supreme Court has granted a request for a writ of certiorari, i.e., has agreed to entertain an appeal from the cited decision.
Cert. pending: One or more of the parties has requested a writ of certiorari from the Supreme Court but the Court has not yet decided whether to issue the writ and entertain the appeal.
En banc: The decision was made by all of the judges of a particular circuit court rather than the usual three judge panel.
Memorandum (mem.): The court ruled but did not issue an opinion.
On remand: The court is acting after the case was remanded to it for further proceedings by a higher court.
Per Curiam: Indicates a very short opinion, usually without naming the judge who authored the opinion.
Rehearing denied (reh. denied): The court denied a request by one or more of the parties for reconsideration of the subject issue.
Rehearing granted (reh. granted): The court has granted a request to reconsider its ruling on the subject issue but has not yet ruled.
Rehearing requested (reh. req.): One or more of the parties has asked the court to reconsider its ruling on the subject issue.
Reversed (rev'd): The cited decision was reversed on appeal.

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96. *See* §8.03.

Glossary of Antitrust and Related Terms

Words and phrases in the definitions in italics are defined elsewhere in the "Glossary." The sections (§§) indicated in parentheses at the end of the definitions are references to the sections of this book in which the term is discussed.

Accrual of Cause of Action or Claim: A party's antitrust claim accrues on the date on which the party first has the right to sue under the antitrust laws. It is the date on which the *statute of limitations* begins to run, although the statutory limitations period can be extended by *tolling* or by a *continuing violation*. (§3.08[A])

Actual *Potential Competition* Theory: This is the theory that a proposed merger or acquisition is illegal because it eliminates competition from a firm that would very likely have entered the market *de novo* or through a *toe-hold* acquisition. A claimant must prove (in addition to the elements necessary to prove *perceived potential competition*): (1) that the entering company could have entered the market somehow other than through the challenged transaction; and (2) that this other method "offer[s] a substantial likelihood of ultimately producing deconcentration of that market or other significant pro-competitive effects." *United States v. Marine Bancorporation*, 418 U.S. 602, 633 (1974). *See* DOJ/FTC *1984 Merger Guidelines* §§4.111–4.112. (*Compare Perceived Potential Competition.*) (§5.06)

Adequacy (of Class Representative): The *class representative*'s ability to adequately represent the interests of the class is one of the criteria a court uses to determine whether to certify an action as a *class action*. (§8.05[E])

Administrative Agency: Administrative agencies are Congressionally created bodies with a combination of legislative, executive, and judicial powers. Examples include the *Federal Trade Commission (FTC),* the Federal Aviation Administration (FAA), and the Food and Drug Administration (FDA). (Appendix A §A.01[B])

Administrative Judge: This *Administrative Agency* employee has the authority to preside over agency judicial proceedings. (Appendix A §A.01)

Advice and Consent: Under the U.S. *Constitution*, certain powers of the *President*, such as the power to appoint federal judges, may be exercised only with the advice and consent, i.e., approval, of Congress. (Appendix A §A.01[B])

Aftermarket: This *market* consists of replacement parts and accessories for larger products, such as automobiles. Buyers in the aftermarket are generally distributors, repair, or service organizations, or consumers who own the larger product. Distinguished from an *original equipment market*, in which the buyers are manufacturers who incorporate the parts into the larger products. (§§4.02, 5.02, 5.04)

Agencies: Antitrust lawyers use this shorthand to describe the *Antitrust Division of the Department of Justice (DOJ)* and the *Federal Trade Commission (FTC)*, the two federal regulatory authorities with partially overlapping responsibility for enforcing the federal *antitrust laws.* (*See generally* §§8.01, 8.02, 8.03)

Amnesty: *See Corporate Leniency Program*.

Ancillary Restraint: Such a restraint of trade, such as a *covenant not to compete*, is found to be subordinate to a lawful contractual purpose and may be legitimized for that reason. *Compare Naked Restraint of Trade*. (§3.04[B])

Answer: This paper is served and filed by a *defendant* in a civil lawsuit in response to the *plaintiff's complaint*. (Appendix A §A.03[A][2])

Antitrust: This generic term is used to describe the United States legal practice area concerned with the preservation and regulation of competition in the U.S. markets. Sources of antitrust law include several federal statutes (most notably, the *Sherman Antitrust Act*, *Clayton Act*, *Robinson-Patman Act, Hart-Scott-Rodino Antitrust Improvements Act* and *Federal Trade Commission Act*), federal regulations, individual state antitrust acts, and federal and state *common law*.

Antitrust Audit: This is a comprehensive review of a firm's business practices to ensure that the firm is in compliance with the antitrust laws.

Antitrust Civil Process Act: This federal legislation governs procedures for the government issuance and enforcement of *civil investigative demands*. Codified at 15 U.S.C. §§1311–1314. (§2.07)

Antitrust Compliance Program: This program is designed to ensure that a firm's business practices comply with the antitrust laws. Proof of the good-faith implementation of an antitrust compliance program may provide a firm some protection against criminal liability. An *antitrust audit* often is one part of such a program. (§§3.07, 8.02)

Antitrust Criminal Penalty and Reform Act of 2004: On June 23, 2004, President Bush signed into law the Antitrust Criminal Penalty Enhancement

and Reform Act of 2004. The act increased the maximum penalties for antitrust criminal violations from $10 million to $100 million for corporations. Maximum penalties for individuals were increased from $350,000 to $1 million and from three years in prison to ten years. The act also limited to single damages the civil antitrust liability of those who take advantage of the Department of Justice's *corporate leniency program* by informing the government about antitrust violations in which they participated. Those companies that do not receive amnesty remain liable for treble damages. (§§1.02[F]; 3.02[A][3]; 8.02[A][3])

Antitrust Division: The division of the United States *Department of Justice* with responsibility for enforcing the federal antitrust laws. The Antitrust Division is headquartered in Washington, D.C., and has seven field offices in major cities across the United States. Information about the division is available at http://www.usdoj.gov/atr. (§8.02)

Antitrust Guidelines for Collaborations Among Competitors: These guidelines were published by the *DOJ* and *FTC* in 2000 to provide assistance in analyzing the legality of various *joint ventures* and other types of cooperation between competitors. Frequently, they are referred to as the *Joint Venture Guidelines*. (§§3.09, 5.03)

Antitrust Guidelines for the Licensing of Intellectual Property: These guidelines were issued in 1995 by the *DOJ* and *FTC* to assist users in determining the legality of various licensing programs for patents and other intellectual property. (§4.06)

Antitrust Injury: This is the economic injury to a person caused by an act or practice forbidden by the antitrust laws, i.e., "injury of the type the antitrust laws were designed to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977). The Supreme Court has held that antitrust injury is an element that must be proved in a successful private action for damages under the federal *antitrust laws*. (§3.06[A][2])

Antitrust Laws: Federal and state laws designed to regulate competition and to ensure free and vigorous competition in the marketplace. The most important federal antitrust laws are the *Sherman Antitrust Act*, the *Clayton Act*, the *Hart-Scott-Rodino Antitrust Improvements Act*, the *Robinson-Patman Act*, and the *Federal Trade Commission Act.* (Chapter 2 and *passim*)

Antitrust Modernization Commission Act of 2002: In 2002, Congress passed, as a footnote to Section 1 of the Sherman Act, the Antitrust Modernization Commission Act of 2002, which created an Antitrust Modernization Commission and directed it "to examine whether the need exists to modernize the antitrust laws . . ." 15 U.S.C. §1, notes §§11051–11060. Congress directed the commission to report within three years of its first meeting. (§§1.02[F], 2.02 and *passim*)

Antitrust Out: This provision in a merger, acquisition, or joint venture agreement allows either or both of the parties to abandon the transaction upon the occurrence of some specified event during the *Hart-Scott-Rodino Premerger Review* process. The event could be the issuance of a *second request* or, more commonly, the government's filing of a complaint seeking a preliminary injunction or the failure of the transaction to close by a specified date because of continuing antitrust review. (§6.13)

Antitrust Procedures and Penalties Act (the Tunney Act): This federal legislation enacted in 1974 provides instructions for the entry of consent judgments, (*consent decrees*) at the close of government civil antitrust actions. Codified at Section 5 of the *Clayton Act*, 15 U.S.C. §16(b)-(h). (§§2.03[F], 8.02[B])

Appeal: In litigation, a request by a party (the *appellant*) that an *appellate court* overturn a ruling of or otherwise correct error(s) that the appellant contends were made by, a lower court. (Appendix A §A.03[B])

Appeal as of Right: In the U.S. federal system, certain rulings may only be appealed with permission from the courts, while other rulings are appealable without permission, i.e., as a matter of right. (Appendix A §A.03[B])

Appellant: In litigation, the appealing party, i.e., the party that asks an *appellate* court to overturn a ruling of or otherwise correct error(s) that the appellant contends were made by a lower court. *Compare Appellee*

Appellate Court: The function of this court is to hear appeals from rulings of lower courts. In the U.S. federal court system, for example, the *Circuit Courts of Appeal* hear appeals from the *District Courts* and the *Supreme Court* hears appeals from the Circuit Courts of Appeal. (Appendix A §§A.02, A.03)

Appellee: In litigation, the non-appealing party, i.e., the party that asks an *appellate court* to uphold a ruling of a lower court. *Compare Appellant*

Arbitrability: At one time, it was quite clear that antitrust claims were not "arbitrable," i.e., that parties could not agree to submit antitrust claims to arbitration. But in 1985, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629–37 (1985), the Supreme Court held that antitrust arbitration clauses in *international* agreements were enforceable. The Court expressly left open whether purely *domestic* arbitration clauses would be enforced to require the arbitration of antitrust claims. The issue remains open, although several circuit courts of appeal have found (or suggested) that domestic antitrust claims are arbitrable, at least if the arbitration clause clearly covers antitrust claims. (§8.05[G])

Arraignment: This is the stage in a criminal prosecution at which the defendant appears in court before a judge, is formally charged with having committed

a crime, and enters a plea of guilty, not guilty, or *nolo contendere. See* Fed. R. Crim. Pro. 11, 12. (§8.02[A][2]).

Attempted Monopolization: This activity, forbidden by *Section 2* of the *Sherman Antitrust Act*, is directed at obtaining a *monopoly* and characterized by a dangerous probability of achieving that goal. (§4.03)

Attorney's Fees: In a departure from the usual U.S. rule that each party to a litigation must pay its own legal fees, Section 4 of the *Clayton Act* (15 U.S.C. §15) allows a successful private antitrust plaintiff to collect reasonable attorney's fees from the defendant in addition to *treble damages*. (§§2.03[B], 3.06[B], 8.05[K])

Average Variable Costs: This measure of costs is used to determine whether a seller has engaged in *predatory pricing*. (*See Variable Costs*.) (§4.02[B])

Barriers to Entry (aka *entry barriers*): These items, including patents, high customs duties, and shipping costs, make it difficult or impossible for a would-be competitor to enter a new *market*. (§§4.02, 5.02, 5.04)

Behavioral Remedies: Behavioral (or conduct) remedies are those imposed on adjudged monopolists or would-be merger partners that regulate the future conduct of the monopolist or merged entity. Conduct remedies may include requirements that the monopolist or merged entity refrain from certain types of conduct (such as tying or exclusive dealing), make certain facilities generally available, or make certain types of information public. (*Compare Structural Remedies*.) (§§4.05, 6.12, 8.02, 8.03)

Below Cost Pricing: *See Predatory Pricing.*

Bidding Market: This *market* is characterized by the submission of secret, competitive bids from vendors to customers (e.g., construction, *OEM* supplies) as opposed to a market in which vendors simply offer their products for sale. (§§5.02, 5.04)

Bid-rigging: This is a form of *horizontal price-fixing* whereby companies eligible to bid for a contract secretly and illegally agree among themselves on such matters as whether to bid, which one will win the bid, or the winning price. (§3.04[A])

Bill of Rights: Amendments I through X to the U.S. Constitution, the Bill of Rights guarantees certain rights and freedoms to the people of the United States, such as the right to freedom of speech and the privilege against self-incrimination. U.S. Const. amends. I–X. (Appendix A §A.01[D])

Blue Penciling: This action by a court converts an overbroad *ancillary restraint* (such as a *covenant not to compete*) in a contract for the sale of a business or in an employment contract into a lawful restraint. Courts in some states will do

this, while those in others may simply refuse to enforce the overbroad restraint. (§3.04[B][1])

Bounce: If a party's *Hart-Scott Rodino Premerger Notification and Report* contains too many or too serious errors or omissions, the *FTC Premerger Notification Office* may "bounce" it, i.e., refuse to begin the running of the *HSR thirty-day waiting period* until the party has corrected and refiled the report. (§6.07)

Boycott: *See Group Boycotts.*

***Brady* Material:** This exculpatory evidence in the possession of federal (antitrust) prosecutors must be turned over to the defense before trial under the holding of *Brady v. Maryland*, 373 U.S. 83, 86–88 (1963). (§8.02[A])

***Brown Shoe*:** The popular name for *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the leading Supreme Court case on merger analysis generally and *market definition* in particular. (§§4.02[A], 5.04)

Bright Line Test: This term is used to describe a proposal for categorizing cost measurements in an effort to provide some degree of certainty in determining what will constitute *predatory pricing*. Although pricing above *average total cost* is presumptively non-predatory, pricing above *average variable costs*, as a proxy for the difficult-to-measure *marginal costs*, will generally be deemed non-predatory. (§4.02[B])

***Brunswick* Doctrine:** This doctrine, enunciated in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), holds that the antitrust laws were designed to protect competition rather than competitors and thus requires a private antitrust plaintiff to demonstrate *antitrust injury*, i.e., "injury of the type the antitrust laws were intended to prevent." *Id*. at 489. (§3.06)

Bundling: This is a form of *tying arrangement* whereby a seller requires buyers to purchase a group of products together. (§§3.04[A][2], 3.04[B][2], 4.02)

Bureau of Competition: This section of the *Federal Trade Commission* has the principal responsibility for antitrust enforcement. (§8.03)

Bureau of Economics: This section of the *Federal Trade Commission* is charged with formulating the economic policy relating to merger enforcement and assisting the *Bureau of Competition* with merger enforcement. (§8.03)

Business Review Letter: This letter is issued by the *Antitrust Division of the Department of Justice* at the request of a company or individual and provides an opinion as to the legality under the antitrust laws of a proposed practice. *See* 28 C.F.R. §50.6. (§8.02[D])

Capper-Volstead Act: This federal legislation grants antitrust exemption for agricultural cooperatives and is codified at 7 U.S.C. §§291–92. (§2.11[F])

Case or Controversy: Article III of the *Constitution* gives U.S. federal courts the power to decide only cases or controversies, i.e., they are not empowered to provide advisory opinions in the absence of a case or controversy. (Appendix A §A.01[C])

Cash Tender Offer: This is an offer to buy the *voting securities* of a corporation for cash only. A cash tender offer receives somewhat different treatment under the *Hart-Scott-Rodino Rules* than do other types of acquisition. The contents of the required *Premerger Notification* is slightly different, as are the responsibilities of the *acquired person*. Most important, the initial *waiting period* is reduced from thirty to fifteen days, and the waiting period after compliance with a *request for additional information (second request)* is reduced from thirty to ten days. (§§6.04, 6.07, 6.08, 6.09)

***Cert.* Denied:** This abbreviation is used in U.S. legal citations to indicate that the Supreme Court has denied a request that it issue a writ of *certiorari*. (Appendix A §§A.03[C], A.04[D])

Certiorari: Antitrust cases are generally not appealable to *Supreme Court as of right*. Instead they may be appealed only if the Court grants the appellant's request for a writ of *certiorari*. To obtain such a writ, the appellant must convince the Court that the case is sufficiently important. (Appendix A §A.03[C])

Chain of Distribution: This is the process whereby a product comes to market, beginning with the production or extraction of raw materials, through manufacture, refining, or conversion, to wholesale and/or retail distribution, to purchase by the ultimate end-user. Companies occupying the same level on the chain of distribution are in a *horizontal* relationship, while those occupying different levels are in a *vertical* relationship. *See,* e.g., *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.") (§3.02)

Charitable Gift Annuity Antitrust Relief Act: Passed in 1997 and codified at 15 U.S.C. §§ 37-37a, this federal statute provides antitrust immunity for charitable gift annuities and charitable remainder trusts. (§2.11[G])

Circuit: This is the shorthand for *Circuit Court of Appeal.*

Circuit Courts of Appeal: Intermediate level appeal courts in the federal judicial system, the eleven circuit courts of appeal hear appeals from the federal district courts in their geographic region. Rulings of the circuit courts may be appealed to the *Supreme Court*. (Appendix A §§A.02, A.03[B])

Circumstantial Evidence: Such evidence does not consist of actual personal knowledge or observation of the facts in controversy (i.e, direct evidence),

instead, it consists of other facts from which the finder of fact may draw inferences or make deductions about the facts in controversy.

CID: *See Civil Investigative Demand.*

Civil Enforcement: As distinguished from *criminal enforcement*, these are government actions taken to enforce the antitrust laws in which the enforcing *agency* does not seek a criminal conviction of the defendant(s) and the imposition of *criminal sanctions*, such as jail time or criminal monetary fines, but instead seeks *civil penalties* such as civil monetary fines or equitable relief. (§§8.01–8.04)

Civil Investigative Demand (CID): This is a demand for information issued by the *Antitrust Division of the DOJ* to assist it in conducting a civil antitrust investigation. It seeks documents and/or other information from the recipient. (§8.02[B])

Civil Penalties: As distinguished from *criminal sanctions* such as jail time or criminal fines, civil penalties can result from *civil enforcement*, and take the form of civil monetary fines or equitable relief. (§§8.01–8.04)

Claim: This is the *plaintiff's* statement, contained in a *complaint*, that he has been, or is about to be, injured by an action or failure to act by the *defendant*. (Appendix A §A.03[A])

Class Action: If, as is often true in cases alleging antitrust law violations such as price-fixing on consumer goods, there exists a large "class" of plaintiffs or defendants with similar claims or defenses, the *Federal Rules of Civil Procedure* permit, under carefully specified conditions, one or more *class representatives* to sue on behalf of the entire class. If the court allows the case to proceed as a class action and the plaintiff obtains a judgment (or enters a favorable settlement), it may collect monetary damages on behalf of the entire class, which money is then distributed to the absent class members. (§8.05[E])

Class Certification: Before a court will permit an action to proceed as a *class action*, it must first determine that such a proceeding is appropriate under the *Federal Rules of Civil Procedure*. This determination is known as class certification. Fed. R. Civ. P. 23 requires the court to find that the proposed action meets four criteria: (1) *numerosity*; (2) *commonality*; (3) *typicality*; and (4) *adequacy*. (§8.05 [E])

Class Representative: In a *class action*, the class representative(s) are the individual(s) or entity(ies) that are named to sue on behalf of the class of others similarly situated. (§8.05[E])

Clayton Act: This, the second major federal antitrust statute, was passed in 1914. The act, including subsequent amendments such as the *Robinson-Patman Act* (1936), the *Antitrust Procedures and Penalties Act* (1974), and the *Hart-Scott-Rodino Antitrust Improvements Act* (1976), covers a broad range of

antitrust law. *Section 7* of the act, which is the cornerstone of federal merger enforcement, prohibits mergers, acquisitions, or joint ventures “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be to substantially lessen competition or to tend to create a monopoly.” The act is codified at 15 U.S.C. §§12–27 and 29 U.S.C. §§ 52–53. (§§2.03, 2.11[E], and *passim*)

Clean Team: Such a group is made up of individuals with no ability to influence pricing who are assembled for the purpose of reviewing sensitive materials received from competitors during merger negotiations. Clean teams are assembled to help prevent accusations of *gun-jumping*. (§6.10)

Cluster Market: A *relevant product market* consisting of a “cluster” of distinct but related goods and services. *See,* e.g., *United States v. Grinnell Corp*., 384 U.S. 563, 572 (1966). (The finding was of a cluster market consisting of fire and burglary protection services.) (§5.04)

Cognizable Efficiencies: Those improvements in economic *efficiency* that are likely to result from a proposed merger or acquisition are those that the *Antitrust Division of the Department of Justice* and the *Federal Trade Commission* will recognize as mitigating factors when analyzing the transaction to determine its competitive impact. The term is used in the agencies' *1992 Horizontal Merger Guidelines*. (§5.02.)

Collateral Estoppel: This legal doctrine prevents parties from relitigating in a new action issues already decided as between them in a different action on a different subject matter. (*See* also *res judicata.*)

Collateral Restraints: These restraints are related but not central to the main purpose of a *joint venture*. (§§3.09, 5.03)

Collective Dominance: This term is used to describe the *market power* exercised jointly by a few companies, usually four or less. It is similar to *oligopoly*.

Collusion: This refers to surreptitious, illegal, concerted activity such as *price-fixing* or *bid-rigging.* (§3.02[A])

Committed Entry: This term is defined in Section 3 of the *1992 Horizontal Merger Guidelines* as “new competition that requires expenditure of significant *sunk costs* of entry and exit.” (§5.02[A][4][a])

Commonality: This is one of the four criteria that must be satisfied before a court will order *class certification* in a *class action*. To satisfy this criterion, the court must find that there are questions of law and fact common to all members of the would-be class. (§8.05[E][3])

Common Law: This is law created by judicial decisions, with reliance on *precedent,* rather than *legislative action*. (Appendix A §A.02[B])

Competitive Impact Statement (CIS): This document must be filed simultaneously with a proposed *consent decree*, describing, among other things, the decree; the nature of the proceedings; and alternative remedies considered and rejected. Procedures governing competitive impact statements are set forth in the *Antitrust Procedures and Penalties Act*, 15 U.S.C. §16(b)–(h). (§§2.03[F], 6.12, 8.02[B], 8.03[B])

Complaint: This document contains a short statement of a *plaintiff's* claims, the filing of which is necessary to start a case in the U.S. federal courts. (Appendix A §A.03[A])

Complementary Bid: In a competitive bidding situation, a bidder may intentionally submit an uncompetitively high bid in order to preserve the illusion of competition. If he does so pursuant to an agreement with one or more other bidders, such a bid is known as a complementary bid, is a form of *bid-rigging*, and is normally treated as a *per se* illegal violation of *Section 1 of the Sherman Act*. (§3.04[A][1])

Compliance Section: Section of the *Federal Trade Commission* responsible for ensuring compliance with FTC orders and remedies. (§§6.12, 8.03)

Concentration: *See Market Concentration*.

Concerted Refusal to Deal: This is a *per se illegal* agreement among competitors not to deal with one or more competitors, suppliers, or customers (also known as a *group boycott*). (§§3.04[A][2], 4.02[B])

Conditioning: This is an agreement whereby the seller refuses to sell one product (the tying product) unless the buyer also agrees to buy another, separate product (the tied product). It is also known as *tying* or *sales on condition*. Tying is generally *per se illegal* if the seller has the economic *power* necessary to enforce the tie-in. Otherwise, it is tested under the *rule of reason*. The tying of commodities can violate either Section 1 of the *Sherman Act* or Section 3 of the *Clayton Act*, while the tying of services or a commodity to a service can violate Section 1 of the Sherman Act. The Supreme Court's leading cases on tying include *Northern Pa. Ry. Co. v. United States*, 356 U.S. 1 (1956); *Fortner Enterprises v. United States Steel Corp*., 394 U.S. 495 (1969) (*Fortner I*); and *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610 (1977) (*Fortner II*); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992); *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2 (1984); and *Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28 (2006). (§§3.04[A][2], 3.04[B][2])

Conduct Remedies: Conduct (or behavioral) remedies are those imposed on adjudged monopolists or would-be merger partners that regulate the future conduct of the monopolist or merged entity. Conduct remedies may include requirements that the monopolist or merged entity refrain from certain types of conduct (such as tying or exclusive dealing), make certain facilities

generally available, or make certain types of information public. (Compare *Structural Remedies*.) (§§4.05, 6.12, 8.02, 8.03)

Conglomerate Merger (or conglomerate acquisition): This is a merger or acquisition that results only in the acquiring company adding new products to its offerings, i.e., not a merger between competitors (*horizontal merger*) or between a supplier and a customer (*vertical merger*). (§5.06)

Conscious Parallelism: Similarly timed actions, such as the announcements of price increases by horizontal competitors, that, though not illegal in the absence of an agreement, would constitute a violation of *Sherman Act, Section 1* if done pursuant to agreement between the competitors. *See,* e.g., *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954) (" . . .'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely . . ."). (§3.02[A])

Consent Decree: This judicial order embodies the terms of a private entity's or individual's agreed settlement of the charges contained in a *Federal Trade Commission* or *Antitrust Division of the Department of Justice* civil antitrust complaint brought against the private entity or individual. Procedures relating to consent decrees are set forth in the *Antitrust Penalties and Procedures Act,* 15 U.S.C. §16(b)–(h). (§§2.03[F], 6.12, 8.02, 8.03)

Conspiracy: This is an agreement to do an illegal act. In the words of the Supreme Court, a conspiracy is "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). Alternatively, it is a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Services Corp.*, 465 U.S. 752, 768 (1984). (§3.02)

Constitution: The U.S. Constitution, which was ratified in 1788, is the original and basic set of laws creating and governing the United States, the "Supreme Law of the Land." (Appendix A §A.01)

Constitutional, Constitutionality: Actions taken by the federal or state governments are constitutional if they do not violate the *Constitution, unconstitutional* if they do. The federal courts, using the power of *judicial review* as declared in *Marbury v. Madison*, 5 U.S. 137 (1803), make the determination of constitutionality. (Appendix A §A.01[C][2])

Consumables: These are products, or parts or components of larger products (e.g., foodstuffs, automobile tires, razor blades, office supplies), that are consumed, wear out, or are used and discarded.

Continuing Violation: So long as an antitrust violation is continuing, the plaintiff's claim continues to *accrue* and the *statute of limitations* does not begin to run. (§3.08[A])

Contribution: This is the right of one coconspirator who has been found civilly liable for damages, or who pays to settle a case, to recover from other coconspirators who have not paid the plaintiffs. The Supreme Court held that there is no right to contribution in antitrust cases in *Texas Industries v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981), stating, "[t]he federal courts are not empowered to fashion a federal common-law rule of contribution among antitrust wrongdoers. Contribution does not implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." (§8.05[H])

Control: For purposes of *Hart-Scott-Rodino Antitrust Improvements Act* analysis, an individual or entity controls a corporation if it owns 50 percent or more of the corporation's voting securities or has a contractual right to appoint 50 percent or more of the corporation's board of directors. Control of a partnership consists of ownership of 50 percent or more of the partnership interests or the right to 50 percent or more of the assets on dissolution. 16 C.F.R. §801.1. (§§3.03, 6.03)

***Copperweld* Doctrine:** This is the doctrine, based on the Supreme Court's holding in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), that a parent company and its wholly owned subsidiary cannot be found liable for conspiring with each other because they are part of a single entity. *See also Intraenterprise Conspiracy Issue*. (§3.03)

Corporate Amnesty Program: *See Corporate Leniency Program*.

Corporate Immunity Program: *See Corporate Leniency Program*.

Corporate Leniency Program: If several specific conditions are met, this program, instituted by the *Antitrust Division of the Department of Justice,* provides leniency, i.e., no criminal charges, for companies that discover and report antitrust violations committed by their employees. It is also known as the corporate amnesty or corporate immunity program. (*See also Individual Leniency Program*) (§8.02)

Cost Justification Defense: One defense to a claim of *price discrimination,* under the *Robinson-Patman Act,* is that the lower price charged to one customer (the *favored customer*) was justified by the fact that the supplier's costs to supply that customer were lower than its costs to supply the *disfavored customer*. (§§2.05, 7.06[A])

Covenants Not to Compete: Such agreements (also known as *non-competes*), found most often in employment contracts or contracts for the sale of a business, require one or more parties to refrain from competing with the other(s) for a specified time period. Non-competes can be found to violate the antitrust laws. The legality of non-competes is generally judged under the *rule of reason*. (§3.04[B])

Criminal Enforcement: These are actions taken to enforce the *antitrust laws* in which the *enforcement agency* seeks a criminal conviction of the defendant and the imposition of *criminal penalties,* such as jail time or criminal fines. (§8.02[A])

Criminal Intent: In *United States v. United States Gypsum Co.*, 438 U.S. 422, 435, 436 n.13, 443 n.20 (1978), the Supreme Court held that in order to obtain a criminal conviction for an antitrust violation, the prosecution must prove that the defendant possessed "criminal intent" and that it may do so by proving either that the (1) defendant's conduct had an anticompetitive effect and was undertaken with knowledge of its probable consequences or (2) defendant acted with the purpose of producing anticompetitive effects. (§§3.07, 8.02[A])

Criminal Sanctions: These penalties are imposed upon an individual or entity that has been convicted of a crime. Criminal sanctions include probation, jail time, monetary fines, and other penalties. (§§2.02, 8.02)

Cross-Elasticity of Demand: "The responsiveness of the sales of one product to price changes of the other." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956). This concept is used in *market analysis* to help determine the *substitutability* of one product for another. (§§4.02, 5.02, 5.04)

Cross Examination: At trial, this is the questioning of a witness called to testify by an opposing party. (Appendix A §A.03[A][5])

Cross-licensing: This is the practice, judged under the *rule of reason*, whereby two or more patent holders license each other to use the technology covered by their respective patents. (§4.06[A])

Curt Flood Act of 1998: Codified at 15 U.S.C. §26b, this federal statute partially repeals the judicially created antitrust exemption granted major league baseball in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.,* 346 U.S. 356 (1953) (*per curiam*); and *Flood v. Kuhn*, 407 U.S. 258 (1972). (§2.11[H])

Customer Allocation: This is a *per se* illegal practice whereby competitors agree not to compete with each other for sales to certain customers, either individually or by location: "One of the classic examples of a *per se* violation of §1 [of the Sherman Act] is an agreement between competitors at the same level of market structure to allocate territories in order to minimize competition." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972). *See Market Allocation.* (§3.04[A][2])

Damages: Monetary payment sought by an aggrieved party in a *legal action*, money damages are a form of *legal relief*, as contrasted with *equitable relief*. (Appendix A §A.03[A])

Declaration: This unsworn statement may be used in lieu of a notarized affidavit or other sworn statement whenever the latter is required by federal law, agency, or court. 28 U.S.C. §1746. If executed outside the United States, the declaration may simply state: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on (date). (Signature)." If executed within the United States: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date) (Signature)." This provision has broad application and is especially useful when working with clients outside the United States who do not have ready access to a U.S.-qualified notary. It is also helpful when preparing *Hart-Scott-Rodino Premerger Notification and Report Forms*, which must be accompanied by various certifications. (§§2.13[A], 6.04)

Declaratory Judgment (DJ): This is a *Judgment* declaring the legal rights and obligations as between the *plaintiff* and *defendant* in a legal action. Fed. R. Civ. Pro. 57; 28 U.S.C. §§2201, 2202. (Appendix A §A.03[A][1])

Declaratory Relief: *See Declaratory Judgment.*

Defendant: In a legal action in federal court, the defendant is the party who has been sued by the *plaintiff* seeking *legal, equitable,* or *declaratory relief*. (Appendix A §A.03[A][1])

Defense Production Act of 1950: This federal legislation provides antitrust immunity for those participating in certain programs to promote the national defense. Codified at 50 U.S.C. app. §2158. (§2.11[D])

Deliberations: This is the phase of a trial in federal court in which the jury retires to a private room to discuss the case and reach their decision. (Appendix A §A.03[A][5])

Demand Curve: This graphic curve depicts how customers respond to an increase (or decrease) in the price of a product, i.e., to what extent price increases (or decreases) will affect the volume of sales of the product. (*See Cross-Elasticity of Demand, Elasticity of Demand,* and *Inelasticity of Demand.*) (§§4.02, 5.02, 5.04)

Demand-Side Substitutability: In merger analysis, this refers to the ability of customers for a product to switch to other products if prices for the product rise as the result of a merger of two or more producers. (*See Cross-Elasticity of Demand, Elasticity of Demand,* and *Inelasticity of Demand.*) (§§4.02, 5.02, 5.04)

***De Novo* Entry:** This is entry into a *market* from scratch rather than through the acquisition of a company already participating in that market; sometimes referred to as *Greenfield Entry.* (§§5.02, 5.04)

Department of Justice (DOJ): This is the principal law enforcement agency of the executive branch of the United States government, headquartered in Washington, D.C. The DOJ's *Antitrust Division* has responsibility for the *criminal enforcement* of the federal antitrust laws and shares responsibility for the *civil enforcement* of those laws with the *Federal Trade Commission*. (§8.02 and *passim*)

Deposition: Part of the pretrial *discovery* process, depositions are examinations of witnesses under oath conducted outside of the courtroom and recorded stenographically, or on audio- or video-tape, for possible later use at trial or in connection with a motion for *summary judgment*. (Appendix A §A.03[A][3])

Devices for Avoidance: This term is used by the *Hart-Scott-Rodino Rules* to describe practices engaged in solely to avoid having to file a *Premerger Notification and Report*. Such practices are punishable by fines of up to $11 thousand per day over the time the parties are not in compliance with the reporting requirements. *See* 16 C.F.R. §801.90. (§6.02[B])

Dicta: *See obiter dicta*.

Direct Evidence: This evidence, if believed, proves the existence of a fact in issue without requiring that the finder of fact draw inferences or make deductions, as distinguished from indirect or *circumstantial evidence*.

Direct Examination: At trial, this is the questioning of a witness by the attorney for the party that called the witness to testify. (Appendix A §A.03[A][5])

Direct Purchaser Rule: This rule, set forth in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), restricts the ability to sue for *price-fixing* to those who purchased the price-fixed products directly from the price-fixers; also known as the *Illinois Brick* or *indirect purchaser rule*. Some individual state antitrust laws do allow suits by indirect purchasers. (§3.06[A][1])

Discovery: This is the pretrial phase of a case in federal court during which the parties exchange information relevant to the case via responses to *document requests* and *interrogatories* and *depositions*. This is phase is governed by Fed. R. Civ. Pro. 26–37. (Appendix A §A.03[A][3])

Disfavored Customer: This term is used in *Robinson-Patman Act price discrimination* context to describe the buyer who is the victim of price discrimination, i.e., the customer who is asked to pay a higher price than another buyer. (§7.02)

Dismissal Motion: This is the formal request by a defendant in federal case that the court throw plaintiff's *complaint* out of court on the ground that, on its face, the complaint will not support a finding that the plaintiff is entitled to relief from the defendant. (Appendix A §A.03[A][2])

District Court: The eighty-four U.S. federal district courts are the trial-level courts in the U.S. federal judicial system and the courts in which virtually all antitrust suits must first be brought. (Appendix A §§A.01[C], A.03[A], A.04[D])

Diversity Jurisdiction: This is one of two types of federal court *subject matter jurisdiction*, the other being *federal question jurisdiction*. Diversity jurisdiction allows federal courts to decide controversies that arise between states; a state and a citizen of another state; citizens of different states; and a state or a citizen of a state and any foreign state, or foreign citizen or subject. *See* U.S. Const. art. III, §2; 28 U.S.C. §1332. (Appendix A §A.01[C][1])

Divestiture: This refers to the sale of assets or a subsidiary, usually in the context of making an otherwise problematic merger or acquisition acceptable to the federal merger enforcement authorities (i.e., the *Antitrust Division of the Department of Justice* and the *Federal Trade Commission*). (§§4.05, 6.12)

DJ: *See Declaratory Judgment.*

Document Requests: This device is used during the *discovery* phase of federal court case that allows one party to ask another to turn over documents and other physical objects relevant to the matter in controversy. Fed. R. Civ. Pro. 26–37. (Appendix A §A.03[A][3])

DOJ: *See Department of Justice.*

Downstream: In the *chain of manufacture and distribution,* purchasers are said to be downstream from their suppliers. Thus, a consumer is downstream from a retailer, which is downstream from a wholesaler, which is downstream from a manufacturer, etc. (*See Vertical* and *Horizontal.*)

Early Termination: The *Federal Trade Commission* or *Antitrust Division of the Department of Justice* may terminate the *Hart-Scott-Rodino Thirty-Day Waiting Period* in less than thirty days if the parties request early termination and the agency decides that the proposed transaction poses no threat to competition. (§§6.02, 6.08)

Early Termination Box: The filing party must check (tick off) this box on the first page of *Hart-Scott-Rodino Premerger Notification Form* in order to obtain *early termination* of the *Hart-Scott-Rodino Thirty-Day Waiting Period*. (§§6.02, 6.08)

Economic Power: An element of proof of a per se *tying* claim, it requires proof that the defendant seller has sufficient control over the market for one product to condition its sale on the purchase of a different product. The Supreme Court has stated that the level of control needed to prove economic power is not as great as that needed to prove market (or monopoly) power. *Fortner Enterprises v. United States Steel Corp*., 394 U.S. 495, 502–503 (1969)

("economic power over the tying product can be sufficient even though the power falls short of dominance"). (*See Market Power* and *Monopoly Power*.) (§§3.04[A], 3.04[B])

Efficiencies: In merger analysis, increased economic efficiencies that will result from a proposed merger or acquisition—resulting in lower costs per unit of output and thus to the ability to charge lower prices to customers or otherwise compete more effectively—are often used as an argument to support what might otherwise appear to be an anticompetitive transaction. The subject of efficiencies was one of the principal topics of the 1997 revisions to the *1992 Horizontal Merger Guidelines*. (§§4.02, 5.02, 5.04)

Elasticity of Demand: In merger analysis, this refers to how buyers will respond to an increase or decrease in the price of a product. Demand is said to be elastic if buyers will decrease their purchases dramatically when faced with a price increase and *inelastic* if a price increase does not lead to a significant decrease in purchases. As stated by the Supreme Court in *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." (§§4.02, 5.02, 5.04)

Elzinga-Hogarty Test: This test, devised by Kenneth Elzinga and Thomas Hogarty analyzes shipping patterns to assist in *geographic market definition*. (§5.04[B])

Entrenchment Theory: The theory, utilized in *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967), that acquisition of a firm with a dominant position by a non-competitor with substantial resources may violate *Section 7* of the *Clayton Act* by solidifying the acquired company's dominant market position. (§5.06[C])

Entry Barriers: (barriers to entry): These are items, such as patents, high customs duties, or shipping costs, that make it difficult or impossible for a would-be competitor to enter a new *market*. At least in theory, high cost alone is not considered an entry barrier. (§§4.02, 5.02, 5.04)

Equitable Relief: Such an order is issued by a *federal court* in response to a request from one party to a *legal action* for a *temporary restraining order,* a *preliminary injunction,* or a *permanent injunction.* The order directs another party to act or refrain from acting to prevent harm to the requesting party. Equitable relief is distinguished from *legal relief* in which one party is directed to pay another money *damages. See Equity.* (Appendix A §A.03[A][1])

Equitable Tolling: This is a suspension of the running of the statute of limitations on fairness grounds. (§3.08[A])

Equity: Broadly, equity equates to basic fairness. At one time in the U.S., there were separate courts of law and equity. The former employed juries and

provided *legal relief*, i.e., money *damages*. The latter employed only judges and could issue *equitable relief* based on determinations of relative fairness to the parties. (Appendix A §A.03[A][1])

Essential Facilities Doctrine: This is the doctrine in the law of *monopolization* and *joint ventures* under which a party or parties that controls facilities essential to effective competition may be required to permit its competitors access to those facilities. First discussed by the Supreme Court in *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912) and most recently in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko,* 540 U.S. 398 (2004), *reversing* 305 F.3d 89 (2d Cir. 2002). (§§3.09[D], 4.02[B])

Exclusive Dealing: A *vertical restraint*, judged under the *rule of reason,* is one whereby a supplier and customer agree to deal exclusively with each other for a certain product(s) in certain geographic areas. (§3.04[B][2])

Exclusive Territories: Vertical restraint judged under the *rule of reason*, is one whereby the supplier limits geographic areas in which distributors may sell its products. (§3.04[B][2])

Executive Branch: This branch of the *tripartite federal government* consists of the president, the vice president and their appointed assistants and related departments, including the *Department of Justice*. The executive branch is charged with ensuring that the laws of the United States are "faithfully executed." U.S. Const. art. II. (Appendix A §A.01[B])

Exemplary Damages: Exemplary (or *punitive*) damages are sums awarded by the court or jury in a civil suit over and above damages designed to compensate the successful plaintiff for actual financial losses. Exemplary damages are meant to make an example of (or punish) defendants if their conduct is deemed especially outrageous, egregious, or blameworthy. (§8.05[L])

Exemptions: Certain activities and industries, such as labor, agriculture, insurance, and major league baseball, enjoy partial or complete statutory or judicial exemptions from the strictures of the antitrust laws. Some regulated industries also enjoy exemptions to the extent the questioned activity is already being regulated. (§§2.03, 2.11)

Exiting Assets Defense (or Doctrine): In merger analysis, it is argued that a seemingly anticompetitive acquisition of assets should be permitted because in its absence the acquired assets would simply be abandoned or otherwise removed from the market. *See*, e.g., *United States v. General Dynamics Co.*, 415 U.S. 486, 503 (1974) (*General Dynamics*) ("While the company had been and remained a 'highly profitable' and efficient producer of relatively large amounts of coal, its current and future power to compete for subsequent long-term contracts was severely limited by its scarce uncommitted resources"). This defense is closely related to the *failing firm defense*. (§§5.02, 5.04)

Expediting Act: Passed in 1903 and codified at 15 U.S.C. §29, this federal statute provides for direct appeal to the U.S. Supreme Court in actions in which the government is a party and *equitable relief* is sought. (§2.13[D])

Export Trading Company Act: This federal statute, passed in 1982 as a companion to the *Webb-Pomerene Act*, provides antitrust immunity for certain export activities upon receipt of Certificate of Review from the Secretary of Commerce. Codified at 15 U.S.C. §§4001–4003 and 4011–4021. (§2.11[B])

Exposure: This term is used to describe the total potential criminal and/or civil liability faced by a defendant accused of an antitrust violation.

Extraterritorial (or extraterritoriality): The term is used to characterize the ability of the antitrust laws and the antitrust enforcement authorities to reach and punish activities occurring outside the United States. The leading case on extraterritoriality is *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). There, the Supreme Court held that U.S. antitrust laws may be used to punish activity that occurred outside the United States if the activity was designed to and did adversely affect competition in the United States. Also of importance is the *Foreign Trade Antitrust Improvements Act of 1982* (15 U.S.C. §6a). Known as the FTAIA, this Act states that the Sherman Act shall not apply to trade or commerce with foreign nations unless the conduct (1) has "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce, U.S. import commerce, or U.S. export commerce, *and* (2) gives rise to a claim under Sections 1–7 of the Sherman Act. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). (§§2.08, 3.08[B])

Fact of Injury: This term is often used synonymously with *impact* or *injury*. A private plaintiff seeking to make out a claim for a federal antitrust violation must prove that he has been injured in his business or property by the complained of conduct (i.e., the fact of injury or impact) in order to recover damages. (§3.06)

Failing Company Defense (Failing Firm Doctrine): In merger analysis, it is argued that a seemingly anticompetitive merger or acquisition should be permitted because one of the parties would otherwise fail, thereby removing its assets from the marketplace and diminishing competition. In *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), the Supreme Court stated that three elements must be satisfied to establish the defense: (1) grave probability of business failure; (2) no alternative, less anticompetitive buyer; and (3) dim or nonexistent likelihood of successful reorganization through receivership or under the Bankruptcy Code. *See also Exiting Assets Defense*. (§§5.02, 5.04)

Favored Customer: In cases alleging *price discrimination* in violation of the *Robinson-Patman Act*, the plaintiff claims that it has been charged a higher price than the defendant's "favored customer." (§7.02)

Federal Circuit: This is shorthand for the United States Court of Appeals for the Federal Circuit, the *Circuit Court of Appeals* that sits in Washington, D.C., and specializes in handling appeals of cases involving patents and related issues. (Appendix A §A.04[D][2])

Federal Court: Shorthand for all U.S.—as opposed to state—courts, including the *Supreme Court,* the *Circuit Courts of Appeal*, and the *district courts.*

Federal Government: The national government of the United States, centered in Washington, D.C., and consisting of the *legislative, executive*, and *judicial branches*. (Appendix A §A.01)

Federal Question Jurisdiction: This is one of the two types of *federal court subject matter jurisdiction*, the other being *diversity jurisdiction*. The federal question jurisdiction gives the federal courts the power to decide all *cases or controversies* arising under the *Constitution* and the federal laws and treaties of the United States. U.S. Const. art. III. (Appendix A §A.01[C][1])

Federal Reporter: This series of volumes is published by West and contains the text of opinions issued by U.S. federal *circuit courts of appeal.* Abbreviated Fed., Fed. 2d, and Fed. 3d. (Appendix A §A.04[D])

Federal Rules of Civil Procedure: Rules that govern proceedings of civil cases in U.S. *district courts*, they are abbreviated F.R.Civ.P. or Fed. R. Civ. P. (Appendix A §A.03)

Federal Rules Decisions: This series of volumes is published by West and contains the text of opinions issued by U.S. *district courts* relating to interpretation of the *Federal Rules* of procedure and evidence; abbreviated F.R.D. (Appendix A §A.04)

Federal Rules of Criminal Procedure: These rules govern the proceedings of criminal cases in U.S. *district courts* and are abbreviated F.R.Crim.P. or Fed.R.Crim.P. (Appendix A §§A.04[C]; 8.02[A])

Federal Rules of Evidence: These rules govern the use and admissibility of evidence in trials in U.S. *district courts*; abbreviated F.R.E. (Appendix A §A.03[A][5])

Federal Supplement: This series of volumes is published by West and contains the text of opinions issued by federal *district courts*; abbreviated Fed. Supp., Fed. Supp. 2d. (Appendix A §A.04[D])

Federal System: The U.S. system of government was created by the *Constitution* and vests certain powers in a *tripartite federal government*, while leaving the remaining powers to the states and the people. (Appendix A §A.01)

Federal Trade Commission (FTC): This federal agency is located in Washington, D.C., and shares responsibility with the *Antitrust Division of the*

Department of Justice for the *civil enforcement* of the federal antitrust laws. The FTC's share includes enforcing the *Clayton Act's* prohibition against anticompetitive mergers and the *FTC Act's* prohibitions against unfair competition. It also includes responsibility for administering the *Hart-Scott-Rodino Antitrust Improvements Act*, which governs *premerger notification*. Information about the FTC is available at http://www.ftc.gov. (§8.03 and *passim*)

Federal Trade Commission Act (FTC Act): This federal legislation, passed as companion to the *Clayton Act* in 1914, spells out authority and responsibilities of the *Federal Trade Commission* and is codified at 15 U.S.C. §§41–58. (§§2.06, 8.03)

Field Offices: The *Antitrust Division* of the *Department of Justice*, which is headquartered in Washington, D.C., also maintains seven regional field offices in New York City; Philadelphia, Pennsylvania; Atlanta, Georgia; Cleveland, Ohio; Chicago, Illinois; Dallas, Texas; and San Francisco, California. (§8.02)

Fifth Amendment: Part of the *Bill of Rights*, the Fifth Amendment to the U.S. *Constitution* provides individuals with a *privilege against self-incrimination*, i.e., the right not to be compelled to testify against themselves. U.S. Const. amend. V. (Appendix A §§A.01[D]; 8.02[A])

Firewall: This term is used to describe restrictions on the flow of information and/or employees between two commonly controlled business units, usually engaged in *vertically* related businesses. The erection of firewalls is sometimes required by the DOJ or FTC as a condition of allowing parties to complete potentially anticompetitive mergers or acquisitions. (§6.12[A])

Fisherman's Collective Marketing Act: This federal legislation, passed in 1932, provides antitrust exemption for fishermen's cooperatives similar to that granted to agricultural cooperatives by the *Capper-Volstead Act*. Codified at 15 U.S.C. §§521–22. (§2.11[F])

Fixed Costs: These are manufacturing costs, such as rent and general and administrative expenses, that do not vary with the number of products produced. (Compare *Variable Costs*.) (§4.02[B][1])

Fix-It-First Policy: This *FTC/DOJ* merger enforcement policy requires parties seeking a negotiated settlement of a government challenge to a proposed merger or acquisition to accomplish any divestiture or other remedy before being allowed to close their transaction. (§6.12)

FOIA: *See Freedom of Information Act*

Follow-on Litigation: This private civil litigation is based upon government criminal or civil enforcement actions; sometimes also known as piggyback litigation. (§8.05)

Form CO: This form must be filed with the European Commission to notify it of the parties' intent to proceed with a merger, acquisition, or joint venture meeting certain prescribed criteria; analogous to the *Hart-Scott-Rodino Premerger Notification and Report*.

Foreign Trade Antitrust Improvements Act of 1982: This act, known as the FTAIA, was added to the *Sherman Act* by Congress to clarify the *extraterritorial* reach of the Sherman Act. It states that the Sherman Act shall not apply to trade or commerce with foreign nations unless the conduct (1) has "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce, U.S. import commerce, or U.S. export commerce, *and* (2) gives rise to a claim under Sections 1–7 of the Sherman Act; codified at 15 U.S.C. §6a. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155 (2004). (§§2.08, 3.08[B])

4(c) Documents: These documents respond to item 4(c) of the *Hart-Scott-Rodino Premerger Notification and Report.* Item 4(c) requires the production of documents created by or for an officer or director of the reporting entity (or any entity within its *ultimate parent entity*) that analyze the proposed transaction from the perspective of "market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets . . .." *Hart-Scott-Rodino Premerger Notification and Report Form, Appendix/Instructions.* (§6.04[A][4][c])

Fraudulent Concealment Doctrine: This doctrine *tolls* (i.e., postpones the running of) the statute of limitations on antitrust claims if the plaintiff victim can show that the defendant fraudulently concealed the violation from the plaintiff. A plaintiff seeking to defeat a statute of limitations defense on this ground must prove that: (1) the defendant wrongfully concealed the violation; (2)through no fault of its own, the plaintiff failed to timely discover the basis of his or her claim; and (3) the plaintiff exercised due diligence in protecting his or her own interests. Mere silence by the defendant is not normally enough—the defendant must have taken affirmative steps to conceal the violation, although some courts have found certain conspiracies to be "self-concealing." (§3.08[A][2])

Freedom of Information Act: The Freedom of Information Act (FOIA), 5 U.S.C. §552, allows citizens to demand and receive certain documents and information from the federal government. (§§2.07, 6.04)

From Scratch Entry: Sometimes referred to as *Greenfield* or *De Novo Entry*, this is an entry into a *market* from scratch rather than through the acquisition of a company already participating in that market. (§§5.02, 5.04)

Functional Discount: If a manufacturer sells both to wholesalers who resell to retailers and directly to retailers, the manufacturer will often sell to the wholesaler at a lower price than to the retailer. This is known as a functional discount, because it reflects the different functions performed by the

wholesaler and the retailer. If reasonable and not anticompetitive, such a discount can survive challenge as *price discrimination* under the *Robinson-Patman Act. See Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990). (§7.06 [A])

Fungible: Goods are said to be fungible if those from different sources are indistinguishable.

FTAIA: This is the acronym for the *Foreign Trade Antitrust Improvements Act of 1982* (15 U.S.C. §6a).

FTC: *See Federal Trade Commission.*

Geographic Market: This refers to the geographic area in which products comprising a *product market* compete with one another to form a *market*:

> The geographic market selected must, therefore, both "correspond to the commercial realities" of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.

Brown Shoe Co. v. United States, 370 U.S. 294, 336–37 (1962). (§§4.02, 5.02, 5.04)

Government Action Toll: This is the suspension of the running of the *statute of limitations* pursuant to Section 5(i) of the *Clayton Act* (15 U.S.C. §16 (i)) because of government action against defendants. (§3.08[A][1])

Grand Jury: Prosecutors from the *Antitrust Division of the DOJ* may empanel a grand jury to assist them in investigating suspected antitrust violations. Grand juries have the authority to subpoena evidence and witnesses and return *indictments* if they find *probable cause* to believe that there was in fact a violation. (§8.02[A])

Grand Jury Subpoena: This is an order from an (antitrust) grand jury requiring the recipient to appear and testify or produce documents or other evidence to the grand jury. (§8.02[A])

Greenfield Entry: This is entry into a *market* from scratch rather than through the acquisition of a company already participating in that market; sometimes referred to as *De Novo* or *From Scratch Entry.* (§§5.02, 5.04)

Group Boycott: This is a *per se illegal* agreement among competitors not to deal with one or more competitors, suppliers, or customers (also known as a *concerted refusal to deal*). The Supreme Court's most recent decision in this area was *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128 (1998). *See also Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). (§3.04[A][2])

Gun-Jumping: The Federal Trade Commission and the Department of Justice take a dim view of companies that engage in "gun-jumping," the practice of

behaving as if they have already completed an acquisition or merger before they have received Hart-Scott-Rodino clearance to complete the transaction. The agencies have threatened to charge such companies with violations of the Hart-Scott-Rodino Act, or even of Section 7 of the Clayton Act or Sections 1 or 2 of the Sherman Act. The agencies also caution against companies going too far during the period between receipt of Hart-Scott-Rodino clearance and actual closing. (§6.10)

Hart-Scott-Rodino Antitrust Improvements Act (the Hart-Scott-Rodino or HSR Act): This federal antitrust act, passed in 1976, requires parties to mergers, acquisitions, or joint ventures of a certain size to file *Premerger Notification and Reports* with federal antitrust authorities and wait thirty days (fifteen days in the case of a *cash tender offer*) before closing to allow the authorities to examine the proposed transaction for possible antitrust concerns; part of the Clayton Act. (§2.04, Chapter 6)

Hart-Scott-Rodino Rules (HSR Rules): These are the federal rules promulgated to explain and amplify the Hart-Scott-Rodino Act. 16 C.F.R. §§801–803. The rules are also known as the *Premerger Rules*. (Chapter 6, §8.03)

Herfindahl-Hirschman Index (HHI): This one-number index of *market concentration* is used in *merger analysis* and obtained by totaling the squares of the *market shares* of all competitors in the *market*. The *DOJ* and *FTC* adopted the HHI as their measure of concentration for merger analysis in their *Merger Guidelines*. (§5.02[A][2])

HHI: *See Herfindahl-Hirschman Index.*

Highly Concentrated Market: As defined by the DOJ/FTC *Merger Guidelines*, this is a *market* in which the *Herfindahl-Hirschman Index* is greater than 1800. (§5.02[A][2])

Hold Separate Order: This order, usually contained in a *consent decree*, requires merging parties to hold assets that must be divested to cure antitrust concerns separate from the newly merged entity. (§6.12[A])

Horizontal: If they occupy the same level in the *chain of distribution*, direct competitors have a horizontal relationship. *See*, e.g., *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints"). (§3.02 and *passim*)

Horizontal Merger or Acquisition: This refers to a merger or acquisition involving two companies on the same level in the *chain of distribution*, i.e., involving competitors. (§§5.02, 5.04)

Horizontal Price-Fixing: This is a *per se* illegal conspiracy or agreement between competitors to charge specified prices. (§§3.02, 3.04[A])

Horizontal Restraint: This is any agreement between two companies in a *horizontal* relationship (i.e., between competitors). (§§3.02, 3.04)

House of Representatives: This is one of the two houses of *Congress*, the other being the *Senate*, that make up the *legislative branch* of the U.S. *federal government*. (Appendix A §A.01[A])

HSR Act: *See Hart-Scott-Rodino Act.*

HSR Rules: *See Hart-Scott-Rodino Rules.*

***Illinois Brick* Doctrine:** This doctrine, set forth in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), restricts the ability to sue for *Price-Fixing* to those who purchased the price-fixed products directly from the price-fixers. It is also known as the *direct (or indirect) purchaser rule*. (§3.06[A][1])

Immunity: *Attorneys* at the *DOJ's Antitrust Division* involved in prosecuting criminal antitrust actions often offer immunity to witnesses in exchange for their cooperation or testimony. *Use immunity* protects an immunized witness from the use of his testimony against him. (18 U.S.C. §§6001–6005.) If prosecutors can show that they obtained evidence against the witness independent of what they learned from him, they can still prosecute him. *Transactional immunity* is an outdated concept pursuant to which a witness would be immunized from prosecution for any activity that relates to the matter about which he testified. Immunity may be provided pursuant to a judicial order or to a letter agreement between the prosecutors and the witness. (*See Judicial Immunity* and *Letter Immunity*.) (§8.02[A])

Impact: This term is often used synonymously with *injury* or *fact of injury*. A private plaintiff seeking to make out a claim for a federal antitrust violation must prove that he has been injured in his business or property by the complained of conduct (i.e., impact) in order to recover damages. (§3.06[A])

Inadvertent Failure to File: Parties occasionally discover that they have completed a merger, acquisition, or joint venture for which they should have filed *Hart-Scott-Rodino Premerger Reports* but did not. If this happens, the parties still have an obligation to file their reports. The FTC has announced a *one free bite policy* for inadvertent failures to file. If the agency is convinced that the failure to file was truly inadvertent, i.e., not the result of gross negligence or reckless disregard of the act, and if it is the party's first offense, the FTC normally will not seek sanctions. It will, however, monitor future compliance. A second failure could result in sanctions being sought for the earlier failure as well. (§6.06)

Incipiency Standard: Term used to describe *Clayton Act, Section 7's* prohibition against mergers or acquisitions the effect of which "*may* be to substantially lessen competition, or to *tend* to create a monopoly." (15 U.S.C. §18; emphasis added.) (§§2.03[H], 5.01, 5.04)

Indictment: This criminal complaint charges an individual or corporation with a felony violation of the (antitrust) laws. An indictment may only be returned by a *grand jury* upon a finding that there was *probable cause* to believe the violation occurred. Fed. R. Crim. P. 7. (§8.02.)

Indirect Purchaser: A purchaser who does not purchase price-fixed products directly from one of the *price-fixing* conspirators and thus may not be entitled to sue under the *Illinois Brick Doctrine.* This doctrine holds that only those who have purchased directly from the price-fixers have sustained an injury that entitles them to sue under the *antitrust laws*. (*See also direct purchaser rule*.) (§3.06[A][1])

Individual Leniency Program: This program, instituted by the *Antitrust Division of the Department of Justice*, provides leniency, i.e., a promise not to bring criminal charges, to individuals who, under certain specified conditions, report antitrust violations. (§8.02)

Inelasticity of Demand: Demand is said to be inelastic if an increase in price does not lead to a dramatic decrease in the number of products sold. There are varying degrees of demand elasticity. Complete inelasticity means there is no change in the number of units purchased when prices change. Complete elasticity is a characteristic of a perfectly competitive market in which, at any given time, all available products can be sold only at one, market-clearing price. (*See Elasticity of Demand*.) (§§4.02, 5.02, 5.04)

Informal Immunity: *Immunity* is conferred via a letter from an antitrust criminal prosecutor to a witness promising the witness *immunity* from prosecution if the witness cooperates with the prosecution; also known as *letter immunity*. (*See Immunity,* and *Judicial Immunity.*) (§8.02)

Information: A criminal complaint may be substituted for an *indictment* if accused waives right to have *grand jury* make *probable cause* determination. Fed. R. Crim. P. 7. (§8.02)

Injunction: This form of *equitable relief,* an injunction may be either *preliminary* or *permanent*, is a court order directing a party to a lawsuit to act or refrain from acting. (Appendix A §§A.03[A][1]; 2.03[L], 8.05[C])

Injunctive Relief: *See injunction*.

Injury: This term is often used synonymously with *impact* or *fact of injury*. A private plaintiff seeking to make out a claim for a federal antitrust violation must prove that he has been injured in his business or property by the complained-of conduct (i.e., impact) in order to recover damages. (§3.06[A])

Innovation Market: This is a *market* in which the participants have not necessarily made any sales of products but are in the process of developing products that if brought to market will compete with each other. Discussed in

detail in the *FTC*'s and *DOJ*'s *Antitrust Guidelines for the Licensing of Intellectual Property*, at §3.2.3. (§4.06[D])

***In Pari Delicto* Defense:** This defense is based on the allegation that the plaintiff participated with the defendant in the challenged activity. *In pari delicto* is generally not recognized as a defense to an antitrust claim: "[O]nce it is shown that the plaintiffs did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it . . . the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." *Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 139–40 (1968). (*See also Unclean Hands*.) (§3.06[A][4])

***In Personam* Jurisdiction:** Also known as personal jurisdiction, this refers to the ability of a *federal court* to exercise power over an individual or entity. The defense of lack of *in personam* jurisdiction is one frequently raised by non-U.S. citizens or entities that have been sued in U.S. courts. (3.08[B][2] Appendix A §§A.03[A][2].)

Instructions: This refers to the phase toward the end of a *jury trial* in *federal court* during which the judge instructs the jury about the law governing the case and how they are to apply that law to the facts they find during their *deliberations*. (Appendix A §A.03[A][5])

Integrative Efficiencies: Such *efficiencies* result from the integration of two or more formerly separate businesses. (§§5.02, 5.04)

Intellectual Property Guidelines: *See Antitrust Guidelines for the Licensing of Intellectual Property*.

Interbrand Competition: This is the competition between products from different manufacturers or sources. The Supreme Court has stated that the antitrust laws are more concerned with preserving interbrand competition than *intrabrand competition* and, thus, that the former carries more weight in the *rule-of-reason* balancing. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 52 and n.19 (1977) ("Interbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of antitrust law"). (§3.04[B][2])

Interlocking Directorates: This situation arises if one person sits on the boards of, or serves as a board-selected officer of, two competing companies, and is illegal in circumstances specified by Section 8 of the *Clayton Act*, 15 U.S.C. §19. (§2.03[I], 5.07)

Interlocutory Appeal: As a general rule, parties may not appeal from rulings of a *federal district court* until the entire case has been decided and *judgment* entered. Exceptions to this rule, known as interlocutory appeals, are permitted on rulings from motions for *injunctions* or if fairness or efficiency so require. 28 U.S.C. §1292. (Appendix A §A.03[B])

International Antitrust Enforcement Assistance Act: This federal statute, which was passed in 1994, provides for increased cooperation between the United States and foreign countries for the purposes of improving international antitrust enforcement. It allows, among other things, for the United States to enter *mutual assistance agreements* with other countries for this purpose. Codified at 15 U.S.C. §§6201–6212. (§2.09)

Interrogatories: Part of the *discovery* phase of a case in *federal court*, interrogatories are written questions posed by one party to another, the responses to which may be used at trial or on a motion for *summary judgment*. Fed. R. Civ. Pro. 26–37. (Appendix A §A.03[A][3])

Interstate Commerce: The federal antitrust laws reach only those acts or practices that harm competition in commerce among two or more states or a state and a foreign state. Proof of a substantial and adverse effect on interstate commerce is, therefore, an element of any federal antitrust claim. *See Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976). (§3.05)

Intrabrand Competition: This competition is between products of the same brand sold by multiple resellers. The Supreme Court has stated that the antitrust laws are less concerned with preserving intrabrand competition than *interbrand competition* and, thus, that the latter carries more weight in the *rule-of-reasoning* balancing. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 (1977). (*See* and *compare Interbrand Competition*.) (§3.04[B][2])

Intraenterprise Conspiracy Issue: This is the question of whether two members of the same corporate family are separate enough to be capable of illegal concerted action, i.e., of forming an illegal agreement. In the leading case in the area, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771–77 (1984), the Supreme Court held that a corporation cannot be guilty or liable for conspiring with an unincorporated division or with a wholly owned subsidiary: "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of §1," because they "have a complete unity of interest." But the Court left open, among other things, whether a corporation can conspire with a less than wholly owned subsidiary or a *sister subsidiary*. (§3.03)

Irreparable Harm: A party seeking an *injunction* or other *equitable relief* from a *district court,* generally must show that he will suffer irreparable harm, i.e., harm that cannot later be compensated by his receiving money damages, if the relief is not granted. (Appendix A §A.03[A][1])

Joint and Several Liability: Codefendants in U.S. antitrust suits are jointly and severally liable for damages done to the plaintiffs, meaning that the plaintiff may recover all or part of any monetary damages awarded him, including *treble damages,* from any one or combination of the defendants. In addition, because there is no right of *contribution*, one defendant may not

seek compensation from another if it has to pay more than its share of the damages. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–46 (1981). (§805[H])

Joint Newspaper Operating Arrangement: The term is used in the *Newspaper Preservation Act*, 15 U.S.C. §§1801–1804, to describe any agreement between two or more newspaper publishers calling for joint production, printing, publication, distribution, advertising or circulation soliciting, advertising rates, and the like. The act provides an antitrust exemption for such arrangements under specified circumstances. (§2.11[I])

Joint Venture: This generic term is used to describe a wide variety of cooperative arrangements between two or more business entities that do not involve mergers or acquisitions. Common areas for joint ventures include research and development, production, distribution, and sales and marketing. (§§3.09, 5.03)

Joint Venture Guidelines: This is the commonly used shorthand for the officially titled *Antitrust Guidelines for Collaborations Among Competitors*. These guidelines were published by the *DOJ* and *FTC* in 2000 to provide assistance in analyzing the legality of various *joint ventures* and other types of cooperation between competitors. (§§3.09, 5.03)

Judgment: The final step in the process of a civil trial in *federal district court*, the judgment is an order of the court stating the outcome of the case. Once entered, a judgment may be appealed to a *circuit court of appeal*. Fed. R. Civ. Pro. 56–58. (Appendix A §A.03[A][6])

Judicial Branch: This branch of the *federal government* consists of the *federal courts*. (Appendix A §A.01[C])

Judicial *Immunity*: If a witness asserts Fifth Amendment privilege against self-incrimination and refuses to testify, the court may issue an immunity order, which requires him to testify but states that his testimony may not used against him in a later prosecution (except for perjury if his testimony is found to be false). (*See Immunity, Letter Immunity, Use Immunity.*) (§8.02)

Judicial Panel on Multidistrict Litigation (JPML): This panel of federal judges was created by Congress (28 U.S.C. §1407) to implement and administer the rules governing *multidistrict litigation*. (§8.05[F])

Judicial Review: This is the power of a *federal court* to rule that an act of *federal, state, or local government* is *unconstitutional*, i.e., void because it violates the *Constitution*. *Marbury v. Madison*, 5 U.S. 137 (1803). (Appendix A §A.01[C][2])

Jump Cite: In the U.S. legal citation system, a jump cite (also known as a pin cite) indicates the page in the court's decision upon which the reader may find

the language being relied upon by the party citing the case. (Appendix A §A.04[D])

Jumping the Gun: *See Gun-Jumping.*

Jurisdiction: This is the power of a court to adjudicate a dispute. Jurisdiction has two components: (1) *subject matter jurisdiction*, which is the power to adjudicate the matter in dispute; and (2) *personal*, or *in personam jurisdiction*, which is the power make rulings that are binding on the parties to the dispute. (Appendix A §§A.01[C], A.03[A][2], 3.08[B])

***Kodak* Claim:** A monopolization or tying claim is based on the Supreme Court's ruling in *Eastman Kodak Co. v. Image Technical Services,* 504 U.S. 451 (1992) that there could be a relevant market consisting of parts, service, or maintenance of the products of a single manufacturer. (§§3.04[A][2], 4.02[A])

Legal Action: This is another name for a lawsuit brought in the U.S. *federal courts*.

Legal Relief: This is the payment of money damages to compensate a party who has successfully brought a claim in *federal court*. It is distinguished from *equitable relief*, which is the relief available if money damages will not adequately compensate the aggrieved party. (Appendix A §A.03[A][1])

Legislative Branch: One of three branches of the *tripartite federal government* of the United States, the legislative branch consists of the two houses of *Congress*, the *Senate* and the *House of Representatives*. (Appendix A §A.01[A])

Leniency Program: *See Corporate Leniency Program, Individual Leniency Program.* (§8.02)

Letter *Immunity*: This letter from an antitrust criminal prosecutor to a witness promises the witness *immunity* from prosecution if the witness cooperates with the prosecution; also known as informal immunity. (*See Immunity, Use immunity,* and *Judicial immunity.*) (§8.02)

Leveraging: In the antitrust context, this generally refers to the use of *market power* or *monopoly* in one market to increase penetration of another market (e.g., through the use of *tie-ins*). (§§4.02, 4.06)

Little Robinson-Patman Acts: This generic term is used to describe state statutes containing anti-*price discrimination* provisions similar to those contained in the *Robinson-Patman Act*.

Little Sherman Acts: This generic term is used to describe state statutes containing provisions similar to those contained in the *Sherman Act*.

Location Clauses: These *vertical* arrangements restrict where a distributor may set up facilities to distribute and sell the products of its supplier. (§3.04[B][2])

Local Government: As distinguished from *state governments* or the *federal government*, local governments include governments at the county, city, town, or village level.

Local Government Antitrust Act of 1984: The Local Government Antitrust Act of 1984 (LGAA), 15 U.S.C. §§34–36, immunized local governments and local government officials and employees acting in their official capacities from liability for damages under the antitrust laws. It also immunized anyone who acted at the direction of any local government official or employee acting in his official capacity. The courts have held that this statute does not prohibit injunction actions or forbid the award of attorneys fees to plaintiffs who prevail in such actions. (§§2.11[J], 3.08[C])

Loyalty Discount: This refers to the discount offered by a seller on the condition that the buyer agrees to purchase all or a minimum percentage of its requirements for the product from the seller or that it purchase another product or group of products from the seller. Related to *tying, bundling,* and other sales on condition, it is sometimes viewed as a predatory practice for purposes of proving *monopolization* or *attempted monopolization*. (§§3.04; 4.02[B])

Manufacturer's Suggested Retail Price (MSRP): These are retail, or "sticker" prices suggested by the manufacturer. If the manufacturer forces the retailer to charge the MSRP, it may give rise to a Sherman Act Section 1 *rule-of-reason* claim for *resale price maintenance* or *vertical price fixing*. (§§3.04[A][1], 3.04[B][2])

MAP: *See Minimum Advertised Price.*

Marginal Cost: This is one measure of cost (the additional costs incurred by a producer to produce one additional unit of the product) used to determine whether a seller has engaged in *predatory* (or below-cost) pricing. (§4.02[B][1])

Market: This is a group of products that compete with one another in a defined geographic area. (Each market consists of a *product market* and a *geographic market*.) (§§3.04[B], 4.02, 5.02, 5.04 and *passim*)

Market Allocation (aka *Customer Allocation*): A *per se* illegal practice whereby competitors agree not to compete with each other for sales to certain customers, either individually or by location: "One of the classic examples of a *per se* violation of §1 [of the Sherman Act] is an agreement between competitors at the same level of market structure to allocate territories in order to minimize competition." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972). (§3.04[A][2])

Market Concentration: Market concentration is one measure of how competitive a market is and how close or far it is from being a *monopoly* or *monopsony*. It asks how many sellers (or buyers) are in the market and what are their *market shares*. The fewer the sellers (or buyers) and the greater their

market shares, the more concentrated the market, and (in theory) the easier it is for them to collude. Historically, market concentration was measured in terms of the combined market shares of the top two, three, four, or five competitors. More recently, market concentration has been measured primarily using the *Herfindahl-Hirschman Index.* (§§4.02, 5.02, 5.04)

Market Definition: This analytical process is used to determine what constitutes the *market* for purposes of antitrust analysis. (§§4.02, 5.02, 5.04)

Market Power: A seller (or buyer) is said to have market power if it can charge (or pay) whatever prices it chooses without regard to its competition (if any) or can exclude competition from the market. *See*, e.g., *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (Market power is defined as "the power to control market prices or exclude competition."). (*See Monopoly*.) (§4.02)

Market Share: The percentage of sales in a given *market* made by a given seller, market share is one element looked to when seeking to determine whether a party has *market power* or a *monopoly*, or whether a combination of proposed merger partners is likely to threaten competition. (*See also Market Concentration*.) (§§4.02, 5.02, 5.04)

Maximum Price-Fixing: This is an agreement to set or cap the price to be charged for a particular product or class of products and is usually encountered in the area of *vertical price-fixing* (*resale price maintenance*). In 1997, the Supreme Court held that the vertical fixing of *maximum* prices would no longer be treated as *per se* illegal, but would instead be judged under the *rule of reason. State Oil Co. v. Khan*, 522 U.S. 3 (1997). (§§3.04[A], 3.04[B])

McCarran-Ferguson Act: This federal legislation provides antitrust immunity for insurance activity regulated by state law and is codified at 15 U.S.C. §§1011–1015. (§2.11[C])

Meeting Competition Defense: This common shorthand is used to refer to the defense to a *Robinson-Patman Act price discrimination* claim that the lower price charged one customer was necessary to meet a similar price being charged to that same customer by a competitor. The defense is codified as part of the Robinson-Patman Act at 15 U.S.C. §13(b). (§§2.05, 7.06[C])

Merger Analysis: This process examines a proposed merger, acquisition, or joint venture to determine whether it would violate the antitrust laws. (§§5.02, 5.04, 6.09, 6.11, 6.12)

Merger Control Regulation: Passed by the European Council in 1989, this regulation resembles the *Hart-Scott-Rodino Antitrust Improvements Act*. It imposes a one-month waiting period to give the European Commission an opportunity to review potentially anticompetitive mergers, acquisitions, and

joint ventures. It also provides for a four-month second phase investigation if the commission deems it necessary.

Merger Guidelines: Commonly used shorthand for the *1992 Horizontal Merger Guidelines*, this refers to a joint publication of the *FTC* and the *DOJ Antitrust Division* that describes their methodology for *merger analysis*. The *Merger Guidelines* are useful to those planning mergers, acquisitions, or joint ventures in determining how the proposed transaction will be received by the *regulatory authorities*. The *1992 Merger Guidelines* superseded the agencies' earlier *1984 Merger Guidelines*, except that they incorporated by reference the treatment of nonhorizontal mergers (i.e., *vertical mergers* and *conglomerate mergers*) contained in the *1984 Merger Guidelines*. (§§5.02, 5.05, 5.06)

Merger Task Force: This agency of the European Commission is headquartered in Brussels, Belgium, and charged with enforcing the European Union's rules against anticompetitive mergers, acquisitions, and joint ventures.

Minimum Advertised Price (MAP): Occasionally, a manufacturer will demand that its retailers agree not to advertise the manufacturer's goods for sale at a price below a designated minimum or MAP. Even if the retailer retains the right to charge less than the MAP, this practice may be challenged under the *rule of reason* as *resale price maintenance* or *vertical price fixing*. (§§3.04[A], 3.04[B])

MLAT: *See Mutual Legal Assistance Treaties*.

Moderately Concentrated Market: As defined by the DOJ/FTC *Merger Guidelines*, this is a market with a *Herfindahl-Hirschman Index* between 1,000 and 1,800. (§5.02)

Monopolization: This activity, forbidden by *Section 2* of the *Sherman Act*, is characterized by the ability to exclude competition or to set prices without regard to the competition (if any) and the abuse of that dominant market position. (§2.02, Chapter 4)

Monopoly: This is a dominant market position held by a seller and allows that seller to exclude competition or set the prices for its products without regard to what its competitors (if any) are charging. (*See market power*.) (§2.02, Chapter 4)

Monopoly Power: "The power to control market prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *see also American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946). This is also known as *market power*.) (§2.02, Chapter 4)

Monopoly Prices: These prices (known as *supra-competitive prices*) charged by a monopolist and are higher than the prices it would be able to charge in the presence of competition. (§2.02, Chapter 4)

Monopsony: This dominant market position held by a buyer allows that buyer to decide how much it will pay for goods or services without regard to how much its competitors (if any) are willing to pay. (§2.02, Chapter 4)

Most Favored Nation (or Most Favored Buyer) Clause: Also known as a *price protection provision*, a most favored nation (or most favored buyer) clause is an agreement by a seller to provide a particular buyer terms no less favorable than it provides any other customer. (§3.04[B][2])

Motion: This is a formal request to a *federal court* for a ruling during the course of a case.

MSRP: *See Manufacturer's Suggested Retail Price*.

Multidistrict Litigation: This transfers multiple federal lawsuits sharing common issues of fact to a single judicial district for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407 and the rules of the *Judicial Panel on Multidistrict Litigation*. (§8.05[F])

Mutual Assistance Agreement: This is an agreement between the United States and another country for the purpose of improving international antitrust enforcement; also known as mutual legal assistance treaties or MLATs. Authority for the United States to enter such agreements is granted by the *International Antitrust Enforcement Assistance Act of 1994*, 15 U.S.C. §§6201–6212. (§2.09)

Mutual Legal Assistance Treaty: This is the treaty between the U.S. and a foreign government whereby the parties agree to provide each other assistance in criminal law enforcement. (§§2.09, 8.02[A][1][a])

NAICS: This is the acronym for *North American Industrial Classification System*. (§6.04[A])

Naked Restraint of Trade: A naked restraint of trade is an agreement "with no purpose except stifling of competition." (Compare *ancillary restraint*.)

Natural Monopoly: This is a controversial concept asserting that certain *markets*, typically those where *network effects* are strong, tend to favor, and perhaps perform better in, the presence of monopoly. (§4.02)

Network Effects: These are the positive economic effects that result if a service network (e.g., telephone, cable television, computer operating systems) reaches a certain critical size. (§§4.02, 5.02)

The Newspaper Preservation Act: This act was passed in 1970 to provide limited antitrust exemption for *joint newspaper operating arrangements* while preserving editorial independence and reporting competition. 15 U.S.C. §§1801–1804. (§2.11[I])

1984 Merger Guidelines: *See 1992 Horizontal Merger Guidelines.*

1992 Horizontal Merger Guidelines: A joint publication of the *FTC* and the *DOJ Antitrust Division* that describes their methodology for *merger analysis*. The *Merger Guidelines* are useful to those planning mergers, acquisitions, or joint ventures in determining how the proposed transaction will be received by the *regulatory authorities*. Also known simply as the *Merger Guidelines*, the 1992 version superseded the agencies' earlier *1984 Merger Guidelines*, except that they incorporated by reference the treatment of nonhorizontal mergers (i.e., *vertical mergers* and *conglomerate mergers*) contained in the *1984 Merger Guidelines*. (§§5.02, 5.05, 5.06)

No Contest (*Nolo Contendere*) Plea: This is a plea of no contest to a criminal *indictment* or *information*. For sentencing purposes, a no contest plea is identical to a plea of guilty, but unlike a plea of guilty, it has been held by lower courts not to carry *prima facie* weight in a later civil action against the defendant. (§§2.03[E], 8.02)

***Noerr-Pennington* Doctrine:** This Supreme Court doctrine (also known as the political action doctrine), derived from *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), provides an exemption from the antitrust laws for individual or collective attempts to influence government (i.e, legislative, administrative, or judicial) action. (*See Sham Exception*.) (§§3.08[D], 4.06[C])

No-Hire Agreement: No-hire agreements (also known as *non-poach clauses*) are frequently found in confidentiality agreements entered into between two companies considering a merger or acquisition. They prohibit the parties from using information gleaned about the other during due diligence to hire away, or "poach," critical employees from the other. Such agreements have generally survived antitrust *rule-of-reason* challenge. (§3.04[B])

Nolo Contendere* Plea (aka *Nolo* Plea):* This is a plea of no contest to a criminal *indictment* or *information*. For sentencing purposes, a *nolo* plea is identical to a plea of guilty, but unlike a plea of guilty, it has been held by lower courts not to carry *prima facie* weight in a later civil action against the defendant. (§§2.03[E], 8.02)

Non-Compete: Shorthand for a covenant not to compete, these agreements are found most often in employment contracts or contracts for the sale of a business, requiring one or more parties to refrain from competing with the others for a specified time period. The legality of non-competes is generally judged under the *rule of reason. (See Ancillary Restraint, Blue Pencilinig, Naked Restraint of Trade)*(§§2.02, 3.04[B])

Non-Poach Clause: Non-poach clauses (also known as *no-hire agreements*) are frequently found in confidentiality agreements entered into between two companies considering a merger or acquisition. They prohibit the parties

from using information gleaned about the other during due diligence to hire away, or "poach," critical employees from the other. Such agreements have generally survived antitrust *rule-of-reason* challenges. (§3.04[B])

Norris-LaGuardia Act: This federal statute, passed in 1932, reinforced the *Clayton Act* labor exemption and is codified at 29 U.S.C. §§101–110, 113–115. (§2.11[E])

North American Industrial Classification System: This system (commonly known by the acronym NAICS) was created by the Bureau of Commerce for the purpose of classifying products in order to collect national sales data. Effective July 1, 2001, parties filing *Hart-Scott-Rodino Premerger Notifications and Reports* must present company sales data by NAICS categories rather than by *Standard Industrial Classification* (SIC) *Codes* as was the prior requirement. (§6.04[A])

Notification Threshold: Under the *Hart-Scott-Rodino Antitrust Improvements Act and Rules*, a party must file a *Premerger Notification and Report* not only when it acquires voting securities or assets of another company valued at $65.2 million or more, but also (if other tests so require), if a later acquisition of shares or assets in the same company would cross either of four additional notification thresholds—$130.3 million, $651.7 million, 25 percent of the voting securities of a company if valued at more than $1,303.4 million, and 50 percent of the voting securities of an issuer if valued at more than $65.2 million. *See* 16 C.F.R. §801.1(h); §801.20. (§6.03) (Note: The dollar thresholds are adjusted annually for inflation. These are the 2009 thresholds.)

Numerosity: This is one of the four criteria that must be satisfied before a court will order *class certification* in a *class action*. To satisfy this criterion, the court must find that the would-be class is so large that it would be impractical to join all members as individual parties to the action. (§8.05[E][3])

***Obiter Dicta*:** These are portions of a judicial opinion or decision that are not directly related to the *holding*, i.e., the formal ruling, of the opinion. They are often referred to simply as *dicta*. (Appendix A §A.02[B])

OEM: Shorthand for *original equipment manufacturer*—this refers to a producer of complex products such as automobiles that purchases parts and systems from parts and components suppliers in an *original equipment market*.

Oligopolist. This is a member of an *oligopoly*.

Oligopoly: This is a *monopoly* of a *relevant market* shared by a small number of companies, usually two or three. (§§4.02, 5.02, 5.04)

Oligopoly Prices: These prices charged by oligopolists reflect the fact that they have *market power*, i.e., the prices that are greater than could be charged in the presence of competition. (§§4.02, 5.02, 5.04)

One Free Bite Policy: Parties occasionally discover that they have completed a transaction for which they should have filed *Hart-Scott-Rodino Premerger Reports* but did not. Parties that discover such an *inadvertent failure to file* still have an obligation to file their reports. The FTC has announced a "one free bite" policy for inadvertent failures to file. If it is convinced that the failure to file was truly inadvertent, i.e., not the result of gross negligence or reckless disregard of the act, and if it is the party's first offense, the FTC normally will not seek sanctions. It will, however, monitor future compliance. A second failure could result in sanctions being sought for the earlier one as well. (§6.06)

On the Fringe Competitor: The term used by the Supreme Court in *United States v. Falstaff Brewing Corp.,* 410 U.S. 526, 534 (1972), to describe company whose presence "on the fringe of the market [would] likely influence [] existing competition." (*See Actual Potential Competition* and *Perceived Potential Competition*.) (§5.06)

Original Equipment Manufacturer (OEM): This is a producer of complex products such as automobiles, that purchases parts and systems from parts and components suppliers in the *original equipment market*.

Original Equipment Market: This *market* consists of manufacturers (such as automobile manufacturers and often known as the *OEMs*) that purchase parts from suppliers for inclusion in larger products. It is distinguished from an *aftermarket*. (§§4.02, 5.02, 5.04)

Output Restrictions: These agreements between competitors limit manufacturing or restrict output and have been held *per se illegal. See, e.g., Hartford-Empire Co. v. United States*, 323 U.S. 386, 406–07 (1945). (§3.04[A][2])

Overlaps: In *merger analysis*, overlaps are the *market(s)* in which two or more parties to a proposed transaction both do business, i.e., compete. (§§4.02, 5.02, 6.04[A][3])

***Parens Patriae* Action:** An antitrust suit brought on behalf of the people of a state by the state's attorney general, as authorized by the *Clayton Act* §4C (15 U.S.C. §15c). (§§2.03[D], 8.04)

***Parker v. Brown* Doctrine:** This doctrine provides partial or complete immunity from antitrust attack for actions taken in response to federal or state law or executive, legislative, or administrative direction. The Supreme Court first articulated the state action immunity doctrine in *Parker v. Brown*, 317 U.S. 341 (1943). It is also known as the *state action doctrine*. (§3.08[C])

Patent Cross-Licensing: This is the practice, judged under the *rule of reason*, whereby two or more patent holders license each other to use the technology covered by their respective patents. (§4.06)

Patent Misuse Doctrine: Although possession of and exercise of rights granted pursuant to a patent are generally immune from antitrust attack, a patent holder's misuse of a patent or patents to enhance its monopoly or *leverage* it into new areas may be subject to an antitrust challenge. (§4.02, 4.06)

Perceived *Potential Competition* Theory: This is the theory that a proposed merger or acquisition is illegal because it eliminates competition from a firm that existing competitors view as a likely potential entrant into a concentrated *market*. *See*, e.g.,*United States v. Marine Bancorporation*, 418 U.S. 602, 624–25 (1978) (claimant must prove: (1) substantial market concentration; (2) that the acquiring firm has the "characteristics, capabilities, and economic incentive to render it a potential *de novo* entrant" into that market; and (3) that the acquiring firm's presence on the "fringe" of the market had "in fact tempered oligopolistic behavior" in the market). (*Compare Actual Potential Competition Theory*.) (§5.06)

Permanent Injunction: This final order directs a party to a litigation to act or refrain from acting, as distinguished from *preliminary injunction* and *temporary restraining order*. (Appendix A §§A.03[A][1]; 2.03[L], 8.05[C])

***Per Se* Illegality:** The Supreme Court has decreed that certain agreements (including agreements involving *horizontal and some vertical price-fixing, restrictions on output, bid-rigging, tying, market or customer allocations,* and *group boycotts*) are *per se* illegal, i.e., that they are so inherently anticompetitive that no justifications or defenses will be permitted: "there are certain agreements or practices which 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." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). (§§3.01, 3.04)

Person: The *Hart-Scott-Rodino Rules* define a person as "an *ultimate parent entity* and all entities which it *controls* directly or indirectly." 16 C.F.R. §801.1(a)(1). (§6.03)

Personal Jurisdiction: Also known as *in personam* jurisdiction, this refers to the ability of a *federal court* to exercise power over an individual or entity. The defense of lack of personal jurisdiction is one frequently raised by non-U.S. citizens or entities that have been sued in U.S. courts. (Appendix A §§A.03[A][2]; 3.08[B][2])

Phantom Freight: This term is used to describe the practice of charging all customers freight from a single shipping point even though some shipments originated from different sites. The practice was found to constitute illegal price discrimination in the companion cases *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945) and *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945). (§§7.02, 7.06)

Piggyback Litigation: This private civil antitrust suit is based on an earlier, successful criminal antitrust prosecution of the same defendant(s). (§8.05)

Pin Cite. *See Jump Cite.*

Plaintiff: In U.S. *federal court* litigation, the plaintiff is the party that commences the action seeking *legal, equitable, or declaratory relief* from the defendant(s). (Appendix A §A.03)

Plus Factors: This is circumstantial evidence that can be used to help prove the existence of a *price-fixing* agreement in the presence of *consciously parallel* pricing behavior. Plus factors can include the raising of prices despite an excess of supply, behavior that would not make economic sense in the absence of a conspiracy, and suspiciously timed meetings or communications between competitors. (§3.02)

PNO: This is the acronym for the *Premerger Notification Office*.

Positive Comity Agreement: This is an agreement between the United States and another country under which the two countries agree that each will, at the request of the other, investigate and, if warranted, prosecute violations of its own competition laws that the requesting country claims are having adverse effects inside the requesting country. (§8.02[A][1][a])

Political Action Doctrine: This Supreme Court doctrine (also known as the *Noerr/Pennington Doctrine*), is derived from *Eastern Railroad President's Conference v. Noerr Motor Freight*, *Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), and provides an exemption from the antitrust laws for individual or collective attempts to influence government (i.e., legislative, administrative, or judicial) action. (*See Sham Exception*.) (§§3.08[D], 4.06[C])

Potential Competition: Though rarely, federal merger authorities have challenged proposed mergers or acquisitions on the theory that they eliminate the most likely potential competitor or a perceived potential competitor from a *concentrated market*. The leading case on this theory is *United States v. Marine Bancorporation, Inc.,* 418 U.S. 602, 633 (1974). (*See Actual Potential Competition*, *Perceived Potential Competition*.) (§§5.06)

Precedent: Judicial opinions from earlier cases, these are looked to by judges for rules or guidance as part of the *common law* process. (Appendix A §A.02)

Predatory Pricing: This is the practice of pricing below cost in an effort to drive a competitor out of business and thereby obtain or preserve a *monopoly*. (§4.02[B])

Predatory Purchasing: This is the practice of driving up competitors' costs by overpaying for inputs in an effort to drive the competitors out of business. (§4.02[B])

Preliminary Injunction: This court order directs a party to a litigation to refrain from acting pending the outcome of a trial. The purpose is to maintain the status quo while determining whether the plaintiff is entitled to a *permanent injunction*. This is the relief sought by the *DOJ* or *FTC* if they have determined that a proposed merger or acquisition would violate the antitrust laws. As distinguished from a *temporary restraining order* or *permanent injunction*, it is often referred to as a PI. (Appendix A §§A.03[A][1], 2.03[L], 6.12, 6.13, 8.02, 8.03)

Preliminary Investigation: Investigation into competitive impact of proposed transaction by *DOJ* or *FTC* during *Hart-Scott-Rodino thirty-day waiting period*. (§6.09)

Premerger Notification and Report: Report that the *Hart-Scott-Rodino Act* requires parties to certain proposed mergers, acquisitions, and joint ventures exceeding specified *notification thresholds* to file with the *Federal Trade Commission* and the *Department of Justice's Antitrust Division* before completing the proposed transaction. (§2.04, Chapter 6, §§8.02, 8.03)

Premerger Notification Rules: The FTC promulgates these rules pursuant to its mandate to enforce and interpret the *Hart-Scott-Rodino Antitrust Improvements Act*. Also known as the HSR Rules, they are published at 16 C.F.R. §§801–803. (Chapter 6, §8.03)

Premerger Notification Office (PNO): This department of the *FTC* is charged with administering, interpreting, and enforcing the *Hart-Scott-Rodino Antitrust Improvements Act and Rules.* The Premerger Office staff is available by telephone at (202) 326–3100 to answer questions on issues relating to *Premerger Notification*, the *Hart-Scott-Rodino Antitrust Improvements Act*, and the *Premerger Notification (or HSR) Rules*. (Chapter 6, §8.03)

Price Discrimination: This is the practice by a seller of charging different prices to different but similarly situated customers, which was outlawed by the Robinson-Patman Act, 15 U.S.C. §§13, 13a. (§§2.05, Chapter 7)

Price-Fixing: This is a *per se* illegal conspiracy or agreement to charge specified prices or not to charge below specified prices. (§§3.01, 3.04, 8.02)

Price Protection Agreements: A price protection provision (or *most favored nation*, or most favored buyer, clause) is an agreement by a seller to provide a particular buyer terms no less favorable than it provides any other customer. (§3.04[B][2])

Price Squeeze: A price squeeze occurs if a vertically integrated company raises its wholesale prices while lowering its retail prices, thereby "squeezing" the profit margins of its wholesale customers, and making it impossible for them to compete against it at retail. (§4.02[B])

***Prima Facie* Effect:** Section 5 of the *Clayton Act* gives *prima facie* effect to final judgments entered in civil or criminal proceedings brought by the United States. 15 U.S.C. §16(a). This section lightens the burden on a plaintiff who has brought a civil antitrust action against a person convicted of violating the antitrust laws by allowing the plaintiff to use the government's judgment against the defendant as *prima facie* evidence that the defendant committed an antitrust violation. (§§2.03[E], 8.02[A], 8.05[B])

Primary Line Effects: This refers to the analysis performed in a *Robinson-Patman Act* case to determine how *price discrimination* affects competition among sellers of the product that is the subject of the discriminatory pricing. (*See also Secondary Line Effects* and *Third Line Effects*.) (§7.03)

Private Label Goods: These products are sold bearing the brand or label of one company that were manufactured for that company by a separate company.

Privilege Against Self-Incrimination: Part of the *Bill of Rights*, the *Fifth Amendment* to the U.S. *Constitution* provides individuals with a privilege against self-incrimination, i.e., the right not to be compelled to testify against themselves. U.S. Const. amend. V. (Appendix A §§A.01[D]; 8.02[A])

Probable Cause: Probable cause to believe that a violation has been committed is the legal standard that must be met before a *grand jury* can hand down an *indictment*. (§8.02)

Product Market: This is a group of products that compete with one another or are reasonable substitutes for one another. Defining the product market is a crucial step in both *rule-of-reason* and *merger analysis*. One method of doing this is through a measurement of the *elasticity of demand* for a given product. (§§3.04[B], 4.02, 5.02, 5.04)

Proffer: A grand jury witness seeking *immunity* in exchange for cooperation may be required to provide the prosecutors from the *Antitrust Division of the DOJ* with a proffer, i.e., a written or oral description of the testimony he will provide. (§8.02)

PTO: This is the shorthand acronym for the *United States Patent and Trademark Office*.

Punitive Damages: Punitive (or *exemplary*) damages are sums awarded by the court or jury in a civil suit over and above damages designed to compensate the successful plaintiff for actual financial losses. Punitive damages are meant to punish (or make an example of) defendants if their conduct is deemed especially outrageous, egregious, or blameworthy. (§8.05[L])

Quick Look Policy: This *FTC/DOJ* merger enforcement policy allows for the possibility of an abbreviated *second request* process based on a "quick look" at specially targeted information. (§6.11)

Reciprocal Dealing: This entails dealing with a customer or supplier for one product or service only on the condition that the customer or supplier also deal with you for another product or service. It is a form of *tying arrangement*. (§3.04[B][2])

Redirect Examination: This is the further examination of a witness at trial by the lawyer who called the witness for *direct examination*. It occurs after the opposing counsel's *cross-examination* of the witness and often involves an attempt to *rehabilitate* a witness whose testimony has been shaken during cross. (Appendix A §A.03[A][5])

Regulatory Authorities (or Agencies): The federal regulatory *agencies* that share responsibility for the enforcement of the antitrust laws are the *Federal Trade Commission* and the *Antitrust Division* of the *Department of Justice*.

Rehabilitation: When the credibility or other aspects of the testimony of a witness in a lawsuit has been shaken on *cross-examination*, the lawyer who called the witness on *direct examination* may choose to conduct a *redirect examination* in an attempt to rehabilitate his witness. (Appendix A §A.03 [A][5])

Removal: In U.S. litigation, a *defendant* that has been sued in *state court* may exercise the right of removal and have the case transferred to *federal district court* if the case could have been brought in federal court originally. 28 U.S.C. §1441, *et seq*. (Appendix A §A.01[C][1])

Reportability: This is the determination of whether a proposed sale or exchange of assets or voting securities or formation of a joint venture corporation is a *reportable event*, i.e., whether it triggers a requirement that one or more of the parties file a *Hart-Scott-Rodino Premerger Notification and Report*. (§6.03)

Reportable Event: This is any proposed sale or exchange of assets or voting securities or formation of a joint venture corporation that triggers a requirement that one or more of the parties file *Hart-Scott-Rodino Premerger Notification and Reports*. (§6.03)

Request for Additional Information (*Second Request*): This is a request from the federal antitrust enforcement authority to a party filing a *Hart-Scott-Rodino Premerger Notification and Report* for information in addition to that contained in the original report. Issuance of such a request has the effect of extending the original thirty-day waiting period until thirty days after the party has completed its response to the second request (ten days in the case of a *cash tender offer*). (§6.11)

Resale Price Maintenance (RPM): This agreement between a supplier and a distributor requires the distributor to charge specified prices (also known as *vertical price-fixing*.) Thanks to a 2007 Supreme Court decision, RPM, which

had once been viewed as *illegal per se,* is now judged under the *rule of reason. Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). (§§3.04[A], 3.04[B])

***Res Judicata*:** This legal doctrine prohibits parties from relitigating matters already determined via judicial judgment.

Reverse Payment: This is a payment by a pharmaceutical patent holder to a generic competitor in exchange for the generic competitor's agreement to withhold its drug from the market during all or part of the remaining life of the patent. (§4.06[A])

Robinson-Patman Act: This federal antitrust statute was passed in 1936 as amendments to Section 2 of the *Clayton Act*. The Robinson-Patman Act outlaws *price discrimination*. Codified at 15 U.S.C. §§13, 13a, 13b, 21a. (§2.05, Chapter 7)

Rule of Reason: This test is used to determine the legality of agreements in restraint of trade or other practices that are not *per se illegal*. The basic query is whether the pro-competitive aspects of the practice outweigh its anti-competitive aspects. Unlike *per se* illegal analysis, a rule-of-reason analysis requires a full factual and legal inquiry into whether the challenged practice actually harms competition in a *relevant market*. As most recently formulated by the Supreme Court: "[M]ost antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). (§§3.01, 3.04[B])

Safe Harbor: Several of the *Merger Guidelines* issued by the antitrust regulatory *agencies* contain safe-harbor provisions. These are statements that conduct will ordinarily be safe from an antitrust challenge if it meets specified criteria.

Sale on Condition: An agreement whereby the seller refuses to sell one product (the tying product) unless the buyer also agrees to buy another, separate product (the tied product). Also known as *tying* or *conditioning*, this kind of agreement is generally *per se illegal* if the seller has the economic *power* necessary to enforce the tie-in. Otherwise, it is tested under the rule of reason. Tying violates both Section 1 of the *Sherman Act* and Section 3 of the *Clayton Act*. The Supreme Court's leading cases on tying include *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1956); *Fortner Enterprises v. United States Steel Corp*., 394 U.S. 495 (1969) (*Fortner I*); and *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610 (1977) (*Fortner II*); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992); *Jefferson Parish Hospital District*

No. 2 v. Hyde, 466 U.S. 2 (1984); and *Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28 (2006). (§§3.04[A][2], 3.04[B][2], 4.02[B])

Secondary Acquisition: A secondary acquisition occurs if one company acquires another which in turn owns a substantial, but noncontrolling (i.e, less than 50 percent), stake in a third. A secondary acquisition can trigger separate *HSR* reporting requirements for the acquiring company and the third party. *See* HSR Rules §801.4. (§6.03)

Second Request: Commonly used shorthand name for a *request for additional information*. The request is from a federal antitrust enforcement authority (either the *FTC* or *DOJ*) to a party filing a *Hart-Scott-Rodino Premerger Notification and Report* for information beyond that contained in the original report. Issuance of a second request has the effect of extending the original *Hart-Scott-Rodino thirty-day waiting period* until thirty days after the party has completed its response to the second request (ten days in the case of a *cash tender offer*). (§6.11)

Secondary Line Effects: Refers to the analysis performed in a *Robinson-Patman Act* case to determine how *price discrimination* affects competition among buyers of the product that is the subject of the discriminatory pricing. (*See also Primary Line* and *Third Line*.) (§7.03)

Section 1: This is the commonly used shorthand for Section 1 of the *Sherman Antitrust Act*, 15 U.S.C. §1. Section 1 outlaws certain agreements: "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states is hereby declared to be illegal." The courts have held that certain agreements are *per se illegal* under Section 1. Such agreements will be found to violate the law without regard to any possible justifications. *Per se* illegal agreements include *price-fixing, bid-rigging, customer and market allocations, group boycotts*, and certain *tying arrangements*. All other agreements are judged under the *rule of reason,* which requires a balancing to determine whether the agreement's pro-competitive aspects outweigh its anti-competitive ones. (§2.02, Chapter 3, and *passim*)

Section 7: This is the commonly used shorthand for Section 7 of the Clayton Act, 15 U.S.C. §18. Section 7 is the key provision that allows the government to regulate proposed mergers, acquisitions, and joint ventures. It forbids mergers or acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be to substantially lessen competition or to tend to create a monopoly." (Section 7A of the Clayton Act, known as *the Hart-Scott-Rodino Antitrust Improvements Act*, is treated separately.) (§2.03[H], Chapter 5 and *passim*)

Section 2: This is the commonly used shorthand for Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2. Section 2 outlaws *monopolization, attempted monopolization*, and *conspiracies to monopolize.* (§2.02, Chapter 4 and *passim*.)

Self-Concealing Conspiracy: For a plaintiff to invoke the *fraudulent concealment toll* of the statute of limitations, most courts require that he prove that the defendants took active steps to conceal their illegal activity. Some courts have, however, found some conspiracies to be "self-concealing," and thus relieved the plaintiff of this burden. (§3.08[A])

Self-Incrimination: Part of the *Bill of Rights*, the *Fifth Amendment* to the U.S. *Constitution* provides individuals with a *privilege against self-incrimination*, i.e., the right not to be compelled to testify against themselves. U.S. Const. amend. V. (Appendix A §§A.01[D]; 8.02[A])

Senate: This is one of the two houses of *Congress*, the other being the *House of Representatives*, that make up the *legislative branch*, of the U.S. *federal government*. (Appendix A §A.01[A])

Service Market: This is a *product market* consisting of services rather than goods. (§§4.02, 5.02, 5.04)

Sham Exception: An exception to the *Noerr-Pennington Doctrine* that arises if the collective action for which the *Noerr-Pennington* antitrust exemption is claimed is "objectively baseless," and "an attempt to interfere *directly* with the business relationships of a competitor, through the use [of] the government *process* as opposed to the *outcome* of that process as an anticompetitive weapon." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60–61 (1993) (emphasis in original; citations omitted). (§§3.08[D], 4.06[C])

Share of the Market: The percentage of sales in a given *market* made by a given seller, market share is one element used to determine whether a party has *market power* or a *monopoly*, or whether a combination of proposed merger partners is likely to threaten competition. (*See also Market Concentration*.) (§§4.02, 5.02, 5.04)

Sherman Antitrust Act (Sherman Act): The original federal antitrust statute passed in 1891, *Section 1* outlaws agreements in restraint of trade, and *Section2* outlaws *monopolization, attempted monopolization*, and *conspiracies to monopolize*. The act is codified at 15 U.S.C. §§1–7. (§2.02, Appendix A and *passim*)

SIC Codes: This is the acronym for *Standard Industrial Classification* Codes. (§6.04)

Sister Subsidiaries: Two or more subsidiaries ultimately controlled by a single parent. Whether two sister subsidiaries are separate parties capable of conspiring in violation of *Sections 1* or *2* of the *Sherman Antitrust Act* is one subject of the *intraenterprise conspiracy issue*. (§3.03)

Size-of-the-Parties (or Persons) Test: One of two tests (along with the *size-of-the-transaction test*) that is used to determine *reportability*, i.e., whether a

Hart-Scott-Rodino Premerger Notification and Report must be filed for a proposed transaction. Generally, if one party to the proposed transaction has worldwide annual sales or gross assets of $130.3 million or more and another party has worldwide annual sales or gross assets of $13.0 million or more, the size-of-the-parties test is satisfied. Note, however, that if one party will be acquiring voting securities or assets valued at $260.7 million or more, the size-of-the-parties test no longer applies. Such a transaction is reportable regardless of the size of the parties. (*See Hart-Scott-Rodino Act* §7A(a)(2), 15 U.S.C. §18a.) (§6.03) (Note: The dollar thresholds are adjusted annually for inflation. These are the 2009 thresholds.)

Size-of-the-Transaction Test: One of two tests (along with the size-of-the-parties test), this is used to determine *reportability,* i.e., whether a *Hart-Scott-Rodino Premerger Notification and Report* must be filed for a proposed transaction. The size-of-the-transaction test is satisfied if one party will be acquiring voting securities or assets valued at $65.2 million or more. Note, however, that if one party will be acquiring voting securities or assets valued at $260.7 million or more, the size-of-the-parties test no longer applies. Such a transaction is reportable regardless of the size of the parties. (*See Hart-Scott-Rodino Act* §7A(a)(3), 15 U.S.C. §18a.) (§6.03) (Note: The dollar thresholds are adjusted annually for inflation. These are the 2009 thresholds.)

SKU: *See Stock Keeping Unit*.

SNIPP: This is the acronym for small but significant and nontransitory increase in the price of that product. It represents a test described in the *FTC/DOJ Merger Guidelines* for defining the boundaries of a market. If such a price increase would result in lower profits—by causing buyers to turn to other products or purchase the product outside the geographic area—then the product and geographic markets will be deemed to include those other products and other areas. The process is repeated until a relevant market is found where the price increase will result in higher, or at least equal, profits. (§5.02[A][1])

Standard Industrial Classification Codes: This system (commonly known by the acronym SIC Codes) was created for the purpose of classifying products in order to collect uniform national sales data. Until July 1, 2001, parties filing *Hart-Scott-Rodino Premerger Notifications and Reports* were required to report company sales data by SIC Code. On that date, a changeover to *North American Industrial Classification System* reporting was implemented. (§6.04)

Standing: This is the legally recognized ability to sue for the wrong complained of. According to the Supreme Court, standing determines "which persons have sustained injuries too remote to give them standing to sue for damages under §4 [of the Clayton Act]." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 n.7 (1977). (§3.06)

State Action (or *Parker v. Brown*) Doctrine: This doctrine provides partial or complete immunity from antitrust attack for actions taken in response to federal or state law or executive, legislative, or administrative direction. The Supreme Court first articulated the state action immunity doctrine in *Parker v. Brown*, 317 U.S. 341 (1943). (§3.08[C])

State Court: This is a court of law or equity created under the auspices of one of the fifty separate state governments; as distinguished from *federal courts*.

Statute of Limitations: Section 4B of the Clayton Act imposes a four-year statute of limitations for bringing civil treble-damage actions under the federal antitrust laws. 15 U.S.C. §15b. Criminal violations are subject to a five-year statute of limitations pursuant to a catchall federal provision covering "Offenses not capital." 18 U.S.C. §3282. (§§2.03[C], 2.13[C], 3.08[A], 8.02)

Sticker Price: See *Manufacturer's Suggested Retail Price.*

Stock Keeping Unit or SKU: Unique identifier assigned to a distinct product or service that enables sellers to keep track of products and product sales, and manage inventory.

Structural Remedies: Structural remedies are imposed on adjudged monopolists or would-be merger partners to restore or preserve competition. The most common structural remedy involves the divestiture of assets or one or more subsidiaries. (Compare *Conduct Remedies.*) (§§4.05, 6.12)

Subject Matter Jurisdiction: This refers to the power of the U.S. *federal courts*, i.e., it limits which cases they have the authority to decide. The courts have two types of subject matter jurisdiction: *federal question jurisdiction* and *diversity jurisdiction*. (Appendix A §A.01[C])

Submarket: Legally cognizable *market* within a larger market; the Supreme Court recognized the existence of submarkets in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). (§§4.02, 5.02, 5.04)

Subpoena Ad Testificandum: This is a court order requiring the recipient to appear and testify before a court or *grand jury*. (§8.02)

Subpoena Duces Tecum: This is a court order requiring the recipient to produce documents or things to the issuing court, agency, or *grand jury*. (§8.02)

Substantial Compliance: Under the *Hart-Scott-Rodino Antitrust Improvements Act,* when the agency investigating a proposed transaction issues the parties a *request for additional information* (or *second request*), the *HSR waiting period* continues to run until all parties certify that they have substantially complied with the request by producing the information called for. (§6.11)

Substitutability: Products are said to be substitutable when they "have reasonable interchangeability for the purposes for which they are produced—price,

use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394–404 (1956); *see also Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). (*See Demand Side-Substitutability* and *Supply-Side Substitutability*.) (§§4.02, 5.02, 5.04)

Summary Judgment: Judgment in a federal lawsuit entered in response to a pretrial *motion* by one of the parties. Summary judgment dismisses one or more of the opposing party's claims on the grounds that the undisputed facts require such a finding. (Appendix A §A.03[A][4])

Summons: This is the document that the plaintiff(s) in a federal lawsuit serves on the defendant(s) along with the *complaint*. The summons notifies the defendant(s) that an action has been started and tells it when, where, and how it must respond. (Appendix A §A.03[A])

Sunk Costs: These are the costs incurred in setting up a manufacturing or other facility that cannot be recovered if the facility is unsuccessful. (§5.02)

Supply-Side Substitutability: This refers to the ability of manufacturers to convert production facilities to manufacture a different product if prices on the product rise, usually as the result of a merger of two other competitors or *supra-competitive pricing* by a *monopolist* or *oligopolist*. (§§4.02, 5.02, 5.04)

Supra-Competitive Prices: These prices are higher than those that could be charged in a competitive market. A *monopolist* or *oligopolists* can charge such prices because they have *market power*. (§§4.02, 5.02, 5.04)

Supreme Court: This is the highest court in the United States and the final arbiter of legally justiciable issues. Part of the *judicial branch* of the *federal government,* its decisions are the law of the land. Created by article III of the *Constitution*. (Appendix A §A.01[C]).

Target Letter: This letter is sent by an attorney with the *Antitrust Division* of the *Department of Justice* to an individual or company informing the recipient that it is the focus of a grand jury investigation and offering it the opportunity to provide the grand jury its side of the story but without offering *immunity*. (§8.02)

Temporary Restraining Order: This is an order issued by a *federal court* in response to a motion by a party to a lawsuit directing another party to refrain from acting. The temporary restraining order, or TRO, preserves the status quo pending a determination of whether the court will issue a *preliminary injunction*. (Appendix A §A.03[A][1])

Territorial Allocation: This is a *per se* illegal practice whereby competitors agree not to compete with each other for sales to certain customers, either individually or by location: "One of the classic examples of a *per se* violation of §1 [of the Sherman Antitrust Act] is an agreement between competitors at

the same level of market structure to allocate territories in order to minimize competition." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972). *See Market Allocation, Customer Allocation.* (§3.04[A][2])

Territorial Restraints: This is a vertical restraint, judged under the rule of reason, whereby a supplier limits the geographic areas in which distributors may sell its products; also known as *exclusive territories*. (§3.04[B][2])

Third Line Effects: This refers to the analysis performed in a *Robinson-Patman Act* case to determine how *price discrimination* affects competition among the customers of the buyers of the product that is the subject of the discriminatory pricing. (*See also Primary Line* and *Second Line*.) (§7.03)

Thirty-Day Waiting Period: This waiting period is mandated by the Hart-Scott-Rodino Act. Parties who are required to file *Premerger Notification* generally must wait thirty days after filing before closing their transaction. Exceptions occur in the cases of *early termination* of the waiting period and *cash tender offers*. (§§2.04, 6.01, 6.02, 6.07, 6.08, 6.11)

Thresholds: Under the *Hart-Scott-Rodino Act and Rules*, a party must file a *Premerger Notification and Report* not only if it acquires $65.2 million or more of the assets or the voting securities of another company but also if a later acquisition of shares in the same company would cross either of four additional *notification thresholds*—$130.3 million, $651.7 million, 25 percent of the voting securities of an issuer if valued at more than $1,303.4 million, and 50 percent of the voting securities of an issuer if valued at more than $65.2 million. *See* 16 C.F.R. §801.20. (§§2.04, 6.03) (Note: The dollar thresholds are adjusted annually for inflation. These are the 2009 thresholds.)

Tied Product: In a *tying arrangement*, the less desirable product that the seller requires the buyer to purchase as a condition of being permitted to purchase the more desirable *tying product*. (§§3.04[A][2], 3.04[B][2], 4.02[B])

Tie-Ins: *See Tying Arrangement*.

Toe-hold Acquisition: The acquisition of a very small market participant is a way to enter a new market. Alternatives are the acquisition of a larger market player or *de novo* (*greenfield, from scratch*) entry.

Tolling (1): This refers to the suspension of the running of the statute of limitations for equitable reasons such as *fraudulent concealment* or the pre-existence of a related government action. (§3.08[A])

Tolling (2): This refers to the service provided by a refiner whereby the refiner refines raw materials owned by another in exchange for a "tolling fee."

Transactional Immunity: This is an outdated concept (at least at the federal level) pursuant to which a witness would be immunized from prosecution for any activity that relates to the matter about which he or she testified.

Immunity may be provided pursuant to a judicial order or to a letter agreement between the prosecutors and the witness. (*See Immunity, Judicial Immunity,* and *Letter Immunity*.) (§8.02[A])

Treble Damages: Term used to describe the federal antitrust law provision (Clayton Act §4; 15 U.S.C. §15) that allows successful antitrust plaintiffs to collect three times their actual damages. (§§2.03[B], 3.06[B], 8.05)

Treble Damage Action: Generic term used to describe any civil private action under the federal antitrust laws seeking *treble damages*.

Trial Court: In the U.S. federal judicial system, *federal district courts* are the trial courts, the courts in which initial fact-finding is done; as distinguished from *appellate courts*. (Appendix A §§A.01[C], A.02, A.03)

Tripartite: Three-branched, this term refers to the structure of the U.S. *federal government*, which contains three branches—*legislative, executive*, and *judicial*. (Appendix A §A.01)

TRO: *See Temporary Restraining Order*.

Tunney Act: This is the common name for the 1974 *Antitrust Procedures and Penalties Act* (15 U.S.C. §16(b)–(h)), which governs *consent decrees* and related matters. (§2.03[F])

2AB: The formula (2 x *A* x *B*) is used to calculate the increase in the *Herfindahl-Hirschman* market concentration index (*HHI*) attributable to a proposed merger or acquisition, where *A* and *B* are the precombination market shares of the combining entities. 2*AB* is also used in conversation as a shorthand way to express the concept, e.g., "2*AB* is less than 50." (§5.02A][2])

Tying Arrangement: This is an agreement whereby seller refuses to sell one product (the tying product) unless buyer also agrees to buy another, separate product (the tied product). Also known as *tie-ins or* sales on condition. Tying is generally *per se illegal* if the seller has the economic *power* necessary to enforce the tie-in. Otherwise, it is tested under the rule of reason. Tying of products can violate either Section 1 of the *Sherman Antitrust Act* or Section 3 of the *Clayton Act*. The tying of services or services to products can violate Section 1 of the Sherman Act. The Supreme Court's leading cases on tying include *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1956); *Fortner Enterprises v. United States Steel Corp*., 394 U.S. 495 (1969) (*Fortner I*); and *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610 (1977) (*Fortner II*)); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992); *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2 (1984); and *Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28 (2006). (§§3.04[A][2], 3.04[B][2], 4.02[B])

Tying Product: In a *tying arrangement*, the more desirable product is the one that the seller refuses to sell unless the purchaser also agrees to purchase the less desirable *tied product*. (§§3.04[A][2], 3.04[B][2], 4.02[B])

Typicality: This is one of the four criteria that must be satisfied before a court will order *class certification* in a *class action*. To satisfy this criterion, the court must find that the claims of the would-be representative are typical of those of the members of the alleged class. (§8.05[E][3])

Ultimate Parent Entity (UPE): For purposes of *Hart-Scott-Rodino Antitrust Improvements Act* analysis, this is an entity that is not *controlled* (generally, owned 50 percent or more) by any other person or entity. An individual may be a UPE. Defined at 16 C.F.R. §801.1(a)(3). (§6.03)

Unclean Hands Defense: This defense is based on the allegation that the plaintiff willingly participated with the defendant in the challenged activity or took some illegal action. Unclean hands, which overlaps and is sometimes equated with *in pari delicto*, is generally not recognized as a defense to an antitrust claim: "[O]nce it is shown that the plaintiffs did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it . . . the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." *Perma-Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139–40 (1968). (§§3.06[A][4])

Unconcentrated *Market*: As defined by the DOJ/FTC *Merger Guidelines*, this is a *market* where the *Herfindahl-Hirschman Index* is less than 1,200. (§5.02[A][2])

Unconstitutional: An act of *federal, state,* or *local government* that violates the U.S. *Constitution* is said to be unconstitutional. The *federal courts*, through the power of *judicial review*, have the power to determine *constitutionality. Marbury v. Madison*, 5 U.S. 137 (1803). (Appendix A §A.01[C])

Unilateral Effects: This term is used in merger analysis to describe anticompetitive effects the proposed merger may give rise to without regard to whether the proposed merger will facilitate or increase the likelihood of *collusion*. For example, the merger may allow the newly merged entity to raise prices unilaterally because the merger will have eliminated the only (or only meaningful) competitor and the new entity will thereby have obtained *market power*. (§5.02)

United States Patent and Trademark Office (PTO or USPTO): The office, located in Washington, D.C., is responsible for issuing and supervising patents and trademarks.

United States Reports: Series of volumes containing the official versions of the written decisions or opinions of the U.S. *Supreme Court.* Also known as the U.S. Reports, it is abbreviated U.S. in legal citations. (Appendix A §A.04[D][1])

UPE: This is the acronym for *Ultimate Parent Entity*.

Upstream: In the *chain of manufacture and distribution,* sellers are said to be upstream from their customers. Thus, a raw material supplier is upstream

from a manufacturer, which is upstream from a wholesaler, which is upstream from a retailer, which is upstream from a consumer. (*See Vertical* and *Horizontal.*)

Use Immunity: Attorneys at the *DOJ's Antitrust Division* involved in prosecuting criminal antitrust actions often offer "use *immunity*" to witnesses in exchange for their cooperation or testimony. Use immunity protects an immunized witness from the use of his testimony against him. (18 U.S.C. §§6001–6005.) If prosecutors can show that they obtained evidence against the witness independent of what they learned from him, they can still prosecute him. Use immunity is often contrasted with *transactional immunity*, an outdated concept pursuant to which a witness would be immunized from prosecution for any activity that relates to the matter about which he testified. (*See also Immunity, Judicial Immunity* and *Letter Immunity*.) (§8.02[A])

U.S. Reports: *See United States Reports.*

Variable Costs: These manufacturing costs, such as materials and hourly wages, vary with the number of products produced. (*Compare fixed costs*.) (§4.02[B])

Vertical: This describes the relationship of entities occupying different levels in the chain of distribution. A manufacturer's supplier of raw materials and the manufacturer are said to have a vertical relationship as are the manufacturer and its distributors. *See, e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between forms at different levels of distribution as vertical restraints"). (§§3.02, 3.04 and *passim*)

Vertical Merger or Acquisition: This kind of merger or acquisition involves two companies on different levels of the *chain of distribution*, i.e., between a raw material supplier and a manufacturer or between a manufacturer and a distributor. (§5.05)

Vertical Non-Price Restraints: This is the generic term for all restraints between suppliers and customers other than *vertical price-fixing* (*resale price maintenance*). Examples of vertical non-price restraints include *exclusive distributorships or territories*, *customer restrictions, tying* and *reciprocal dealing.* In *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 51–52 (1977), the Supreme Court held that henceforth vertical non-price restraints (except some instances of *tying*) would be judged only under the *rule of reason*, i.e., would not be treated as illegal *per se*. (§3.04[B])

Vertical Price-Fixing: This agreement between a supplier and a distributor requires the distributor to charge specified prices (also known as *resale price maintenance* or *RPM*). Thanks to a 2007 Supreme Court decision, vertical

price fixing, which had once been viewed as *illegal per se* is now judged under the *rule of reason. Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). (§§3.04[A], 3.04[B])

Vertical Restraint: This refers to any agreement between two companies in a *vertical* relationship. Vertical restraints are often divided into those that involve pricing, e.g., *vertical price-fixing* (or *resale price maintenance*) and those that do not. The latter are referred to as *vertical non-price restraints*. (§3.04)

Waiting Period: This is the shorthand for the *thirty-day waiting period* mandated by the *Hart-Scott-Rodino Antitrust Improvements Act (HSR Act)*. Parties who must file *HSR Premerger Notification* must wait thirty days after filing before closing their transaction (unless they receive *early termination* of the waiting period or are involved in a *cash tender offer*). (§§2.04, 6.01, 6.02, 6.07, 6.08, 6.12)

***Walker Process* Doctrine:** This doctrine, based on Supreme Court's holding in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172 (1965), holds that a fraudulently obtained patent may form the basis for a claim that the patent holder illegally monopolized the market for the patented product. (§§4.06[B], 4.06[D][3])

Webb-Pomerene Act: This federal antitrust statute provides, under specified conditions, antitrust immunity for competing U.S. companies that form associations for the purpose of agreeing on quantities and prices of goods to be exported from the United States; codified at 15 U.S.C. §§61–66. (§2.11[A])

Webb-Pomerene Association: This association of competing U.S. companies is formed pursuant to the *Webb-Pomerene Act* for the purpose of coordinating exports and export pricing. (§2.11[A])

Wilson-Tariff Act: This federal legislation was passed in 1894 to outlaw conspiracies in restraint of international trade. Largely unused today, apparently because deemed redundant of *Section 1* of the *Sherman Act*, it is codified at 15 U.S.C. §§8–11. (§2.12)

Writ of Certiorari: Most cases are not *appealable as of right* to the *Supreme Court*. Instead, the would-be *appellant* must petition the Supreme Court for a writ of *certiorari*, which grants leave to appeal. The petition must convince the Court that the matter to be appealed is sufficiently important to warrant the attention of the Court. (Appendix A §A.03[C])

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