ANTITRUST LAW

THE ANTITRUST GAME

- **Goal –** Promoting competition, preventing monopoly
  - **US predominant.** Main body of law, often applied internationally.
  - **Push to internationalize antitrust law** due to international scope.
- **Players**
  - **Plaintiffs –** DOJ Antitrust Division, FTC competition Division, States, Private Plaintiffs
    - **FTC**
      - **FTC Act Sec 5 –** Embodies Secs 1 and 2 of Sherman act, equal and coterminous.
      - Staff recommend to commissioners -> Issuance of Complaint -> ALJ -> Initial Opinion -> Appeal to Commissioners -> CoA -> SCOTUS
    - **States** usually involved, even in larger issues
    - **Private plaintiffs**, such as competitors, can recover damages.
  - **Defendants –** Companies, Individuals, etc.
- **Courts –** Federal Courts, generally.
  - **SCOTUS creates numerous rules of thumb** due to difficulty of cases for judges, jury.
  - **Jury trial guaranteed** where fines/criminal penalties involved.
- **Stakes**
  - **State-sought:** (1) Injunctions, (2) Divestiture, (3) Dissolution, (4) Fines [Considered a criminal penalty] [$1m for individual, $100m for organization, 2x losses alt], (5) Jail
  - **Privately Sought:** (6) Damages [AUTOMATIC TREBLE DAMAGES]
- **Attorneys' Fees**
  - **Win:** Losing defendant pays.
  - **Lose:** Both pay individual costs.

CREATION OF A MONOPOLY

- **(1) "Better Mousetrap Monopoly" –** Via innovation/first mover advantage. Patents, etc. Allowable.
- **(2) Impermissible Monopolies**
  - **(a) "Buy Them Up"** - Major mergers, etc. - Clayton Act
  - **(b) "Blow Them Up"** - Squeeze-out, etc. - Sherman Act Sec. 2
  - **(c) "Deal"** - Cartels, etc. - Sherman Act Sec. 1
- **Types of Arrangements**
  - **Horizontal** – Between competitors
  - **Vertical –** Between suppliers and buyers, etc.
- **Evils of Monopolies:** (1) Power of price fixing may injury the public, (2) Power to limit production, (3) Danger of deterioration of product. *Standard Oil Co. of NJ v. US.*

CIVIL PROCEDURE

- ***Twombly* 12(b)(6) Rule**
  - **"Economic Sense" Rule:** P must plead "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. [...] An allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Bell Atlantic Corp. v. Twombly;*
    - Must reasonably exclude independent action. *Monsanto*
- **PRIVATE ENFORCEMENT (90% of cl.) - Standing, Causation and Antitrust Injury**
  - **Clayton Act Sec. 4 –** Plaintiff must be a "person" (inc. corporations and associations) who was "injured in his business or property"
    - "Little in the way of restrictive language." *Reiter v. Sonotone Corp.*
    - **Does not include: Employees discharged** (*Ostrofe 1/2),* **Downstream purchasers (can only be used defensively),***Illinois Brick,* Shareholder suing on own right for reduction in value in stock; trade association or nonprofit for recovering damages allegedly inflicted on members; nor may a landlord sue even though leased property involved percentage of profits.
    - **SCOTUS has general sympathetic feel towards private enforcement.** *Blue Shield of Virginia v. McCready*
  - **STANDING**
    - **(0) DUPLICATIVE RECOVERY**
    - **(1) REMOTENESS (CAUSATION) –** Direct Victim
      - **Purchasers** have standing, employees etc do not. Goal of preventing duplicative recovery.
      - ***Blue Shield***
        - **(A) Physical and economic nexus** between the alleged violation and the harm to the plaintiff; and
        - **(B) The relationship of the injury alleged with those forms of injury** about which Congress was likely to have been concerned in making defendant's conduct unlawful in providing a private remedy under Sec. 4.

- **[BUT] Plaintiff need not "prove an actual lessening of competition in order to recover** … competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened."

- (2) **INDIRECT PURCHASER RULE –** "Passing on" not a defense. *Illinois Brick*
  - **Even if "passed on", only direct purchasers have standing.** Thus, middle men and not consumers. *Illinois Brick*.
  - **Some states allow consumers to sue anyway.** Results in multiple damages, though damages may be reduced if suit in same jurisdiction.
- (3) **ANTITRUST INJURY –** Damage must be kind of damage AT system designed for.
  - **i.e. TARGETING**
  - **Proof of actual harm irrelevant.** *Klors v. Broadway-Hale*.
- [4] **FOREIGN INJURY (*Empagram*)**
  - **Sherman Act "shall not apply to conduct involving trade or commerce … with foreign nations."** Foreign Trade Antitrust Improvements Act of 1982.
  - **Foreign D in US –** Y, suit allowed.
  - **Foreign D, actions overseas, no exports –** N
  - **Foreign Ds, action overseas, exports to US, national Ps –** Yes, if "direct and immediate effect"
  - **Foreign Ds, action overseas, exports to US, foreign Ps –** Y, only if harm to foreign and US "interdependent". *Empagram*. Must meet proximate cause. *Id.*

SHERMAN ACT

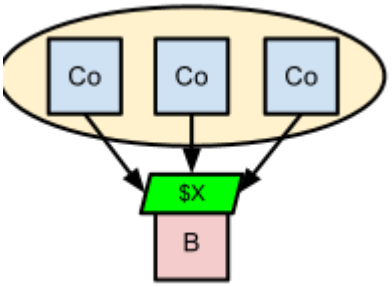
- Historical
  - **OLD: Limited monopolies for market correction possibly allowable if not "naked price fixing".** Focuses on *adding* competition, enlarging market, good intentions, etc. Ex: *Chicago Board of Trade v. US*.
    - **Rule of Reason for non-price-fixing ("Ancillary" agreements):** "All contracts where there is a bare restraint of trade and no more, must be void; where special matter appears as to make it a reasonable and useful contract, the presumption is excluded." *Mitchel v. Reynolds*.
    - **Overturned concept of "good" price fixing,** emphasis on "setting sail on the sea of doubt" in *Addyston* re: judge inability to determine the value of "good" monopolies.
  - Sherman Act embraces *all direct restraints* such that *every combination or conspiracy* that would extinguish competition between [competing railroads] engaged in *interstate trade or commerce* and which would *in that way restrain such trade* or commerce is made illegal. *Northern Securities*.
  - Sherman Act held to prohibit *all* contracts in restraint of trade, not just those originally in common law rules. *US v. Trans-Missouri Freight Association*.

MULTILATERAL RESTRAINTS, GENERALLY

- Sherman Act 1 - Every **contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce** among the several States, or with foreign nations, is declared to be illegal. 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 10 years, or by both said punishments, in the discretion of the court.

"AGREEMENT"

- **(1) NORMAL "Skill, Foresight, and Industry" IN COMPETITION**
  - **But-for test:** If but-for agreement behavior would still occur, legal/competitive/etc.
  - **Parallel business behavior alone insufficient.** Reasonable strategies as adopted by multiple parties in the same position does not prove agreement. *Theatre Enterprises v. Paramount Film Distro*
- **(2) AGREEMENT (CONSPIRACY) ->***Illegal per Sherman Act* (HARM + PUNISHMENT)
  - **Agreement –** Must "Exclude the possibility of independent action" via direct or circumstantial evidence that "reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*

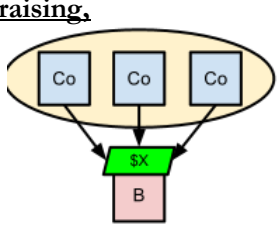


  - **(0)Copperweld Rule –** Cannot "conspire" with own subsidiary, etc. *Copperweld.*
    - **Joint ventures** count. *Texaco v. Dagher*, but **Leagues DO NOT COUNT**. *Am. Needle v. NFL*
      - **(1) WHOLLY OWNED SUBSIDIARIES** count as one big group. *Copperweld v. Independence Tube Corp.*
      - **(2) PARTIAL OWNERSHIP –** Open question, courts vary from 50-100%.
      - **(3) M&A –** Parties agreeing to merger as one entity for Sherman Act OK
      - **(4) COMMON OWNERS –** May be one entity.
      - **(5) AGENCY –** Agency model MAY apply.
      - **[6] LEAGUES –** Not one single entity where no necessity to be as such. *American Needle v. NFL*
  - **(A) Express Agreements** ("Hotel Room Agreements")
    - Some "**unity of purpose or common design and understanding**, or a **meeting of minds** in an unlawful arrangement." *Am. Tobacco Co v. US*
    - May be directly proven or inferred.
    - **Inferring: Evidence can be drawn from** "radical departure[s] from the previous business practices of the industry and a dramatic increase in [prices]." *Interstate Circuit v. US.*
    - **TEST: "Acceptance by competitors,** without previous agreement, **of an invitation to participate in a plan,** the necessary consequence of which, if carried out, **is a restraint of interstate commerce,** is sufficient [for the Sherman Act]." *Interstate Circuit v. US*
      - What the parties actually did, rather than the words used. *US v. Parke Davis.*
      - **Concerted action was contemplated and invited, Ds gave adherence to scheme and participated.**
  - **(B) Implicit Agreements** ("Conscious Parallel Behavior")
    - Conscious parallel pricing ALONE does NOT violate Sherman Act. *Theatre Enterprises.*
    - **Requires "Plus Factors" (*Blomkest v. Potash*):**
      - **(a) Econometric Evidence**
      - **(b) Actions against Interest**
      - **(c) Interfirm Communications**
    - **Evidence** must **"tend[] to exclude the possibility" that the alleged conspirators acted independently**. *Matsushita* (For JMOL)*; Monsanto v. Spray-Rite.*
      - But proponent **does not have to exclude ALL possibility.** *In re Brand Name Prescription Drugs Antitrust Litigation*
    - **MUST MEET *TWOMBLY.*** Cannot merely allege agreement.
- **(3) OLIGOPOLY->***Inapplicable to Sherman Act*(HARM BUT NO PUNISHMENT)*(Gas Station Example)*
  - **Facilitating Features:** (1) Concentrated Market, (2) Fungible Product, (3) Transparency of Pricing, (4) Lumpy Pricing.
    - **FOCUS ON FUNGIBILITY WITHIN MARKET.**

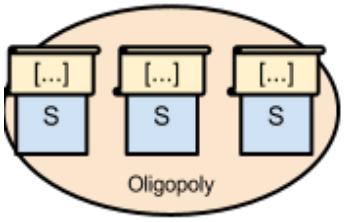
HORIZONTAL RESTRAINTS

PER SE ILLEGAL

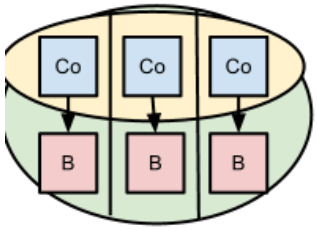
- **Appropriate "once experience** with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Maricopa County.*
  - "Pernicious effect on competition" *Northern Pac. RR* that courts have had "considerable experience" with. *Topco.*
- **(A) HORIZONTAL PRICE FIXING**
  - "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.*"** *US v. Socony-Vacuum Oil Co.*



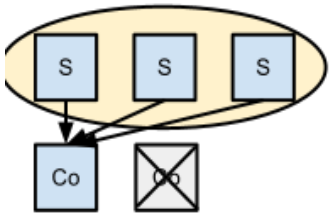
    - **EVEN IF A FAILED ATTEMPT.** FN 59 of *Socony.*
    - *But* **offers to agree** alone not punishable. *American Airlines*
    - **Professional services count too,** though some non-PF regulations okay under ROR. *Goldfarb.*
    - **"Advisory" limits still prohibited.** *Goldfarb* (may be distinguishable per facts).
  - **(1) FACILITATING PARALLEL PRICE FIXING**
    - Generally involve **facilitating price fixing by promoting parallelism.**
    - **(I) INFORMATION EXCHANGE**



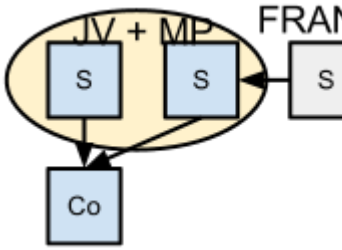
      - RULE OF REASON. *Gypsum; Todd v. Exxon.* If sufficiently specific, per se vio. Else, must show plus factors.
      - **APPROACH A:** *Per se* vio for explicit, direct price sharing tied to price changes. *American Column.* Contrast *Maple Flooring* (vague info, no vio).
      - **APPROACH B: Specific info** sharing – must show **"PLUS FACTORS" (*Container Corp; Gypsum)*:**
        - **(1)** Highly Concentrated Market
        - **(2)** Fungible Product, and
        - **(3)** Nature of info exchanged
        - **(4)** Demand inelastic.



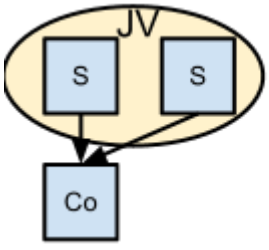
- **(B) HORIZONTAL MARKET ALLOCATIONS**
  - **PER SE ILLEGAL: Division of market, etc with the effect of limiting competition in are**a. *US v. Topco; Palmer v. BRG*
- **(C) GROUP BOYCOTTS ("Horizontal Concerted Refusals to Deal")**
  - **BOYCOTTS IN ANTITRUST**
    - **(1) Agreement –** Per Se Unlawful, see below
    - **(2) Evidence of Underlying Agreement –** Per Se Unlawful, see below.
    - **(3) As Facilitating Practice/"Implied Boycott" –**Per Se Unlawful
  - **"Group boycotts,** or **concerted refusals by traders to deal with other traders,** have long been held to be in the forbidden category. *Klor's v. Broadway Hale,* citing *Fashion Originators' Guild.*



    - **Apply to** joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." *NW Wholesale v. Pacific Stationary.*
      - **HINGES ON ATTACKING COMPETITORS**
      - **BOYCOTT:** One party getting 10 suppliers to boycott all competitors.
      - **NOT:** One party getting one supplier to boycott competitors (VERTICAL). (*Nynex*).
      - **Applies regardless of number of Ds.** *Klor's.*



    - **(i) EXCLUSION OF MEMBERS**
      - **If market power, must provide membership on FRAND terms**(and exclusion *Per Se* Unlawful). If no market power, Rule of Reason. *NW Wholesale*
        - **But FRAND terms do not mandate inclusion all the time.** Non-paying members, etc.
    - **(ii) ESSENTIAL FACILITIES -** If market power (alone or as JV), then **must provide access on FRAND terms.** *Terminal RR; Nw. Wholesale v. Pac. Stationary.*
    - **(iii) EXCEPTION:JOINT VENTURE "boycotts "generally ALLOWED**

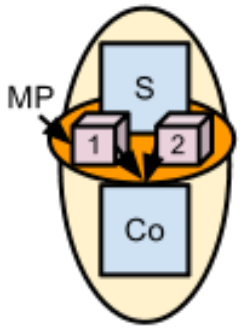


      - **Rule of Reason** triggered -> MUST HAVE REASON FOR ANTICOMPETITIVE BEHAVIOR

- **(D) EXCEPTIONS**
  - **(0) Ancillary Restraints.** Posner in *General Leaseways* ("Ancillary Quick Look")
    - **"Legitimately" Ancillary approach.** Posner approach in *General Leaseways*:
      - **(1) Procompetitive Contract**
      - **(2) Anticompetitive proviso reasonably related/necessary**
      - **(3) No available precompetitive alternatives.**
  - **(1) Leagues (to quick look).** *NCAA v. Bd. Of Regents; Clarett.*
  - **(2) Professions** regulating "**Ethical Norms that Regulate and thereby Promote Competition"(to quick look).** *FTC v. SCTLA, Goldfarb FN; Chicago Board of Trade;* etc. -> **GO TO QUICK LOOK**
    - **Includes higher education.** *US v. Brown* -> FULL RULE OF REASON
  - **(3) State Action.** Where state demands compliance. *Goldfarb.*
  - **(4) New Products/*Sui Generis* Rule.** *BMI*
    - **(a) Joint Ventures -> RoR (UNLESS Essential Fac).** *Texas v. Daugher.*
  - **(5) Noncommercial Motive.** *SCTLA* if assuming only jail cleanup protest motive.
  - **(6)Noncommercial/Academic Institutions.***US v. Brown* ("antithesis of commercial activity")
  - **(7)*Copperweld* Unity of Purpose.** Where wholly owned, etc.
  - **(8) Free Speech.** *SCTLA.* Not generally followed.
  - **(9) Free Riders.** *Topco; TRU.* Not favored.
  - **(10) Interstate Commerce.** VERY hard to disprove. *Goldfarb.*

IDIOSYNCRATIC RULES

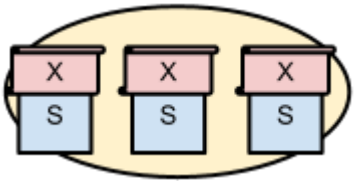
- **(A) TYING ARRANGEMENTS**
  - "Agreement" as "Contract" + Monopolizing + Clayton Sec. 3
  - **MODIFIED PER SE VIOLATION.** *Jefferson Parish* (but requires RoR-like analysis)
    - Compare to exclusive dealing/purchasing. Can be similar.
    - NO PROCOMPETITIVE DEFENSE.
  - **(1) TWO PRODUCTS TIED TOGETHER**
    - **(i) MUST BE SEPARATE:** Question if, if consumers *could* purchase separately (i.e. from different sources), *would* they, or would they consider them the same? See e.g. *Jefferson Parish*
      - **Distinct products IF** "there [is] sufficient customer demand so that it is efficient for a firm to provide [one] separate from [the other]." *Kodak*
      - Depends on nature of consumer demand. *Multistate Legal Studies v. Harcourt Brace Jonavich Legal and Prof'l Publications*
    - **(ii) MUST BE FROM SAME SELLER.** S can force purchase from third party.
    - **(iii) MUST FORECLOSE MARKET FOR SECOND PRODUCT.** If consumers would never have purchased second product, no antitrust injury per se. *Jefferson Parish.*
      - BUT parts themselves have independent demand, even if necessitate #1. *Kodak v. ITS*



  - **(2) MARKET POWER IN TYING PRODUCT**
    - **(i) DEFINE MARKET + (ii) DEFINE SHARE OF MARKET**
    - Power to force purchase **where customers would prefer buying from someone else**
      - NOT power to force purchase where customers would not purchase (See above)
    - **% of market relevant,** NOT percent of customer base already held.
    - **Patents** do not create de facto market power. *Illinois Tool*
    - **May coexist with aftermarket parts.** *Eastman Kodak v. Image Tech. Services*
    - **Imply a non-"fair" Monopoly –** Tying considered an attempt to monopolize by squeezing out competitors
  - **(3) "NOT INSUBSTANTIAL" $ VOLUME**
    - **Super low bar – almost ignorable.** Simply requires some money involved. *Int'l Salt.*
  - **[4] IF FAILURE -> ROR** (Allows procompetitive analysis, etc).
  - **[5] Trend: RoR, no proof that tying is profitable and harmful**

"QUICK LOOK" (BURDEN ON D)

- **D must prove procompetitive benefit.** Presumption of anticompetitiveness.
  - P shows suspect case -> burden on D to prove procompetitive benefit -> P can contest justification
  - **NO DISCRETION FOR TRIAL COURT.** No "scaling back." *SCTLA.*
- **(1) REFUSALS TO DEAL OR TO DISCUSS/ADVERTISE PRICES**
  - "**No elaborate industry analysis is required** 'to demonstrate the anticompetitive character of '**horizontal pricing agreements among competitors to refuse to discuss prices**, *Nat Soc. of Prof'l Engineers v. US,* or to **withhold a particular desired service**, *FTC v. Indiana Fed. Of Dentists.*"
  - Includes **restraints on price information/advertising** *California Dental Ass'n.*

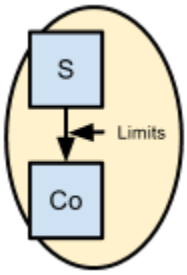


- **(2) LEAGUE SPORTS/NONPROFITS**
  - **LEAGUE SPORTS -** Some league sport restrictions allowed, including limits on age entry. *NCAA v. Board of Regents.* BUT exception limited, ostensibly to where necessary. *American Needle v. NFL.* May justify full ROR. *American Needle.*
  - **NONPROFITS.** Something like a quick look per *Brown.*
- **(3) PROFESSIONS WITH ETHICAL NORMS**
  - "Ethical norms may serve to regulate and thereby promote competition"
  - Evaluated with quick look. *FTC v. SCTLA, Arizona v. Maricopa,* etc.

RULE OF REASON

- **ESSENCE: IMPACT ON COMPETITION.** *NCAA v. Bd of Regents of Univ. Of Oklahoma.*
  - **CAN DEFEND WITH PRO-COMPETITIVE BENEFITS ONLY.** *Bd of Trade of City of Chicago.*
  - **THREE BURDEN SHIFTS: (1)** Burden on P to show *actual* adverse effect on competition. **(2)** Burden on D to offer evidence procompetitive "redeeming virtues" of combination. **(3)** Burden back on P to demonstrate that any legitimate collaborative objectives proffered by D could be achieved by less restrictive alternatives (i.e. less prejudicial alts).
- **FACTORS ASSISTING ANALYSIS**
  - **TOTALITY OF CIRCUMSTANCES TEST, ALL HINGING ON PRO VS ANTI COMPETITIVE**
  - **(A) HARM TO COMPETITION**
    - Government must prove adverse effect to competition (as a whole in the market). *US v. Visa.*
  - **(B) (MARKET) POWER**
    - A form of harm – gaining unjustified power in market, leading to potential harm.
    - **(i) DEFINE MARKET (ii) DEFINE SHARE OF MARKET**
    - A distinct product market "comprises products that are considered by consumers to be 'reasonably interchangeable' with what the defendant sells." *US v. Visa.*
    - **Cannot argue for effects in different market.** *Clarett.*
    - **Can be indirect.** Price of components, credit lines, etc.
    - Measurements: 1% insufficient (*Tampa Elec*) but 40% Substantial (*Microsoft*)

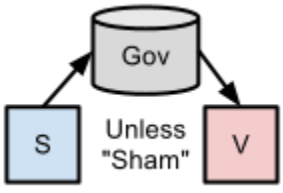
VERTICAL RESTRAINTS



- **Trajectory:** Once completely *per se*, *Sylvania* makes NPR evaluated under RoR, *Monsanto* creates "agreement" standard as high bar, *Leegin* makes RPM RoR => ALL RoR.
- **(A) VERTICAL PRICE RESTRAINTS**
  - **(i) NAKED PRICE RESTRAINTS** ("Resale Price Maintenance")
    - Entirely RoR. *State Oil* (Maximum RPM), *Leegin* (Minimum).
    - **Agency consignment arrangements** also allow price control, given lack of sale etc. *US v. GE*
    - **SUBJECT TO CONSPIRACY, ETC.** If P can show price fixing part of conspiracy or otherwise tool for abuse, likely can find unreasonable. *Leegin.*
  - **(ii) *COLGATE* LACK OF "AGREEMENT"**
    - **Refusals to deal not agreement,** but can effectuate RPM).
      - When RPM was PS illegal, had to prove refusal was due to price cutting. *Monsanto* (now irrelevant).
      - ("I refuse to deal with you unless you sell for ___")
    - **ASSENT (CREATING AGREEMENT) DESTROYS.** *Girardi v. Gates Rubber.*
  - **(iii) "Agency" Consignments –** Still permit RPM despite being needless now. *Valuepest.com v. Bayer*
- **(B) VERTICAL NON-PRICE RESTRAINTS (MARKET ALLOC, ETC)**
  - **RULE OF REASON**. *Continental v. GTE Sylvania; Standard Fashion*
  - **Section 1 if agreement, Section 2 if monopoly to force without agreement**
  - **(i) EXCLUSIVE DEALING**
    - **Question of foreclosure:**
      - **(1) % of Foreclosure** (how much of the market is left),
      - **(2) Duration of Contracts** ("Breakability" of contract),
      - **(3) Harm to Competition** (if exclusion of new competitors actually furthers competition)
  - **(ii) EXCLUSIVE PURCHASING**
    - **Question of foreclosure.** *Tampa Electric v. Nashville Coal.* **Factors:**
      - **(1) Line of commerce** (wares in controversy)
      - **(2) Area of effective competition** (threatened foreclosure must be in relation to market affected),
      - **(3) Relevant market involved**
      - **[4] Future impacts of pre-emption of that share**
- **Hatch-Waxman**
  - **Open question re: settlement validity.** Issue of if settlement curtailing competition can be valid.

INFLUENCE OF GOVERNMENT

- **LIMITED TO ANTITRUST + CANNOT SUE GOVERNMENT.** Only a question of applicability of Sherman Act.
- ***Noerr* Doctrine: Attempts to "petition" or influence the government** to **impose anticompetitive restraint** are **immune** from antitrust action. *Noerr.*
  - **Even incidental effects:** Even if "incidental effect" of petitioning government is direct harm to competitor, no violation. *Noerr*
    - **Motives irrelevant.** Doctrine immunizes any behavior, even if motive evil. *BUT MAY BE REVIVED PER Prof'l Real Estate*
  - **"Petitioning"**
    - **Does not count if AT vio if not directed at government.** Example: Boycotts. *SCTLA.*
  - **(A) APPLICATION**
    - **(1) LEGISLATIVE –** *Noerr,* etc.
    - **(2) ADMINISTRATIVE –** *California Motor Transport*, etc.
    - **(3) JUDICIAL – *Prof'l Real Estate***
      - **(i)** OBJECTIVELY BASELESS (i.e. absence of probable cause) +
      - **(ii)** BAD MOTIVE
  - **(B) "SHAM" EXCEPTION:** Where claims evince "a pattern of baseless, repetitive claims … which lead[] the fact finder to conclude that the administrative and judicial processes have been abused." *California Motor Transport Co. v. Trucking Unlimited.*

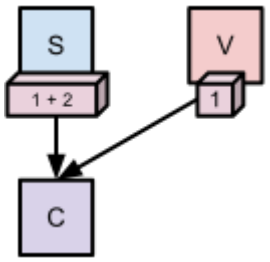


    - Methods to **"harass and deter [competitors] in their use of administrative and judicial proceedings" prohibited.** *California Motor Transport Co v. Trucking Unlimited* ("sought to bar … competitors from meaningful access to adjudicatory tribunals" via bad adversarial proceedings)
    - **Probable cause determination = no sham.** *Prof. Real Estate v. Columbia Pictures.*

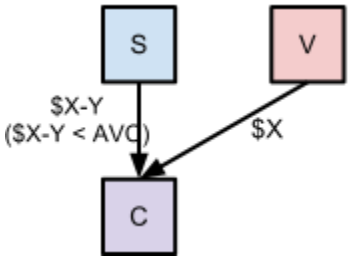
MONOPOLIZATION

MONOPOLY

- Sherman Act 2 -Every person who shall **monopolize**, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
- **(1) MONOPOLY POWER IN A MARKET**
  - **Power to control prices or exclude competition.** *US v. EI du Pont de Nemours*
  - **(A)"MARKET"**
    - Empirical question of fact
    - **(i) GEOGRAPHY**
      - **FOREIGN MARKETS** may be included if imports can come in, etc.
    - **(ii) PRODUCT SCOPE**
      - **Factual** question of **cross-elasticity of demand** - **"how different from another are the offered commodities in character or use**, how far buyers will go to substitute one commodity for another." *US v. DuPont*
        - "Cellophane Trap" SSNIP will always show loss – monopolist is already charging monopoly price.
      - **ELASTICITY OF SUPPLY –** Rate in which competitors will increase production in response to raise in price by monopolist.
      - **"Two-sided" markets, etc allowed.** *FTC v. Google.*
      - One brand can be its own market. *Eastmak Kodak.*



  - **(B) "POWER"**
    - Generally: **POWER TO CONTROL PRICE AND EXCLUDE COMPETITION**
    - **(i) BARRIERS TO ENTRY**
      - "factors ... prevent new rivals from timely responding to an increase in price above the competitive level." *US v. Microsoft.*
      - **Switching Costs**
    - **(ii) ECONOMIES OF SCALE**
  - **(C) PROOF OF MONOPOLY**
    - **Circumstantial Evidence of monopoly power** allowed. *US v. Microsoft*
  - **(D) RELEVANT SHARE**
    - **ABA Antitrust Sec. Model Jury Inst: Over 50%.**
    - 80-90% *per se* per *Alcoa*, but less than 50% insufficient.
- **(2) "MONOPOLIZING" (Use of Power)**
  - **Use of power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor."** *Eastman Kodak.*
    - Intent not explicitly required, but relevant. *Alcoa; Aspen Skiing.*
    - "Unwitting" monopolies or monopolies from survival not illegal. *Alcoa*
    - Preliminary steps to furthering monopoly also count. *Alcoa.*
  - **(A) PREDATORY PRICE CUTTING** (*Brooke Group*)
    - **(i) "the competitor had a reasonable prospect, or, under Sec. 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices."** *Brooke Group* **AND**
    - **(ii) "prices complained of are below an appropriate measure of its rivals costs"** *Brooke Group*
      - **Areeda-Turner Test:** Where the price is lower than average variable cost (marginal cost / sum of all variable costs divided by output). Prices above AVC presumptively lawful.
        - **AVC –** Average (over some period of time) of variable costs (costs that are influenced by amount of output).
          - Ex: If fixed costs 2 and variable costs 2, and sale at 4 impossible, then sale at 3 (slightly under variable cost) OK – mitigates costs from 2 to 1. However, selling at 1 (below fixed costs) highly damaging, and thus monopolistic.



    - **Applicability:**
      - **[a] Also may apply to unjustified expansions.** *Alcoa; Am. Airlines*, etc.
      - **[b] PREDATORY BIDDING AND BUYING included.** *Weyerhaeuser Co v. Ross-Simmons*
        - Must force competitor to have to "eat" price increase and sell below cost.
        - Must be distinguished from miscalculation in input needs, etc.

- **ONLY PRICES BELOW**. *Brooke Group*(but see dispute re: bundled discounts)

- **(B) BUNDLED DISCOUNTS/MONOPOLY TYING**
  - (1) Two distinct products, (2) Mkt power in tying product, (3) Not insub. $.
  - **SPLIT IN AUTHORITY**
    - ***Cascade Health:*** Requires predatory pricing (i.e. below AVC).
    - ***LePage:*** Requires simple attempt to monopolize regardless of price.
- **(C) REFUSALS TO DEAL**
  - **General presumption <u>against</u> duties to deal.** *Pac. Bell v. Linkline; Verizon v. Trinko* (regulation present in both – distinguishable?)
    - **MAY BE ABSOLUTE.** *Linkline* + *Trinko* killing *Aspen.* **MAY ALSO BE ABOUT EVIDENCE**
      - **<u>PREDATORY REFUSALS</u>** vs. **<u>LEGITIMATE BUSINESS JUSTIFICATIONS</u>**
    - **EXCEPTIONS:**
      - **(1) <u>Harm to own business</u>** AFTER dealing BEFORE(?), *Aspen*,
        - **Question of willful attempt at acquiring monopoly -** If a firm has been "attempting to exclude rivals on some basis other than efficiency," then behavior may be predatory. *Aspen Skiing.*
      - **(2) <u>Monopoly upstream AND downstream and refusal to play downstream</u>**. *Otter Tail.*
    - **<u>Defenses:</u>**
      - **(1) Legitimate business justification(s).** *Aspen Skiing*
      - **(2) Having never dealt?** *Linkline; Trinko.*
    - **<u>No duty to continue support.</u>** May withdraw arbitrarily(?). *Olympia Equip. Leasing v. Western Union.*
    - No "essential facilities doctrine," but evidentiary significant. *Trinko*
  - **(ii) IP**
    - **<u>Patents are not market power.</u>** Must first prove market power through traditional means.
    - **<u>Rebuttable presumption</u> re: protecting IP, <u>presumptively valid.</u>** *Kodak v. ITS.*
      - **!!SPLIT.** May not refuse reasonable profits (*Kodak*) vs absolute power (*Xerox*, Fed Cir.).
  - **(iii) REGULATION**
    - **Regulatory schemes > Antitrust.** *Verizon v. Trinko.*

- **(3)DEFENSE: PROCOMPETITIVE JUSTIFICATION**
  - **<u>"Legitimate Business Justification"-</u>**Where it explains how the conduct helps defendant compete has to price or quality AND where it "must be "specifi[c] [and] substantiated". **Social justifications do not count.**
    - AKA **"Relates directly or indirectly to the enhancement of consumer welfare.**" *Data General v. Grumman Systems Support.*
    - Essentially a <u>balancing argument.</u>
- **[4] ATTEMPT TO MONOPOLIZE**
  - **(A)*Spectrum Sports* TEST**
    - **(1) PREDATORY OR ANTICOMPETITIVE CONDUCT** (i.e. must fulfill above).
    - **(2) INTENT TO MONOPOLIZE** (beyond mere vigorous competition)
    - **(3) DANGEROUS PROBABILITY OF ACTUAL MONOPOLIZATION.**
      - **(i) DEFINE <u>MARKET</u>**
      - **(ii)MEASURE <u>SHARE</u>**
      - **(iii)DETERMINE <u>ABILITY</u> TO MONOPOLIZE**
  - **(B) Conspiracy to Monopolize –** Sec. 1 Vio.

MERGERS

MERGERS

- Clayton Act Sec. 7– "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, 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**. [...]"
  - **Section 1 involved if friendly.**
  - **Pre-Merger Notification ("H-S-R Proceedings")–** Notice to DOJ before merger
    - **1st Request** (Basic info) ->**2nd Request** (Extensive info) -> Approval or Threat of Suit
    - **Merger Guidelines** - Establish DOJ rules on mergers.
  - **History -** General presumption *against* mergers, finding business justifications (increased lending power, etc) unpersuasive. *Philadelphia Nat'l Bank*. Most (excepting *Philadelphia Nat'l Bank*) did not have an economic justification. *Brown Shoe; Alcoa; Pabst Brewing* (establishing virtually all nontrivial acquisitions).
  - **NO STATUTE OF LIMITATIONS.** FTC and private plaintiffs may reach back as much as necessary.
- **(1) HORIZONTAL –** Merger between **competitors.**
  - Clayton Act Sec. 7 - Prohibits mergers if "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."
  - **Central concerns:** Unilateral Effects (i.e. Sec. 2 Monopoly), and Cooperative Effects (Sec. 1 conspiracy + oligopoly)
  - ***Prima Facie* Case (for P)**
    - **(1)** Concentration [HHI],
    - **(2)** Market share [In the future, *General Dynamics*],
    - (3) B2E
  - **(0) QUESTION OF MARKET POWER:** "A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives."
    - **(1) P MUST PROVE AFTER MERGER FIRM WOULD CONTROL UNDUE PERCENTAGE OF RELEVANT MARKET, RESULTING IN CONCENTRATION OF FIRMS -> (2) D MUST PROVE MARKET SHARE STATISTICS INACCURATE IN REGARDS TO PROBABLE RESULT ON COMPETITION, (3) IF SHOWN, P ASSUMES BURDEN OF ANTICOMPETITIVE EFFECT.** *Baker Hughes*
    - **(i) CORE ISSUE: Price Effects IN THE FUTURE ("What if?).** Merger Guidelines; *General Dynamics*
      - **(i) UNILATERAL EFFECTS –** Elimination of competition, generally.
        - Pricing of differentiated products, bargaining and auctions, capacity and output for homogeneous products, innovation and product variety
      - **(ii) COORDINATED EFFECTS –** i.e. Conspiracy or Oligopoly
      - OLD: Virtually any merger of any size.
    - **(ii) "MARKET"**
      - **(i) COMPETITION FROM WITHIN**
        - **Factors inhibiting collusion/etc.**
        - **HHI - Herfindahl-Herschman Index** – Square of each participation.
          - Unconcentrated: HHI < 1500 – VIRTUALLY NEVER CONTESTED
          - Moderately: HHI = 1500-2500 – RARELY CONTESTED
          - Highly: HHI < 2500 (i.e. > 25%x4)
          - **Changes:**
            - Small: <100, Moderately: 100+ in *moderately* concentrated markets, Highly: 100+.
      - **(ii) COMPETITION FROM WITHOUT**
        - **Elasticity -** DEMAND SUBSTITUTION FACTORS. Customers' ability and willingness to substitute away one product to another in response to a SSNIP or corresponding non-price change.
          - **PRODUCT MARKET –** (1) Hypothetical Monopolist Test (SSNIP + result), (2) SSNIP of 5% -> result, (3) Overall evaluation of result of projected monopoly, (4) Special handling of target(able) customers.
            - **Hypothetical Monopolist Test –** If ALL firms merge and one enacts SSNIP, could hypothetical monopolist still profit?
              - **If Y-** Market found. This means that there are no alternatives that customers would turn to that is not contained within the market.

- **If N-** Market must be broadened.
- **Preferences irrelevant.** *US v. Oracle.*
- **CORE VS MARGINAL CUSTOMERS (*Whole Foods*)**
  - **"Core" Customers –** Those that stick with the product and largely do not react based on a SSNIP
  - **"Marginal" Customers –** Likely to jump ship
- **GEOGRAPHIC MARKET –** (1) Location of Suppliers, (2) Location of Customers

- (iii) **"MARKET SHARE"**
  - Future-focused – over longer period of time.
  - **Current Participants + Rapid Entrants**, taking "Maverick" participants into account as well
    - **FACTORS TO ENTRY:** (1) Timeliness (2) Likelihood (3) Sufficiency
    - **Barriers to Entry** – The more, the more monopolistic.
      - **Commitment** – Initial costs, etc barring rapid entry and exit from market.
      - **MAY ENTIRELY DESTROY ARGUMENT.** *Syufy.*
- (iv) **"EFFICIENCIES"**
  - **(1) Proof –** Must be particularized and more than mere speculation. Ex: *FTC v. Staples.*
  - **(2) Merger-Specificity –** Merger must be but-for cause of efficiencies.
  - **(3) Pass-on –** Whether efficiencies will be passed on to customers. Split as to whether or not efficiencies alone, without pass-on, should count as a positive towards merger.

(A) FTC ENFORCEMENT

- FTC Act Sec. 13 – [Allows preliminary injunction where vio of Sec 7 of Clayton Act]
  - **PI Standard + Sec 13 ("Substantial Likelihood" + "May be") = VERY BROAD.**

(B) PRIVATE ENFORCEMENT

- Virtually nonexistent.
- Clayton Act Sec. 4 – "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor"
- Clayton Act Sec. 16 – "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief [...] against threatened loss or damage by a violation of the antitrust laws [...]"
- **"Antitrust Injury Requirement" - Requires anticompetitive effect, NOT PRIVATE LOSS.** *Brunswick v. Pueblo Bowl-O-Mat.* (no treble damages without)
  - Customers unlikely (low $ cost), states generally avoid, targets tend to have no unique injury, and competitors most likely but still have trouble proving injury.
  - Must be **"of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful."** *Cargill v. Monfort.*
  - **BUT can be threatened harm**, pending threatened harm ALSO of the type envisioned by act. *Cargill v. Monfort of Colorado,* interpreting Clayton Secs. 4, 16.
  - **i.**e. *competition,* not *competitors. Brunswick v. Peblo Bowl-O-Mat.*
- **Remedies**
  - **Equitable Decrees** generally presumed to restore effective competition. *US v. Crescent Amusement.*
  - **Divestiture allowed per Sec. 16 – that is, even if threatened.** *Cali v. Am. Stores Co.*

- (2) **VERTICAL –** Merger between manufacturer and supplier. ->**GENERALLY OK** (Rare issue)
  - **Same issue:** "Reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly in any line of commerce." *US v. DuPont.*
  - **Theories:** (1) Foreclosure (DOJ theory), (2) Collusion, (3) Exchange of competitively sensitive info, (4) Regulatory evasion
  - **APPROACHES**
    - (A) **"FUCK EFFICIENCIES"** (*Brown Shoe*) – Dead, though *Brown Shoe* is still good law (not refuted by SCOTUS)
    - (B) **"FORECLOSURE" –** Loss of access to either company regardless of mkt power -> Questionable
    - (C) **B2E**
      - (1) **Degree of vertical integration must be so extensive that entrants to market 1 would necessarily have to enter market 2.**
        - **Likely involves supplier/producer lockdown.** Ex: S buys P or vice versa, cutting out other companies from using either product. Result is to destroy other related markets due to lack of efficiencies.
        - **Question of capital and ability.** If Market 2 remarkably different or requires economies of scale, etc.

- **DoJ may require openness to competitors.** Ex: *In re Silicon Graphics, Inc.*
- (2) **Entry at the second market must be significantly more difficult and less likely to occur.**
- (3) **Structure and other characteristics of Market 1 must be otherwise so conductive to non-competitive performance that the increased difficulty of entry is likely to affect its performance.**

- (D) **FORECLOSURE –** Market power in both can destroy competitors.

- **STANDARDS:** Will challenge if (1) overall HHI is above 1800 and (2) large percentage of upstream market would be vertical after merger.

- (3) **CONGLOMERATE –** Merger between unrelated companies. ->**NO APPLICABILITY**
  - **Portfolio Effects –** Potential effects resulting from conglomerate merger – generally related to efficiencies from having wider lines in a corporate umbrella.
    - **Not really accepted by US DoJ.** *GE/Honeywell.*