A PRIMER ON
ANTITRUST LAW FUNDAMENTALS

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I. **OVERVIEW**

A. **Antitrust Policy**

The basic objective of the antitrust laws is to eliminate practices that interfere with free competition. They are designed to promote a vigorous and competitive economy in which each business has a full opportunity to compete on the basis of price, quality, and service.

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition." *Northern Pacific Railway v. United States*, 356 U.S. 1, 4-5 (1958).

B. **The Principal Antitrust Statutes**

1. The principal federal antitrust statutes are the Sherman Act, the Federal Trade Commission Act, the Clayton Act, and the Robinson-Patman Act. The Sherman Act has particularly widespread application.

2. The Sherman Act prohibits:

   a. "Unfair methods of competition," which have been held to encompass not only all Sherman and Clayton Act violations, but also restraints of trade contrary to the policy or spirit of those laws. *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).
   b. "Unfair or deceptive acts or practices," which prohibits false or misleading advertisements or representations as well as practices which are "unfair" to consumers. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).
4. The Clayton Act (including the Robinson-Patman Act amendments) declares certain specific actions or practices to be illegal:

a. Section 2 of the Clayton Act (popularly known as the Robinson-Patman Act) declares unlawful discrimination in prices between different purchasers in the sale of a commodity, where the discrimination may lessen competition. 15 U.S.C. § 13.

b. Section 3 of the Clayton Act prohibits exclusive dealing arrangements, tying arrangements and requirements contracts involving the sale of commodities, where the effect may be to substantially lessen competition. 15 U.S.C. § 14.

c. Section 7 of the Clayton Act prohibits mergers, joint ventures, consolidations, or acquisitions of stock or assets where the effect may be to substantially lessen competition or tend to create a monopoly. 15 U.S.C. § 18.

C. Enforcement and Penalties

1. The federal antitrust laws are enforced by the Antitrust Division of the Department of Justice, by the Federal Trade Commission, and by suits brought by private parties. States can be private parties for purposes of federal antitrust law. In addition, states have their own antitrust laws.

2. The Department of Justice has responsibility for enforcement of the Sherman Act (under which it can bring criminal or civil actions and recover damages suffered by the United States Government) and the Clayton Act (under which it can obtain civil injunctions and recover damages suffered by the United States Government).

a. Criminal violations of the Sherman Act are felonies punishable by imprisonment for up to ten years and/or fines of up to $1,000,000 for individuals and $100 million for corporations per violation. Under an alternative provision, a defendant may be fined up to twice the gross gain or twice the gross loss if any person derives pecuniary gain from the offenses or if the offense results in pecuniary loss to a person other than the defendant.

b. Department of Justice enforcement actions, either civil or criminal, are brought in federal district courts.

3. The Federal Trade Commission and the Antitrust Division jointly must be notified of certain proposed mergers, acquisitions, joint ventures and tender offers.
4. The Federal Trade Commission is responsible for enforcement of the Federal Trade Commission Act and, with the Department of Justice, the Clayton Act, as well as numerous other specific statutes dealing primarily with such matters as product labeling, consumer credit, and consumer warranties.

a. Commission enforcement proceedings are brought in an administrative setting: a trial is held before an Administrative Law Judge with a right of appeal by either the Commission staff (the Complaint Counsel) or the party sued (the Respondent) to the full Commission. Commission decisions adverse to the Respondent can be appealed to a federal court of appeals. Commission decisions adverse to the Commission's staff cannot be appealed.

b. If the Commission determines a particular practice to be illegal, it enters a cease and desist order, which may not only require that the practice be stopped but may also require affirmative action by the violator. Violations of cease and desist orders are punishable by a civil penalty of over $13,000 per violation.

c. The Commission also has authority to promulgate rules defining acts or practices which either are unfair or deceptive or are unfair methods of competition. Depending on the manner in which the rule was promulgated, a knowing violation of the rule may subject a party to civil penalties. 15 U.S.C. § 45 (m)(1)(A).

II. BASIC ANTITRUST CONCEPTS

A. Market Power


2. Proof of market power.
   a. Identification of relevant product market.
   b. Identification of relevant geographic market.
   c. Determination of market share in relevant markets.
   d. Conduct consistent with exercise of market power.
B. Monopoly Power


2. Proof of monopoly power.
   a. Identification of relevant product and geographic markets.
   b. Direct evidence of the power to control price or of actual exclusion of competitors.
   c. Indirect proof of monopoly power through evidence of high market share.
      (1) Exception possible for regulated industries.
      (2) Low barriers to entry may counterbalance market share data.

C. "Horizontal" Agreements or Conduct

Concerted conduct is characterized as "horizontal" when it involves market participants occupying the same level in the chain of distribution. Thus, an agreement by two competing manufacturers to charge X dollars per unit for a commodity that they sell is a horizontal agreement. Similarly, an agreement by two competing suppliers to charge no greater than X dollars for a specific service they perform is a horizontal agreement.

D. "Vertical" Agreements or Conduct

An agreement between parties occupying different levels in the chain of distribution is characterized as "vertical." For example, an agreement between a manufacturer and a reseller that the reseller will not sell the manufacturer's product at less than X dollars per unit is a vertical agreement. Also, an agreement between a manufacturer and a distributor that the distributor will only sell certain equipment within a specific metropolitan area is a vertical agreement.

E. "Rule of Reason"

The "rule of reason" is the fundamental rule of antitrust analysis. The Sherman Act, despite its facial prohibition of all restraints of trade, is interpreted to prohibit only those restraints which are unreasonable. Under the rule of reason, a court weighs the pro-competitive benefits of the defendant's challenged conduct against
the anticompetitive consequences of that conduct, only prohibiting conduct that, on balance, is anticompetitive. See *Standard Oil Co. v. United States*, 221 U.S. 1, 58-60 (1911); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

F. **Per Se Violations**

Per se violations of the antitrust laws are carved out from the general application of the rule of reason. Judicial experience has shown that certain types of conduct are so pernicious, and so lacking in pro-competitive justification, that they are conclusively presumed to be illegal. Such conduct is held to be a per se violation of the antitrust laws. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1 (1958).

G. **A Middle Standard**

Under certain circumstances, where "horizontal restraints on competition are essential if the product is to be available at all", the restraint will be analyzed under the rule of reason rather than under the per se rule. *NCAA v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 101 (1984); see also *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

1. In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), a group of dentists conspired to withhold x-rays requested by dental insurers for evaluating benefit claims. The Supreme Court refused to invoke the per se rule by forcing the dentists' policy into the "boycott pigeonhole". The court noted that the use of the per se approach in boycott cases generally has been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor. The Court further justified the application of the rule of reason analysis because of judicial reluctance "to condemn rules adopted by professional associations as unreasonable per se, see *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), and, in general, to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979)."

III. **HORIZONTAL RERAINTS OF TRADE UNDER SECTION 1 OF THE SHERMAN ACT**

A. **"Naked" Restraints**

As a general rule, "naked" restraints of trade agreed to between competitors, particularly those which tamper, even indirectly, with pricing are per se illegal. If
competitors can make a clear showing that their agreement is a "market creating" mechanism that provides a product or service that could not exist absent cooperation, they may persuade a court to examine their conduct under the rule of reason.

B. Proof

Proof of a contract, combination or conspiracy is a prerequisite to establishing a violation of Section 1 of the Sherman Act. Oksanen v. Page Memorial Hospital, 945 F.2d 696, 702 (4th Cir. 1991). A combination or conspiracy is established by proof of a "a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984). It is unnecessary to prove an overt, formal agreement among wrongdoers; a mere understanding can suffice. See Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 704 (1969).

1. Conspiracy may be established by direct or circumstantial evidence. However, where defendants have no rational economic motive to conspire, and their conduct is consistent with other equally plausible explanations, an inference of conspiracy may not arise. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 596-7 (1984); Todorov v. DCH Healthcare Authority, 921 F.2d 1348, 1356 (11th Cir. 1991).

2. The doctrine of "conscious parallelism" suggests that one or more companies may intentionally act in parallel fashion with the certain knowledge that their concurrent behavior will achieve an anticompetitive objective. Generally, this type of behavior alone is not enough to support a finding of conspiracy. Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41 (1954). However, if other factors in addition to consciously parallel action can be established, such as conduct contrary to the independent self-interest of the alleged conspirators, or opportunities for meetings among the alleged conspirators, such factors may be sufficient to permit an inference of conspiracy. See Weit v. Continental Illinois National Bank & Trust, 641 F.2d 457, 463 (7th Cir. 1981), cert. denied, 455 U.S. 988 (1982); United States v. Container Corp. of America, 393 U.S. 333, 335 (1969). In Cooper v. Forsyth County Hospital Authority, Inc., 789 F.2d 278 (4th Cir.), cert. denied, 479 U.S. 972 (1986), the Fourth Circuit Court of Appeals held that mere contacts and communications among the defendants were insufficient evidence from which a conspiracy could be inferred.

C. Per Se Violations

1. These violations are the most common targets for criminal prosecutions, and must be avoided at all costs.
2. Price fixing in its many forms, including express agreements on prices and bidrigging, is the most egregious of all antitrust violations. The Supreme Court has stated:

Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.


b. Agreements to establish minimum or maximum prices are also condemned. Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348 (1982).


e. The price-fixing prohibition is not limited to tampering with price alone. Thus, efforts to limit output or product quality which are utilized as means to indirectly affect price have been attacked successfully, as have limitations on hours of retailer operation or other activities indirectly affecting price. See National Macaroni Manufacturers Association v. FTC, 345 F.2d 421 (7th Cir. 1965); Detroit Auto Dealers Association, Inc. v. FTC, 1992-1 Trade Cases (CCH) ¶ 69,696 (6th Cir. 1992).


4. Concerted refusals to deal by competitors.

a. Agreements among competitors to deny the provision of goods or services to a common buyer are illegal per se. FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990).
b. An agreement among competitors to exclude another competitor from the market or to combine with entities at another level of distribution to exclude a competitor from the market, is illegal per se. Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).

c. Other refusals to deal for which some justification might be asserted are increasingly analyzed under the rule of reason (see Section III(E) discussion below).

D. Conduct Which Raises Concerns Over Possible Per Se Treatment


2. Exchanges of data, particularly price information, among market competitors. See FTC Staff Advisory Opinion from Robert F. Leibenluft, Assistant Director, Health Care Division, Bureau of Competition, Federal Trade Commission, to Kirk B. Johnson, Esq., American Medical Association (March 26, 1996).

3. Group selling and purchasing activities.

4. Joint ventures among competitors, including joint research and development.


E. Emerging Limitations on Application of the Per Se Doctrine to Horizontal Conduct

1. Certain activities which traditionally fell within the classic per se rule have received favorable treatment from the courts in recent decades. In its analysis of a blanket license agreement among composers, the Supreme Court refused to apply a per se rule, despite the fact that the agreement literally constituted price fixing, because the agreement was essential to the creation of a market and the production of a product which would not otherwise exist. Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979); see also NCAA V. Board of Regents, 458 U.S. 85 (1985).
2. In Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 296 (1985), the Supreme Court determined that the per se rule should not be applied to the expulsion of a competitor from a purchasing cooperative because the group did not possess "market power or exclusive access to an element essential to effective competition."

F. Intra-Enterprise Conspiracy Doctrine

Intra-enterprise conspiracy refers to the legal ability of constituent parts of a single enterprise to conspire for purposes of Section 1. In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court held that a parent corporation and its wholly-owned subsidiary are incapable of conspiring as a matter of law. The Court specifically avoided the question of whether a parent and a less than wholly-owned subsidiary could conspire. Nevertheless, the Court's rationale in support of its decision sheds some light on how such a question might be resolved. Where there is "complete unity of interest" or where "there is no sudden joining of economic resources that had previously served different interests," there is unlikely to be a combination of independent competitors. Radford Community Hospital, 1990-2 Trade Cas. (CCH) ¶ 69,152 (4th Cir. 1990)(two wholly-owned subsidiaries of the same parent are incapable of conspiring for purposes of Section 1 and 2 of the Sherman Act and Section 3 of the Clayton Act). While corporate divisions and employees are incapable of conspiring with the corporation, joint venturers usually are capable of conspiring both among themselves and with the venture. Key Enterprises v. Venice Hospital, 919 F.2d 1550 (11th Cir. 1990).

IV. VERTICAL RESTRANITS OF TRADE UNDER SECTION 1 OF THE SHERMAN ACT

A. General Rule

Vertical restraints are generally analyzed under the rule of reason, meaning that defendants will have the opportunity to present evidence justifying their allegedly anticompetitive conduct. The courts are reluctant to impede a producer's ability to distribute goods or services in the absence of an abuse of market power by the producer. The only remaining area of per se liability is for vertical price fixing, although control of retail prices may be achieved legitimately if certain rules are followed.

B. Control Over Territories and Customers

In Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court held that nonprice, vertical restrictions, such as territorial franchises, are analyzed under the rule of reason.
C. Tying Arrangements

1. A tying arrangement is a requirement by a seller that the sale of a product or service which possesses market power (the tying product) will only be made on condition that the purchaser buy a second product or service (the tied product) from the producer. "The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." Jeffersont Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984).

2. In Jefferson Parish, the Court reiterated that a plaintiff, to prevail, must establish two distinguishable product markets which are linked by the tying arrangement, and further establish that the seller has market power over the tying product. Proof of "market power" or "leverage" is necessary to establish a per se tying violation. There also must be proof of an adverse effect on competition in the market for the tied product.

3. The Supreme Court applied tying analysis to Kodak's restrictions on the sale of replacement parts for its micrographic equipment. In Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992), the Court held that Kodak was not entitled to summary judgment in defense of a charge that it had improperly tied the purchase of replacement parts to the provision of repair service. In discussing the issue of market power, the court determined that the relevant market could be limited to replacement parts for Kodak equipment. The dissent strongly criticized the court's holding, arguing that it makes no economic sense to limit the market power analysis to a determination of market share in a single brand aftermarket.

D. Exclusive Dealing Arrangements

Exclusive dealing arrangements are arrangements under which a party agrees to purchase only from a particular manufacturer or distributor. A common variant of an exclusive dealing arrangement is a "requirements contract" under which a party agrees to obtain all of its needs for a particular commodity from a single source. These arrangements are tested under a rule of reason which focuses on the percentage of the market which is foreclosed and the competitive effect of the foreclosure in the relevant market. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-29 (1960).
E. Resale Price Maintenance Agreements

1. Resale price maintenance is an agreement between seller and buyer fixing the price at which the buyer will resell the product. For nearly a century, agreements in which a seller set minimum resale price were treated as per se unlawful. Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911). United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944). In Monsanto Co. v. Spray-Rite Service Corp., 460 U.S. 1010 (1984), the Supreme Court declined to decide whether that per se rule should be overruled in favor of a rule of reason despite urgings from both government and private parties to do so. The Supreme Court held there that the termination of a discounting dealer in response to complaints and threats to refuse to carry manufacturer's product made by a competing dealer did not constitute price-fixing absent some agreement on price or price levels. See also Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988).

2. However, in 2007 the Supreme Court revisited this issue and, again with urgings from the public and private sectors, decided that minimum resale price maintenance should, in fact, be subject to the rule of reason. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007). Similarly, agreements in which a seller establishes maximum prices also will be evaluated under the rule of reason. State Oil Co. v. Barkat U. Khan, 522 U.S. 3 (1997).

3. On the other hand, a number of state antitrust laws (i.e., California) still treat resale price maintenance agreements as per se violations.


V. MONOPOLIZATION, ATTEMPTS TO MONOPOLIZE, CONSPIRACY TO MONOPOLIZE

A. Definition

Definition of the offense of monopolization: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
B. **Monopoly Power**—see definition in Section II(B) above

1. Mere possession of monopoly power itself does not violate Section 2 of the Sherman Act. Section 2 requires proof of illegal conduct.

2. As a general rule, 70-90 percent of the market is enough to constitute monopoly power; it is questionable whether 60 or 65 percent is enough; and certainly 33 percent is not enough. *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

3. Categories of anticompetitive conduct viewed by the courts as willful acquisition, maintenance or abuse of monopoly power.
   a. Predatory pricing - generally defined as pricing below some appropriate measure of cost.
   b. Refusal to deal - requires proof of "exclusionary" conduct or conduct lacking a legitimate business purpose.
   c. Leveraging - refers to the use of monopoly or market power in one market to obtain market power, or at least a competitive advantage, in another market. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979).
   d. New product innovation/introduction.
   e. Essential facilities - application of the essential facilities doctrine requires proof of the following factors: (1) control of the essential facility by a monopolist; (2) the inability of a competitor to practicably or reasonably duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of the monopolist to provide access to the facility. *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132-33 (7th Cir.), cert. denied, 464 U.S. 891 (1983); *McKenzie v. Mercy Hospital*, 854 F.2d 365, 369 (10th Cir. 1988). This doctrine is meant to address the problem that a monopolist, by means of denying access to the essential facility, can exclude competitors from the "downstream" market.

C. **Elements of Attempt to Monopolize**

1. Specific intent to destroy competition or build a monopoly. *Advanced Health-Care Serv., Inc. v. Radford Community Hospital*, 910 F.2d 139, 147 (4th Cir. 1990).
2. Dangerous probability that the attempt would succeed in achieving monopoly in the relevant market. See generally White Bag Co. v. International Paper Co., 579 F.2d 1384, 1387 (4th Cir. 1974). There is no specific market share that automatically establishes dangerous probability of success, but it generally requires more than 30 percent.

D. Elements of Conspiracy to Monopolize

1. Existence of a combination or conspiracy.

2. Overt acts done in furtherance of the conspiracy.


VI. PRICE DISCRIMINATION

1. Section 2 of the Clayton Act, popularly known as the Robinson-Patman Act ("R-P Act"), prohibits sellers ("any person engaged in commerce") from discriminating in price among different purchasers of commodities of like grade and quality.

   a. Requirement of engaging "in commerce."

      (1) Only the seller need be engaged in commerce.

      (2) Since the R-P Act requires discrimination, at least two sales must occur. But only one sale need be "in commerce," Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974).

   b. Requirement of at least two purchases.

      (1) In order to have a discrimination at least two purchases must have taken place. Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947).

      (2) There must have been an actual sale. The R-P Act has been found not to cover consignments, leases, licenses, agencies, and deferred sales.

   c. Requirement of commodities.

      (1) The sale-purchase transaction must be of a tangible article. The article must be a commodity, good, ware, merchandise, or product.
Providing a service, such as health care, is not providing a commodity. Ball Memorial Hosp., Inc v. Mutual Hosp. Ins., Inc., 784 F.2d 1325 (7th Cir. 1986). Discrimination in the sale of services, as opposed to commodities, may be challenged under Section 1 of the Sherman Act and is assessed under the rule of reason. St. Bernard Gen. Hospital v. Hospital Serv. Ass'n., 712 F.2d 978 (5th Cir. 1983), cert. denied, 466 U.S. 970 (1984).

Where both commodities and services are involved, courts look to the "dominant nature of the transaction." See, e.g., Aviation Specialties, Inc v. United Aircraft, 568 F.2d 1186 (5th Cir. 1978) (sale of aviation parts by aviation repairer is sale of service); General Glass Co., Inc v. Globe Glass & Trim Co., 1978-2 Trade Cas. (CCH) ¶ 62,231 (N.D. Ill. 1978) (sale of glass by automobile glass repairer is sale of service).

On the other hand, many state antitrust acts, like the Virginia Antitrust Act, cover discrimination in the price of services.

d. Requirement of like grade and quality.

For a discrimination to take place the prices charged must be different, but the commodities must be the same. If unlike commodities are involved, no discrimination has occurred. See E.B. Muller & Co. v. Federal Trade Comm'n., 142 F.2d 511 (6th Cir. 1944).

2. The R-P Act is violated only if the discrimination causes injury to competition. The injured may be a competitor of a seller (primary line) or a customer of a seller (secondary line). Most violations occur at the secondary line.

3. The R-P Act prohibits discrimination in cost to the buyer. Not only must selling price not be discriminatory, but also, discounts, delivered costs, and credit terms must not be discriminatory. See Texaco, Inc v. Hasbrouck, 496 U.S. 543 (1990) (to be lawful, a functional discount must constitute a reasonable reimbursement for the purchaser's actual marketing functions).

4. The R-P Act contains several legal defenses that exempt otherwise discriminatory transactions.

a. Cost Justification

Price discriminations may be lawful if they result from different costs of manufacture, sale or delivery due to different methods or quantities in
which the goods are sold or delivered to the customers receiving the different prices.

b. Changing Conditions

Sellers may be permitted to meet variations in the market of or marketability for the goods. If the seller engages in prolonged discrimination it is not likely that the changing conditions defense will apply.

c. Meeting Competition

(1) A seller may in good faith meet a competitor's lower price.

(2) The seller must in good faith verify the buyer's report of lower price. In so doing, sellers must be careful not to violate Section 1 of the Sherman Act. See United States v. United States Gypsum Co., 438 U.S. 422 (1978).


VII. DEFENSES AND IMMUNITIES

A. The State Action Doctrine

Antitrust law is aimed at private conduct, not the regulatory actions of state and local governments. The "state action doctrine," enunciated in Parker v. Brown, 317 U.S. 341 (1943), exempts anticompetitive conduct engaged in by the government acting as sovereign. States may not, however, confer immunity on private conduct merely by authorizing antitrust violations.

1. The Two-Prong Test

The Supreme Court has enunciated a two-prong test for the doctrine. The conduct must be (1) undertaken pursuant to a "clearly articulated and affirmatively expressed … state policy" and (2) "actively supervised" by the state. California Retail Liquor Dealers Association v. MidCal Aluminum, Inc., 445 U.S. 97, 105 (1980).
2. **Applicability to Sovereign Branches of State Government**

Sovereign branches of state government such as the legislature and the Supreme Court have absolute state action immunity. No active supervision or other aspects need be proved.

3. **Application to State Agencies and Local Governmental Entities**

State agencies and entities of local government including municipalities, counties and special local governmental bodies need only satisfy the first prong (clearly articulated and affirmatively expressed state policy). No proof of active supervision is necessary. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

4. **Application to Private Parties**

Private parties engaging in anticompetitive conduct must meet both prongs of the test. That is, the activity displacing competition must be intended and implemented by the State and actively supervised by some agency of the state government. *Patrick v. Burget*, 486 U.S. 94 (1988).

5. **The "Clear Articulation" Prong**

Under this requirement, plaintiff need not prove that the state compelled the anticompetitive conduct. Instead, the Supreme Court has held that as long as the conduct was authorized by the state and the conduct and its effects were reasonably contemplated and foreseeable by the state in authorizing the action, the test is satisfied. *Federal Trade Comm. V. Phoebe Putney Health System*, 568 U.S. ___, 133 S.Ct. 1003 (2013); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991).

6. **The "Active Supervision" Prong**

The Supreme Court has established a fairly rigorous standard for defendants seeking to satisfy the "active supervision" prong of the doctrine. The mere power or potential for state supervision is insufficient; *active* supervision requires that the state engage in an independent review over private activity, that it possess ultimate control over the activity and that it exercise the power to disapprove the conduct not in accordance to state policy. *North Carolina State Bd. Of Dental Examiners v. Federal Trade Comm.*, 574 U.S. ___ (2015); *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992) (deference to private agreements insufficient; test is whether state played a substantial role in determining the specifics of the policy to displace competition; mere potential for state supervision, e.g., by judicial review, insufficient); *Patrick v. Burget*, 486 U.S. 94 (1988);
North Carolina v. P.I.A. Asheville, Inc., 740 F.2d 274 (4th Cir. 1984) (state approval of mergers pursuant to certificate of need legislation inadequate because state did not monitor hospital's action after acquisition).

B. The Local Government Antitrust Immunity Act

1. The Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, immunizes from damage awards, attorneys fees and costs the actions of local governments, officials and employees acting in an official capacity. Actions for injunctive relief are not affected by the act however. Immunity is absolute and there need not be state authorization for the exemption to apply.

2. The Act's immunity covers employees and officials of local government agencies as well as "local government" entities, which includes cities, counties, and special-function governmental units such as hospital districts.

C. Noerr-Pennington Immunity

1. Most activities involving petitioning of governmental agencies or use of administrative or judicial processes enjoy immunity under the so-called Noerr-Pennington Doctrine. The Noerr Doctrine grows out of Supreme Court cases relying on statutory interpretation of antitrust laws and First Amendment concerns; these established cases hold that antitrust law does not apply to activities of parties seeking governmental action even though that action may have anticompetitive effects or the parties may have anticompetitive motives in petitioning the government. Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

2. Test for Applying Exemption.

Where the restraint on competition flows from governmental action the exemption applies; where the anticompetitive effects result directly from the petitioning itself or other anticompetitive conduct of private parties, there is no Noerr immunity. For example, efforts to obtain anticompetitive legislation from the government or similar administrative relief is covered. See, e.g., Sessions Tankliners, Inc. v. Joor Manufacturing, Inc., 17 F.3d 295 (9th Cir. 1994); Sandy River Nursing Care v. Aetna Casualty, 985 F.2d 1138 (1st. Cir. 1993). By contrast, where the anticompetitive effects flow from the petitioning itself, the Noerr immunity does not apply.
3. "Sham" petitioning and coercive conduct.

There is no right to Noerr immunity where petitioning efforts are a "sham" designed to shield anticompetitive conduct. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1971) (filing baseless claims is "sham"; abuse of judicial process does not qualify for immunity). However, an intention to harm a competitor does not by itself make litigation or administrative action a "sham." Potters Medical Center v. City Hospital Association, 800 F.2d 568 (6th Cir. 1986). To qualify as a sham, litigation must be "objectively baseless" and defendant's objective intent to interfere with plaintiff's business by use of litigation must be established. Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993).

VIII. MERGERS

A. Statutes and Jurisdiction

The primary statutory vehicle for examining mergers is § 7 of The Clayton Act, 15 U.S.C. § 18, which prohibits mergers, acquisitions and certain joint ventures that may substantially lessen competition or tend to create a monopoly. Mergers may also be challenged under § 1 of the Sherman Act. In addition, the Federal Trade Commission Act provides for FTC jurisdiction over mergers. The FTC's jurisdiction, however, extends to "corporations," defined as entities "organized to carry on business for its own profit or that of its members." Most courts have found FTC jurisdiction over mergers of not-for-profit institutions although the issue has been frequently contested. See, e.g., FTC v. Freeman Hospital, 69 F.3d 260 (8th Cir. 1995).

B. Governmental Guidelines

There are a number of useful sources of guidance about the policies of governmental agencies in the merger area.

1. 2010 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines.


C. Analytic Framework for Analysis of Mergers Under § 7

1. Incipiency standard. Section 7 of the Clayton Act forbids restraints that "may substantially lessen competition"; this language contemplates a prospective examination focusing on reasonable probabilities rather than
certainties. Inquiries are necessarily more speculative and uncertain than other areas of antitrust law.

2. **Methodology for Analyzing Mergers: A Six-Step Approach**

The following are the essential elements of the federal government’s merger analysis:

a. Product market definition

b. Geographic market definition

c. Identification of market participants

d. Calculation of market share and concentration data

e. Evaluation of the significance of market concentration data: rebuttal of presumption of illegality

f. Defenses

D. **The Relevant Product Market**

The relevant product market is defined as a "product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products would likely impose at least a 'small but significant non-transitory' increase in price." DOJ Merger Guidelines, § 1.11. This rather convoluted economic concept in practical terms means that market definition inquiries focus on the "reasonable interchangeability" of products or services. Merger analysis attempts to determine what services are good substitutes in the minds of consumers. A product market then can be defined as a product or group of products such that consumers would not switch to alternatives even if providers of the identified product market were able to raise prices to monopolistic levels.

E. **Geographic Market Definition**

As with product market definition, delineating geographic markets requires an inquiry into substitution responses. Courts have to determine how far customers would travel to obtain substitute products or services in response to a "small but significant and non-transitory" increase in price. The question is usually framed as determining the area in which customers can practicably turn and within which sellers compete.
F. Market Participants

Under the DOJ Merger Guidelines, the factfinder must include all firms that compete in the relevant geographic and product markets and all "uncommitted entrants," i.e., firms that could enter quickly (i.e., without incurring significant sunk costs).

G. Market Share and Concentration Data and Its Significance

1. Presumptive Illegality

Caselaw establishes that proof of significant levels of concentration and high market shares of the merging parties will establish a presumption of illegality; only evidence "clearly showing" that competitive harm will not occur will suffice to rebut the proofs option. U.S. v. Philadelphia National Bank, 374 U.S. 321 (1963) (30% combined share for merging parties in a concentrated market constituted "an undue market share" giving rise to a presumption of illegality). The DOJ Merger Guidelines apply a similar presumptive rule based on concentration levels. For practical purposes the guidelines presumption is triggered where two firms merge in a market involving six equally sized firms. DOJ Guidelines, § 1.5. However, the Merger Guidelines have substantially weakened the Philadelphia National Bank presumption of illegality. Merger Guidelines § 2.0.

As a general matter, courts look to a variety of factors no one of which is dispositive in evaluating whether defendants have overcome the presumption of illegality based on concentration data. The key inquiry is whether the special circumstances of the particular market make it unlikely that the firms will be able to exercise market power by raising prices either unilaterally or through collusion with the remaining competitors in the market. Of particular importance to these inquiries are the following factors.

2. Factors Considered in Rebuttal of Presumptive Illegality

a. Entry Barriers. Where no significant impediments to entry would foreclose quick and effective entry to new competitors, courts have frequently found sufficient evidence to rebut a prima facie showing of anticompetitive harm based on concentration data. See, e.g., United States v. Baker-Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990). See also Merger Guidelines § 3.0 (setting benchmark of two years for entry barrier analysis and requiring that entry be significant and effective; defining easy entry as entry that is "timely, likely and sufficient" to counteract the competitive effects of concern).
b. **History of Collusion.** An important factor in many merger cases has been a past history of collusion by firms in the market. This evidence is useful in demonstrating that any obstacles to collusion may be overcome by the parties. However, the absence of such evidence does not undermine the government's prima facie case.

c. **Factors Affecting the Likelihood of Coordinated Interaction.** A variety of factors may affect the likelihood that firms may coordinate their activities. In particular, circumstances enabling parties to detect and punish "cheating" or that make it difficult to reach an agreement are given significant weight. See DOJ Merger Guidelines § 2. Courts may thus consider differences in the merging parties' mix of products or the fact that they have different costs in evaluating the likelihood that they would be able to collude on price.

d. **Not-for-Profit Status.** As a general matter, courts have declined to find that a firm's not-for-profit status lessens the likelihood of collusion or supracompetitive pricing in the market. See, e.g., F.T.C. v. University Health, Inc., 938 F.2d 1206, 1224 (11th Cir. 1991); Hospital Corp. v. F.T.C., 807 F.2d at 1390 ("no one has shown that [not-for-profit] makes the enterprise unwilling to cooperate to reduce competition."

e. **Sophisticated Buyers.** Courts have recognized that strong, sophisticated buyers might inhibit the ability of merging firms to raise prices.

f. **Other Factors.** Courts may consider a variety of other factors in evaluating the risks of anticompetitive effect, such as the financial strength of the competitors, excess capacity in the marketplace, and barriers to effective shopping by customers.

H. **Defenses**

1. **The Failing Company Defense.** Where a merging entity is "failing" in the sense that its financial failure is all but certain and imminent and reorganization under bankruptcy is impossible, courts may allow an otherwise objectionable merger to go forward. The burden of proof on defendants is considerable not only because of the required showing of likelihood of failure, but because defendants must prove that no less anticompetitive acquirer was present and no other means (e.g., a joint venture) to assure the survival of the firm was possible. See, e.g., DOJ Merger Guidelines § 5.
2. **Efficiencies.** A defense of growing importance in litigated merger cases is the argument that the merger will generate such large efficiencies so as to outweigh any adverse effects resulting from the merger. Courts and the FTC have closely evaluated efficiencies, sometimes attempting to quantify total cost savings likely to be realized from the merger. They have taken into account savings attributable to economies of scale, lower capital costs, greater per unit efficiencies, operational synergies, and other factors. See, e.g., F.T.C. v. University Health, Inc., 938 F.2d 12-6 (11th Cir. 1991); Merger Guidelines § 4. Caselaw suggests that defendants must demonstrate that efficiencies cannot be achieved by means less anticompetitive than a merger (such as through internal expansion or merger with smaller firms); that the parties demonstrate efficiencies by clear and convincing evidence; and that any resulting efficiencies be passed on to consumers. See U.S. v. Rockford Memorial Corp., 898 F.2d 1278 (7th Cir.), cert. denied, 498 U.S. 920 (1990); American Medical International, 104 F.T.C. 1, 218 (1984). Recently the Federal Trade Commission has indicated an increasing receptivity to efficiencies defenses. However, it remains the case that demonstrating the existence of such efficiencies and proving that their magnitude outweighs anticompetitive effects is a burdensome requirement.

**IX. JOINT VENTURES**

**A. In General**

The term "joint venture" refers broadly to a large range of cooperative efforts among firms that entail collaboration in production, research, distribution, marketing, or other endeavors. Usually, this cooperation is driven by a desire to attain efficiencies from integration. Joint ventures are usually classified according to the relationships among the co-venturers: "horizontal" joint ventures refer to those created by firms that compete with each other in supplying a product or service; "vertical" joint ventures are those involving firms that deal with each other in a complementary fashion in the production or supply of goods or services (e.g., manufacturers and distributors).

**B. Competitive Risks and Benefits Associated with Joint Ventures**

1. **Balancing Risks and Harms**

Joint ventures pose analytic complexity for antitrust enforcers because they may offer procompetitive efficiencies as well as anticompetitive risks. Risks are far more likely in horizontal joint ventures because they entail a combination of two or more previously competing firms. On the
procompetitive side, joint ventures usually entail the realization of efficiencies. This may occur because costs or risks are spread over a larger number of firms, the co-venturers may achieve synergies in production or distribution, or other cost-saving benefits may be realized.

2. Overinclusion and Exclusion

In assessing competitive risks, antitrust enforcers are usually more concerned with over-inclusion, i.e., joint ventures which join together significant competitors so as to enable them to exercise market power either unilaterally or in combination with the limited number of other participants left in the market. Also raised as a concern, but less frequently recognized by the courts, is the problem of exclusion of firms from joint ventures. Those not invited to participate in the joint venture frequently claim an antitrust "boycott" or tying arrangement or allocation of markets has deprived them of the opportunity to compete. Because joint ventures usually benefit from greater selectivity, these claims are rarely successful. See, e.g., Hahn v. Oregon Physicians Services, 868 F.2d 1022 (9th Cir. 1988), cert. denied, 110 S.Ct. 140 (1989). In some cases, however, where the joint venture achieves substantial market power, the exclusion may be seen as a way of preventing competition through exclusionary tactics.

C. Methodology for Analyzing Horizontal Joint Ventures

1. Naked Restraints

Antitrust doctrine seeks to identify those joint ventures that entail "naked" restraints of trade, i.e., agreements having no main purpose other than restraining trade. These ventures are illegal regardless of the legitimacy of the transaction, the parties' motives, or other justifications. Thus networks that entail no significant integration ("sham" joint ventures) have been condemned as naked restraints of trade.

2. Ancillary Restraints

On the other hand, restraints of trade inherent in a joint venture are commonly upheld where they are deemed "ancillary" to a lawful purpose and reasonably necessary to accomplish that purpose. In the latter case, courts examine the activity under the rule of reason, attempting to determine whether on balance the procompetitive efficiencies of the venture override any anticompetitive risks. Doing this entails defining relevant markets, assessing and evaluating market share and concentration data, and judging whether anticompetitive effects are present. Against these risks will be weighed cost-savings and other efficiencies that might
offset competitive harms. Finally, courts will scrutinize the joint venture to make sure it is no broader than necessary to accomplish the legitimate purpose.

3. **Spillovers**

Finally, even legitimate joint ventures that entail "spillover" risks, i.e., agreements not necessary to the legitimate purposes of the venture and that lessen competition in other markets, will be condemned.

D. **Department of Justice/FTC Guidelines**

On April 7, 2000, the Department of Justice and FTC issued "Antitrust Guidelines for Collaborations Among Competitors," which provide an outline of the analytical principles the agencies apply in evaluating joint ventures.