CHAPTER 4
Antitrust Law

"Antitrust laws … 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]

Overview

The purpose of the federal antitrust laws is to control private economic power by promoting and encouraging competition. Competition is valued highly within our legal and economic system for a variety of reasons. Competition is believed to: (1) keep costs and prices lower and quality higher; (2) encourage product and service innovation and efficient allocation of resources; and (3) give consumers broader choices in the marketplace. In short, competition maximizes consumer welfare. In a truly competitive market, firms try to attract consumers by cutting prices and increasing the quality of the products or services they offer.

At the same time, however, antitrust law recognizes that efficiency concerns also come into play. While we want to foster competition, we do not want to inhibit innovation, nor do we want to restrict economies of scale or economies of scope. We also want to promote lower transaction costs and improved quality. Thus, antitrust law must balance a number of competing concerns.

Federal antitrust law is founded on four statutes: the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the Federal Trade Commission (FTC) Act. Each of these federal statutes is designed to reach certain types of anticompetitive behavior. The language of these statutes is often extremely broad and general. As a result, much of antitrust law has been formed through the court opinions that interpret and apply these statutes. As you can imagine, the courts' analyses of the antitrust statutes are heavily influenced by economic concepts such as supply and demand curves, cost, revenue, and market structure.

Antitrust litigation is usually lengthy and complex and the outcomes highly fact-specific. While monopolization that results from unfair business practices is illegal, monopolization that results from business skill is not. Identical pricing that results from collusion among competitors is illegal, but identical pricing that results from intense marketplace competition is not. Cooperation among competitors that results in reduced competition that harms consumers is illegal, but cooperation that increases competition and benefits consumers (such as industry standardization for component parts) is not.

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

In addition, as the U.S. Supreme Court has emphasized, antitrust laws are designed for the "protection of competition, not competitors."[2] Harm to an individual firm by a competitor, even if motivated by pure malice, does not lead to an antitrust violation unless the competitive process itself is harmed (e.g., through an increase in market prices or decrease in market production).

It is important that management and marketing personnel alike understand the basics of antitrust law and the parameters of legal and illegal competitive behaviors. Managers are often surprised to discover that actions that they regard as sound business strategies not only are illegal but subject the firm to substantial fines and/or civil damages. In addition, the individual managers involved in antitrust violations may personally face similar fines and/or damages and may even be imprisoned in certain instances. Thus, knowledge of the antitrust laws is important not only to the firm but also to the manager personally.[3]

Companies should work closely with their corporate or outside legal counsel to develop a compliance program that informs officers, managers, salespersons, and other employees about their responsibilities under the antitrust laws. A well-designed compliance program outlines proper policies and procedures to minimize the likelihood of antitrust violations and provides for periodic monitoring of firm activities and individual actions to ensure that the firm is meeting its compliance goals.

Common Law Contracts in Restraint of Trade

Although antitrust law is primarily statutory today, it is important to realize that the common law also prohibits contracts in restraint of trade and monopolistic combinations, at least in some instances. Because the common law rules arise under state law, they can vary from state to state.

The Restatement (Second) of Contracts states that a contract is in "restraint of trade" if "its performance would limit competition in any business or restrict a promisor in the exercise of a gainful occupation."[4] Contracts in restraint of trade are not automatically illegal; rather, *unreasonable* contracts in restraint of trade are unenforceable on public policy grounds. A contract is considered unreasonable if: (1) "the restraint is greater than is needed to protect the promisee's legitimate interest," or (2) the restraint poses an undue hardship on the promisor or excessive likely injury to the public.[5]

Generally, the types of enforceable restraints include covenants not to compete by the seller of a business, by a partner in a business, or by an employee. Covenants not to compete in the context of employment agreements are discussed in greater detail in Chapter 3.

The enforceability of a covenant not to compete that relates to the activities of a business depends upon the factual circumstances in which the covenant was used. "Naked" covenants (e.g., covenants that are not incidental to the sale of a business) are generally considered unreasonable. Thus, an agreement between Company A and Company B in which A pays B not to compete with A's business would generally be unenforceable. Similarly, if Company A and Company B were already competitors, an agreement between A and B that B would cease competing with A would also be unenforceable.

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[2]*Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

[3]For general information on antitrust law, including a list of links to other antitrust-related websites, see www.antitrustinstitute.org

[4]Restatement (Second) of Contracts § 186.

[5]*Id.* § 188.

If Company A were to purchase Company B's business, on the other hand, A and B could legally enter into a covenant prohibiting B from competing with A.

Covenants not to compete that are ancillary to the sale of a business are typically limited to a reasonable geographic location and to a reasonable time duration. A reasonable geographic location is usually defined as the territory in which the business was previously conducted plus the area in which it may be conducted in the reasonably foreseeable future. Where the covenant is broader in geographic scope or time duration than is necessary and legal, many courts use the "blue pencil rule" to rewrite the covenant to limit it to whatever geographic or time restraint the court deems is appropriate under the circumstances. Other courts simply hold that the covenant is invalid and refuse to enforce it at all.

The usual remedy given for the violation of a valid covenant is *injunctive relief* that prevents the promisor from violating the covenant. *Monetary damages* may be available in certain instances, though this remedy often does not fully compensate the promisee for the injury it suffered as a result of the violation.

The federal antitrust statutes are by far the most important source of law regarding illegal restraints of trade and monopolistic combinations today. The remainder of this chapter focuses on these statutes.

The Federal Antitrust Statutes

The federal antitrust statutes arose out of dissatisfaction with the common law's treatment of contracts in restraint of trade. In particular, the common law was seen as providing inadequate protection to injured parties. While the common law protects the parties to the covenants at issue, it does not generally provide relief or remedies to the public or to third parties harmed by such restraints of trade. In addition, the common law is not uniform but, rather, varies from state to state, making it difficult for interstate businesses to monitor their behavior.

As the United States moved from an agrarian economy to an industrialized one in the late nineteenth century, there were increasing abuses within the economy by large industrial interests, such as railroads and manufacturers. Many of these large businesses engaged in predatory practices, driving out small competitors and then restricting output and increasing prices. In particular, there was great societal concern about "trusts" (i.e., combinations of companies that were able to control entire industries so as to increase monopoly power). The Standard Oil Trust created by John D. Rockefeller was one of the first such trusts, but trusts were created in other industries as well, such as the whiskey, sugar, and lead industries. Ultimately, Congress responded to these concerns by passing a series of antitrust acts. The major statutes are described here briefly, followed by a discussion of specific types of illegal anticompetitive behaviors.

The Sherman Act

The first federal legislation passed to address the economic abuses by large trusts was the Sherman Act of 1890.[6] This Act created a new, federal cause of action to reach two types of anticompetitive behavior: (1) restraints of trade and (2) illegal monopolization or attempts to monopolize. As the Supreme Court explained:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free trade and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the

[6] 15 U.S.C § 1 *et seq.*

> 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.[7]

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that restrain trade; Section 2 prohibits certain monopolies and attempts to monopolize. The language of these two provisions is surprisingly brief:

> Section 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 hereby declared to be illegal ….
>
> Section 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 ….

The courts have provided many layers of interpretation to this short and seemingly simple language. For example, Section 1 of the Sherman Act prohibits "every contract, combination … or conspiracy in restraint of trade." Taken literally, the language of Section 1 would make illegal virtually all business contracts, even those that benefit society and the economy. Every contract between a buyer and a seller, no matter how simple in content or short in duration, limits the market activity of those two parties in the subject matter of that contract and for the duration of the transaction. Thus, in 1911, the Supreme Court determined that only agreements that *unreasonably* restrain trade are unlawful.[8]

As discussed below, certain restraints of trade are deemed automatically unreasonable and so are illegal *per se*, while others are adjudged on a case-by-case basis under the "rule of reason." In addition, it is not necessarily illegal for a company to have or to try to obtain a monopoly position; rather, Section 2 only prohibits maintenance or acquisition of a monopoly position through unfair or abusive methods.

Note as well that Section 1 requires the actions of two or more persons acting together, as it is impossible for an individual to contract, combine, or conspire alone. Much antitrust litigation centers on whether concerted action has occurred. While the Supreme Court has ruled that an agreement between a parent corporation and its wholly-owned subsidiary does not violate Section l (because the two entities are viewed as a single firm),[9] it is unclear whether agreements between a parent and a less-than-wholly-owned subsidiary may potentially violate Section 1.

Section 2 of the Sherman Act applies both to persons acting in concert and to those acting alone. In practice, Section 2 is generally applied to firms acting alone to illegally gain monopoly power, while combinations and conspiracies to monopolize are usually prosecuted under Section 1.

The Clayton Act

In 1914, Congress enacted the Clayton Act[10] in response to perceived shortcomings in the Sherman Act. Unlike the Sherman Act, which is essentially remedial in nature (in that it reaches actual anticompetitive behavior), the Clayton Act is preventative in

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[7] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

[8] See *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

[9] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

[10] 15 U.S.C. §§ 12-27; 44.

nature, as it is directed toward trying to prevent anticompetitive behavior "in its incipiency" and before it harms the public.[11]

The Clayton Act addresses behavior such as certain exclusionary practices, mergers, and interlocking directorates. In particular, Section 3 of the Clayton Act provides:

> Section 3: [I]t shall be unlawful for any person in commerce … to lease or make a sale or contract for the sale of goods for use, consumption, or resale within the United States … on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods … of a competitor … of the lessor or seller, where the effect of such lease, sale … or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 3 thus prohibits activities such as tie-in sales, exclusive dealing arrangements, and requirements contracts in which the effect of such arrangements "may be to substantially lessen competition or tend to create a monopoly." Note, however, that this section applies only to the sale of goods, not to the sale of services.

Among its other provisions, Section 4 of the Clayton Act allows private parties injured by violations of the Sherman or Clayton Act to sue for treble damages. This provision thus encourages private parties to bring actions to enforce these antitrust statutes. Section 7 prohibits mergers or acquisitions in which the effect "may be substantially to lessen competition, or tend to create a monopoly" in "any line of commerce or in any activity affecting commerce in any section of the country." Section 8 prohibits certain interlocking directorates but has not been vigorously enforced. These latter two provisions are less important to the marketing function and so are not discussed further.

The Federal Trade Commission Act

The Federal Trade Commission (FTC) Act[12] was also enacted in 1914. The FTC Act created the Federal Trade Commission, a consumer protection agency, and gave that agency broad powers to enforce certain antitrust acts.[13] Under a 1938 amendment to the FTC Act, the FTC has two mandates: (1) to protect the marketplace from unfair methods of competition and (2) to prevent unfair or deceptive practices that harm consumers. Specifically, Section 5(a)(1) of the FTC Act provides:

> Section 5(a)(1): Unfair methods of competition in or affecting competition and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

Section 5 authorizes the FTC to take preemptive action against potential violations of the Sherman or Clayton Acts—"to stop in their incipiency acts and practices which, when full blown, would violate" those statutes.[14] Section 5 also reaches unfair or deceptive conduct that is outside the provisions of the antitrust statutes.

Only the FTC may sue to enforce Section 5; private individuals have no cause of action under this statute. The FTC also has authority, concurrent with the Department of Justice (DOJ)[15] and private parties, to enforce the Clayton Act and the Robinson-Patman Act. In addition, while the FTC does not have express authority to enforce the Sherman

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[11] *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953).

[12] 15 U.S.C. §§ 41-57a.

[13] The FTC's home page, which contains information about its antitrust enforcement activities, is found at www.ftc.gov

[14] *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953).

[15] The Department of Justice's home page, which contains information about its antitrust enforcement activities, is found at www.usdoj.gov

Act, the courts have read Section 5 of the FTC Act broadly enough that violation of Section 1 or Section 2 of the Sherman Act generally is also a violation of Section 5; thus, the FTC may issue cease-and-desist orders against violations of the Sherman Act.

This chapter focuses on the provisions of the FTC Act directed toward anticompetitive behavior. The "unfair or deceptive acts or practices" provisions of the FTC Act and the consumer protection role of the FTC are discussed further in Chapter 7 and Chapter 8.

The Robinson-Patman Act

The Robinson-Patman Act of 1936[16] is actually an amendment of Section 2 of the Clayton Act. The Robinson-Patman Act was designed to address very specific types of pricing behaviors, particularly those behaviors that favored chain stores, which were in their infancy at the time of the statute's enactment, over traditional small independent retailers. Thus, this federal statute makes it illegal to give, induce, or receive discriminatory prices or supplementary services, except under certain specified circumstances, where the effect of the discrimination would be to substantially lessen competition or tend to create a monopoly.

There are three main sections to the Robinson-Patman Act. Section 2 (there is no Section 1) addresses price discrimination. In particular, Section 2(a) provides:

> Section 2(a) Price Discrimination. [I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale, within the United States … and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them ….

Section 3 establishes criminal liability for certain types of discriminatory pricing. (This provision is seldom enforced.) Section 4 exempts cooperative associations and nonprofit institutions from the Act.

Thus, Section 2 of the Robinson-Patman Act would prohibit a lumber supplier from offering a discount (including allowances for advertisements, counter displays, and samples) to a large home improvement chain unless a "proportional discount" is given to independent lumber supply stores as well. (What is "proportional" is a question of fact to be decided on a case-by-case basis.) Similarly, a firm cannot offer a *wholesaler's* or *broker's discount* to a customer who is not a true wholesaler, even if that customer is a large retail chain that purchases more than the average wholesaler. Cooperative advertising and other promotional assistance are permitted, provided such assistance is offered to all customers on proportionally equal terms.

The Antitrust Statutes Generally

The antitrust statutes apply to most parties involved in business transactions, including corporations, partnerships, sole proprietorships, individuals, trade associations, professionals (such as doctors and lawyers), and certain activities of nonprofit organizations. Labor unions and agricultural organizations are essentially exempt from the provisions

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[16] 15 U.S.C. § 13.

of the Sherman and Clayton Acts, and certain other industries, such as export trade associations, the insurance industry, stock exchanges, utilities, railroads, and shipping, may be exempt from specific provisions as well, at least in certain instances.

The antitrust laws are complex, and it can be difficult for a company to know whether a particular contemplated action is legal. Thus, both the DOJ and the FTC have a procedure by which a company can seek an advisory opinion on the legality of a proposed action before undertaking it. Each has also published guidelines on how the antitrust implications of specific actions or issues, such as the licensing of intellectual property, international operations, collaborations among competitors, and health care industry practices, are analyzed.[17]

While the federal antitrust statutes reach only activities that affect interstate or foreign commerce, this encompasses most U.S. business activities. The courts have interpreted the interstate commerce requirement as requiring only that the business or activity, even if otherwise purely intrastate, have a substantial economic effect on interstate commerce. As the Supreme Court stated, "If it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze."[18]

The Rule of Reason Versus *Per Se* Violations

Alleged antitrust practices are judged under one of two standards. Certain practices, such as horizontal agreements among competitors to fix prices or divide markets, are regarded as so inherently harmful to competition and consumers that they are deemed *per se* violations and are automatically illegal. In such instances, the plaintiff need only demonstrate that the prohibited practice occurred; the plaintiff need not show that the practice had an anticompetitive effect, nor may the defendant argue that the practice was in fact procompetitive. The Supreme Court described the illegal *per se* category as follows:

> [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. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[19]

According to a recent Supreme Court decision:

> Resort to *per se* rules is confined to restraints … "that would always or almost always tend to restrict competition and decrease output." To justify a *per se* prohibition a restraint must have "manifestly anticompetitive" effects, and "lack … any redeeming virtue."
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> As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict

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[17]These guidelines generally can be located on the websites of the FTC, www.ftc.gov, and the DOJ, www.usdoj.gov

[18]*United States v. Women's Sportswear Manufacturers Assoc.*, 336 U.S. 460, 464 (1949).

[19]*Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).

with confidence that it would be invalidated in all or almost all instances under the rule of reason.[20]

In recent years, in particular, the courts have been reluctant to label conduct as *per se* illegal and the number of activities that qualify as *per se* violations has declined. Instead, most alleged antitrust violations are examined under the *rule of reason* and are deemed illegal if the practice significantly restricts competition and has no overriding business justification. This flexible standard mandates a case-by-case determination that takes into consideration a number 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,"[21] and whether the business involved has market power.[22] In short, it requires the court to balance the anticompetitive effects of the restraint against its procompetitive effects. The sole focus under the rule of reason is the effects of the challenged action on competition; the social or political effects of the challenged action are irrelevant, no matter how beneficial they may be.

The Supreme Court has also enunciated a third—intermediate—standard, known as the "quick look" analysis. Under this analysis, certain types of activities are presumed to be anticompetitive unless the defendant shows that the activity has a procompetitive effect. If the defendant can make such a showing, the activity is judged under the rule of reason; if the defendant cannot, the conduct is illegal *per se.*

Remedies for Antitrust Violations

The federal antitrust laws provide for civil or criminal actions against violators. (In some instances, both civil and criminal actions can be filed for the same conduct.) Depending upon the nature of the violation, remedies may include fines, imprisonment, money damages, injunctive relief, court-ordered restructuring of a firm, or some combination of these.

The federal antitrust laws are enforced through a variety of mechanisms. The Antitrust Division of the DOJ can bring criminal and civil enforcement actions. The Bureau of Competition of the FTC can bring civil enforcement actions (but not criminal actions). The state attorneys general can bring civil suits under the Clayton Act on behalf of injured consumers in their states. Finally, private parties can bring antitrust actions to redress injuries.

Both the government and private plaintiffs can sue for *equitable relief* for antitrust violations. Most antitrust violations result in equitable relief. The relief can take many forms, including a restraint on particular acts or conduct, compelled licensing of a patent or other intellectual property asset on a reasonable royalty basis, or the cancellation of contracts. *Preliminary injunctions* are also available to both the government and private parties against conduct that would irreparably injure the plaintiff, provided the plaintiff can show a likelihood of success on the merits and a public interest in the injunction.

Damages are also available in antitrust cases. In fact, in an effort to encourage private enforcement of the antitrust laws, Section 4 of the Clayton Act authorizes "any person … injured in his business or property by reason of anything in the antitrust laws" to recover treble damages, plus costs and attorneys fees.

[20] *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

[21] *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

[22] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

The Clayton and the FTC Acts do not provide for *criminal sanctions*. Violations of Sections 1 and 2 of the Sherman Act, on the other hand, can be prosecuted as felonies. The current maximum fine under the Sherman Act is $1 million for individuals and $100 million for corporations. Individuals may also be imprisoned for up to 10 years.[23]

These criminal sanctions have real teeth. In April 2009, for example, two subsidiaries of the Swedish company Trelleborg AB agreed to plead guilty and pay $11 million in fines for participation in separate conspiracies affecting the sale of marine products in the U.S. and elsewhere. The conspiracies violated the Sherman Act. Five former executives of the subsidiaries also pled guilty to participating in the conspiracies. Each was sentenced to a prison term (which ranged from 6 months to 24 months) and to pay a criminal fine (which ranged from $60,000 to $300,000).[24]

The annual amount of criminal fines obtained by the Antitrust Division has skyrocketed over the last decade. In addition, the federal Amended Sentencing Guidelines, which became effective in 1991, make it substantially more likely than in the past that individuals convicted for antitrust violations will serve a prison sentence[25] (see Exhibit 4.1).

EXHIBIT 4.1 Antitrust Division, Workload Statistics, FY 1999–2008

FINES IMPOSED	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Individual: Total Individual Fines ($000)	12,273	5,180	2,019	8,685	470	644	4,483	3,650	15,109	1,485
Number of Individuals Fined	50	43	20	19	16	15	22	17	25	23
Corporate: Total Corporate Fines ($000)	959,866	303,241	270,778	93,826	63,752	140,586	595,966	469,805	615,671	695,042
Number of Corporations Fined	25	26	14	17	17	13	18	18	12	12
Total Fines Imposed ($000)	972,138	308,421	272,797	102,511	64,222	141,230	600,449	473,455	630,780	696,527

INCARCERATION	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Number of Individuals Sentenced	54	47	24	36	30	28	27	27	39	31
Number of Individuals Sentenced to Incarceration Time	28	18	11	19	15	20	18	18	34	19
Total Number of Actual Days of Incarceration Imposed by the Court	6,662	5,584	4,480	10,501	9,341	7,334	13,157	13,157	31,391	14,331

Source: www.usdoj.gov/atr/public/workstats.pdf

[23] 15 U.S.C. §§ 1, 2.

[24] U.S. Department of Justice Press Release, April 20, 2009 (available at www.usdoj.gov/opa/pr/2009/April/09-at-369.html).

[25] Trade Reg. Rep. (CCH) Para. 13,250, U.S. Sentencing Guidelines Part R. The guidelines are also available online at www.ussc.gov/guidelin.htm

As a practical matter, the DOJ generally seeks criminal sanctions under the Sherman Act only for *per se* violations of the statutes (discussed below) or for egregious predatory conduct. In recent years, the DOJ has particularly focused on the prosecution of international cartels that victimize American businesses and consumers. The DOJ may prosecute actions that constitute antitrust violations under other statutes as well, such as statutes that prohibit perjury, obstruction of justice, conspiracies to defraud the United States, and mail and wire fraud.

The federal Amended Sentencing Guidelines provide real incentives for companies to establish compliance programs. Under the Guidelines, if a company has an effective compliance program "to prevent and detect violations of law" but an antitrust violation nonetheless occurs, the fines assessed against the company may be substantially reduced. In addition, if a company's compliance program reveals the existence of an antitrust violation, the company and its management and employees who admit involvement may avoid criminal prosecution if they report the illegal activity to the DOJ at an early stage and if they meet certain other requirements.[26] A separate leniency program applies to individuals who report illegal antitrust activity to the DOJ in the absence of a company admission of culpability.[27]

The following discussion focuses on those antitrust actions most relevant to marketing practices: (1) horizontal restraints among competitors; (2) vertical restraints between buyers and sellers; (3) maintenance or creation of a monopoly; and (4) price discrimination.

Horizontal Restraints Among Competitors

Trade restraints can be either horizontal or vertical. *Horizontal restraints* occur among competitors at the same level in the chain of distribution, such as among manufacturers or among wholesalers (see Exhibit 4.2). *Vertical restraints* occur among parties at different levels in the chain of distribution, such as between a manufacturer and a wholesaler (see Exhibit 4.4).

To compete horizontally, firms must be at the *same level of distribution* and compete in the same *product* and *geographic* markets. For example, if Firm A and Firm B both sell potato chips in the southeast Michigan region, they compete horizontally. If Firm A sells in southeast Michigan and Firm B in the Northern California region, however, they would be operating in different geographic markets and would not be competing horizontally. If both operate in southeast Michigan, but Firm A sells potato chips and Firm B sells processed cheese, they would be operating in different product markets and again would not compete horizontally.

EXHIBIT 4.2 Horizontal Restraints

[26]U.S. Department of Justice, Antitrust Division, Corporate Leniency Program, Trade Reg. Rep. (CCH) Para. 13,113 (Aug. 10, 1993). This program can be found online at www.usdoj.gov

[27]U.S. Department of Justice, Antitrust Division, Leniency Policy for Individuals, Trade Reg. Rep. (CCH) Para. 13,114 (Aug. 10, 1994). This policy can be found online at www.usdoj.gov

These determinations are very fact-specific in most instances. If Firm A sells potato chips, for example, and Firm B sells pretzels, the court would need to determine whether the relevant product market should be defined as potato chips or whether it would include some broader definition of snack foods, such as salty, hand-held snacks. Not surprisingly, when an illegal horizontal restraint is alleged, the issue of the correct definition of the relevant market is usually hotly litigated.

Certain agreements among competitors may be legal because they have the effect of benefiting consumers (for example, by promoting standardization within an industry that facilitates interchangeability of products, such as component parts). Similarly, competitors can safely lobby together for legislative or regulatory change and can participate in trade association activities that do not stray into the realm of competitive decision making, such as pricing decisions or market allocations.

Other agreements among competitors may have the effect of reducing competition, however, and so are illegal. Certain horizontal restraints, such as price-fixing, are presumed to always be anticompetitive in effect and so are deemed illegal *per se*. Other horizontal restraints are viewed as being potentially procompetitive and so are evaluated under the rule of reason (see Exhibit 4.3).

Horizontal restraint cases raise difficult issues of proof. To succeed in an action under Section 1 of the Sherman Act, the plaintiff must show the existence of an agreement among the defendants. (Recall that Section 1 does not reach unilateral conduct but only agreements among two or more parties.) *Direct evidence*, such as written documentation of the agreement, minutes of a meeting in which agreement was reached, or testimony by a person with personal knowledge of the agreement, while most probative, can be difficult to obtain, if indeed it exists at all.

Because direct evidence of an antitrust violation generally is so difficult to obtain, many cases turn on *circumstantial evidence*. As the Supreme Court put it, "[C]ircumstantial evidence is the lifeblood of antitrust law."[28] Thus, agreements can be shown by inference—i.e., by a combination of circumstantial evidence, such as the existence of a meeting among the competitors before they implemented certain practices (even if the plaintiff has no evidence of the actual agenda of the meeting), records of telephone calls, or signaling behavior. *Signaling behavior* occurs when one company indirectly tells a competitor that it intends to raise prices by a specified amount. Competitors often disseminate information regarding things such as prices, costs, or inventories through mechanisms such as trade associations or the popular press. The courts usually (but not always) regard the exchange of price information as a violation of Section 1 of the

EXHIBIT 4.3 Potential Illegal Horizontal Restraints Among Competitors

- price-fixing and bid-rigging
- group boycotts and concerted refusals to deal
- horizontal market allocations
- agreements to restrict advertising
- joint ventures

[28] *United States v. Falstaff Brewing Co.*, 410 U.S. 526, 532 n.13 (1973).

Sherman Act. Most antitrust lawyers advise their clients not to share price information with competitors as a result. Courts generally are less concerned about the exchange of nonprice information, such as joint market surveys or joint advertising, unless such sharing lessens competition.

Circumstantial evidence of a Section 1 violation may be demonstrated through parallel behavior (known as *conscious parallelism*) by independent firms, such as persistent setting of prices at the same level or simultaneous changing of prices. Parallel behavior might just as easily result from intense competition, however, as from anticompetitive behavior, making it an ambiguous indicator of an antitrust violation. Where the parallel business behavior can be explained in terms of the independent business judgment of each defendant, no antitrust violation would occur. (Such acts may violate the prohibition in Section 5 of the FTC Act against "unfair methods of competition," however.) The courts thus usually require additional evidence of illegal behavior (known as *plus factors*), such as complex actions that would benefit each competitor only if all competitors acted in a prescribed manner (see Case Illustration 4.1).

CASE ILLUSTRATION 4.1

IN RE BABY FOOD ANTITRUST LITIGATION, 166 F.3D 112 (3D CIR. 1999)

FACTS Plaintiffs, who were direct purchasers of baby food from the defendant manufacturers, including wholesalers and supermarket chains, sued the major manufacturers of baby food: Gerber Products Company, H. J. Heinz Co., and Beech-Nut (which was owned at first by Nestlé Food Company and later by Ralston Purina Company). Collectively, the three defendants accounted for over 98 percent of all baby food products manufactured and sold in the United States. Gerber, in particular, accounted for 70 percent of the total U.S. market.

Gerber had positioned itself as the "premium" brand. Heinz had carved out a market niche as the "value" brand. Beech-Nut was originally positioned as a "value" brand but repositioned itself as a "premium" brand with a strong regional presence in the northeast United States.

The plaintiffs alleged that from 1975 to 1993, the defendants engaged in an unlawful conspiracy in violation of Section 1 of the Sherman Act "to fix, raise, and maintain wholesale prices and price levels of baby food in the United States." In particular, the plaintiffs alleged that the defendants exchanged information with each other regarding future price increases before they announced those increases to the public. The plaintiffs argued that the defendants had no legitimate business reason for informing each other before informing the public. The plaintiffs alleged that if Gerber, the dominant company in the industry and the price leader, decided to raise its prices, the other competitors had to follow the price increase immediately or the time gap between Gerber's increases and the other companies' increases would disturb their respective market shares. Giving advance notice solved this problem. The plaintiffs argued that advance notice did occur, showing that an agreement to conspire existed among the defendants.

DECISION The trial court granted summary judgment to the defendants, and the appellate court affirmed.

Although plaintiffs lacked direct evidence of price-fixing, the appellate court noted that they could support their claim with circumstantial evidence of conscious parallelism. "The theory of conscious parallelism is that uniform conduct of pricing by competitors permits a court to infer the existence of a conspiracy between those competitors. The theory is generally applied to highly concentrated markets where few sellers exist and where they establish their prices, not by express agreement, but rather in a consciously parallel fashion. Thus, when two or more competitors in such a market act separately but in parallel fashion in their pricing decisions, this may provide probative evidence of an understanding by the competitors to fix prices."

(Continued)

The court explained:

In an oligopolistic market, meaning a market where there are few sellers, interdependent parallelism can be a necessary fact of life but be the result of independent pricing decisions.

In a market served by three large companies, each firm must know that if it reduces its price and increases its sales at the expense of its rivals, they will notice the sales loss, identify the cause, and probably respond. In short, each firm is aware of its impact upon the others. Though each may independently decide upon its own course of action, any rational decision must take into account the anticipated reaction of the other two firms. Whenever rational decision-making requires an estimate of the impact of any decision on the remaining firms and an estimate of their response, decisions are said to be "interdependent." Because of their mutual awareness, oligopolists' decisions may be interdependent although arrived at independently.

Because the evidence of conscious parallelism is circumstantial in nature, courts are concerned that they do not punish unilateral, independent conduct of competitors. They therefore require that evidence of a defendant's parallel pricing be supplemented with "plus factors." The simple term "plus factors" refers to "the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy." They are necessary conditions for the conspiracy inference. They show that the allegedly wrongful conduct of the defense was conscious and not the result of independent business decisions of the competitors. The plus factors may include, and often do, evidence demonstrating that the defendants: (1) acted contrary to their economic interests, and (2) were motivated to enter into a price fixing conspiracy. Once the plaintiffs have presented evidence of the defendants' consciously parallel pricing and supplemented this evidence with plus factors, a rebuttable presumption of conspiracy arises.

The court found that the evidence was insufficient to prove conscious parallelism on the part of the defendants. Because Gerber controlled 70 percent of the baby food market and was the acknowledged industry leader, Gerber's pricing most likely did influence its competitors' pricing. However, the court stated, "Conscious parallelism … will not be inferred merely because the evidence tends to show that a defendant may have followed a competitor's price increase."

In the absence of "probative proof of concerted action" by the defendants, the appellate court affirmed the district court's grant of summary judgment to the defendants.

Price-Fixing

Horizontal price-fixing occurs when competitors agree on price or price-related issues (such as credit terms). According to the Supreme Court, "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*."[29] The list of behaviors that are defined as "price-fixing" is extensive, including the setting of minimum prices, the setting of maximum prices, the setting of "list prices" (even where the list price is simply the starting point for customer negotiations, such as in automobile sales), production limits (even where no actual price is fixed), agreements regarding the availability of short-term credit, and agreements not to advertise prices. Regulated industries, such as railroads and public utilities, may fix prices or rates without violating the antitrust laws, however, provided they act within the limits established by their regulatory agencies.

See Discussion Case 4.1.

Although we most commonly think of price-fixing as occurring among sellers of goods or services, agreements among buyers to set the price that they will pay for goods or services or the quantities that they will purchase is also price-fixing.

The plaintiff bears the burden of proving price-fixing. This can be a difficult burden to meet. Price similarities or simultaneous changes in prices may result from normal

[29] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

economic conditions rather than from illegal firm behavior. If the price of raw timber increases as a result of changing conditions in the international timber markets, for example, the net effect may be a change in the wholesale price of lumber that causes competing lumber yards in a particular area to raise their retail prices by the same amount at the same time. In the absence of an agreement among the lumber yards to set the price, there would be no antitrust violation.

Price-fixing and its parallel behavior, *bid-rigging* (i.e., when two or more firms agree not to bid against each other to supply products or services to governmental units, or when they agree on the level of their individual bids), are considered by the DOJ to be the worst type of antitrust violation because such behavior invariably harms consumers by raising prices. The DOJ has made criminal prosecution of such behavior a top antitrust enforcement priority, and many corporate officers and managers have been imprisoned for such violations.

Group Boycotts and Concerted Refusals to Deal

As the Supreme Court has stated, a firm has the "right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."[30] Thus, a unilateral refusal to deal does not violate Section 1 of the Sherman Act, although it may violate Section 2 as an illegal monopolization or attempt to monopolize, as discussed below.

Section 1 of the Sherman Act prohibits group boycotts or concerted refusals to deal. These are agreements among competitors not to deal with another person or business, to deal only on certain terms, or to coerce suppliers or customers not to deal with that person or business. Such an agreement violates the antitrust laws if it forces that party to pay higher prices, prevents a firm from entering a market, or disadvantages a competitor.

Although group boycotts or concerted refusals to deal historically were treated as per se violations, the law is unclear on this issue, and most such actions are analyzed under the rule of reason today (see Case Illustration 4.2).

CASE ILLUSTRATION 4.2

GREGORY v. FORT BRIDGER RENDEZVOUS ASS'N, 448 F.3D 1195 (10TH CIR. 2006)

FACTS The Fort Bridger Rendezvous Association (FBRA) hosts an annual event (the "Rendezvous") at which participants reenact an annual gathering held by local fur traders from 1825 to 1840. Activities include shooting, archery and knife-throwing competitions, and "traders" who sell accurate replicas of pre-1840s merchandise. The event is the largest of this type in the region, and attracts up to 50,000 visitors. The FBRA has about 90 members, about half of whom are traders at the Rendezvous. A trader does not have to be a member of the FBRA to participate. The FBRA monitors traders' goods for authenticity and has a system for issuing permits to traders. Space for traders is limited and there are more applicants than permits available.

The Gregorys are traders, but not FBRA members. The Gregorys had exhibited at the Rendezvous for several years, but relations between the Gregorys and the FBRA deteriorated and became contentious. In 2002, the Gregorys were denied a permit to participate. The Gregorys filed suit, alleging, among other things, that the FBRA engaged in a horizontal group boycott by refusing to permit them to sell their goods at the Rendezvous.

(Continued)

[30] *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984).

The trial court granted summary judgment to FBRA on both claims, and the Gregorys appealed.

DECISION The appellate court affirmed the trial court's decision. The Gregorys had argued that by excluding them from the 2002 Rendezvous, the FBRA had engaged in a horizontal "group boycott," which they contended was *per se* illegal under Section 1 of the Sherman Act.

The appellate court found that there is a presumption in favor of applying the rule of reason to boycott cases. The *per se* rule is appropriately applied only to a boycott that "facially appears to be one that would always or almost always tend to restrict competition and decrease output…." Although the *per se* rule has been applied to a few group boycotts, those cases generally have involved firms with market power who boycotted suppliers or customers in order to deter them from doing business with a competitor.

The court noted that traders other than the Gregorys had also been denied space at the 2002 Rendezvous, for a variety of reasons. Mere denial of a space does not therefore necessarily imply anticompetitive animus. Moreover, denial of space to one trader opens up space for another trader and so overall does not have a predominantly anticompetitive effect.

The court went on to note that although the FBRA's behavior was not *per se* illegal, it should also be evaluated under the rule of reason. Because the purpose of the antitrust laws is to protect the public, the FBRA's conduct had to be judged in terms of its effect upon consumers, not upon competitors. The Gregorys had not argued that the denial of a permit for the 2002 Rendezvous violated the rule of reason test, and in fact, the denial of a permit to the Gregorys allowed a different trader to receive a permit and participate, which would indicate no detrimental effect on consumers. A plaintiff does not meet its burden under the rule of reason test when the challenged behavior by the defendant merely results in "a reshuffling of competitors with no detrimental effect on competition."

Thus, the appellate court affirmed the trial court's grant of summary judgment to the defendants.

Horizontal Market Allocations

Agreements among competitors to divide markets (defined by geographic territories, customer types, or product classes) are illegal *per se* as such agreements effectively give each firm a monopoly within its assigned territory.

See Discussion Case 4.1.

Agreements to Restrict Advertising

Agreements among competitors to restrict price advertising may be illegal if the restrictions deprive customers of valuable information. Similarly, restrictions on nonprice advertising may also be illegal if the restrictions have anticompetitive effects and no reasonable business justification.

Joint Ventures

A *joint venture* is a business association between two or more firms organized to carry out a specific business endeavor, such as joint research or a joint sales agency. If the purpose of the joint venture is to engage in behavior that is illegal *per se*, such as price-fixing or horizontal market allocation, the joint venture itself is illegal *per se*. Otherwise, the joint venture is evaluated under the rule of reason.

In 1984, Congress enacted the National Cooperative Research Act to alleviate concerns among businesses that joint research and development ventures might somehow violate the antitrust statutes. Joint ventures covered by the Act are evaluated under the rule of reason, are liable only for single (not treble) damages, and may qualify for "safe harbor" protection if they have less than a 20 percent market share. In 1993, the Act was extended to protect joint production ventures as well.

In April 2000, the FTC and the DOJ jointly issued *Antitrust Guidelines for Collaborations Among Competitors.*[31] These guidelines address the various types of horizontal agreements that competitors may form, such as joint ventures and strategic alliances, and provide an analysis that firms and their lawyers may apply in evaluating whether a proposed collaboration is likely to run afoul of the antitrust laws.

Vertical Restraints Against Competition

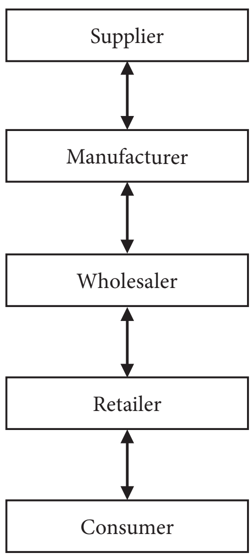
While relationships among competitors are described as being "horizontal," the relationships created between suppliers, manufacturers, wholesalers, retailers, and consumers of a product are described as "vertical" (see Exhibit 4.4). Certain agreements between such parties are illegal under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Some such agreements are illegal *per se*, while others are evaluated under the rule of reason (see Exhibit 4.5).

See Discussion Case 4.2.

Resale Price Maintenance Agreements

Manufacturers often want to establish the prices at which their distributors sell to customers. A manufacturer who has established a marketing program that positions its product as a high-prestige item will not want its distributors to dilute that product image by selling at a discount. The manufacturer would thus want to set a *minimum* price at which its distributors may sell. On the other hand, a manufacturer who is seeking high-volume sales, perhaps in an effort to establish economies of scale in production or to gain a prominent

EXHIBIT 4.4 **Vertical Restraints**



[31]The guidelines are available on the DOJ's website. See www.usdoj.gov

EXHIBIT 4.5 Potential Illegal Vertical Restraints Against Competition

- resale price maintenance agreements
- nonprice agreements between manufacturer and dealer
- tying arrangements

market share, will not want its distributors to reduce those sales by overpricing. The manufacturer would thus want to set a *maximum* price at which its distributors may sell.

In either event, the manufacturer's and the distributors' interests may well diverge. The distributors' total profits, for example, may be higher if sales are lower but prices are higher than those sought by the manufacturer.

In a 5–4 decision in 2007, *Leegin Creative Leather Products v. PSKS, Inc.*,[32] the Supreme Court overruled almost a century of precedent by holding that all vertical price restraints are to be evaluated under the rule of reason. The Court found that there can be "precompetitive justifications" for a manufacturer's use of vertical resale price maintenance, including encouraging retailers to invest in services or promotional efforts that better serve consumers and stimulating interbrand competition by reducing intrabrand competition. The Court also noted that vertical resale price maintenance can have anticompetitive effects, such as facilitating manufacturer cartels, assisting collusion among retailers to fix prices to consumers, or permitting a powerful manufacturer or retailer to abuse that power by limiting sales of products of rivals or new entrants, or to limit distribution to competitor retailers.

See Discussion Cases 4.2, 4.3.

Manufacturers are free to announce "suggested retail prices" as long as the prices are merely suggested and the action is unilateral. In *United States v. Colgate & Co.*, the Supreme Court stated:

> In the absence of a purpose to create or maintain a monopoly the [Sherman] act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.[33]

In addition, the manufacturer may even announce that it will terminate its dealings with any retailer who fails to adhere to the suggested pricing. As long as the manufacturer adheres strictly to its policy, it will likely avoid any antitrust problems. A manufacturer who announces such a policy and then engages in a pattern of suspending and reinstating retailers who first fail to adhere but then agree to do so, however, or who engages in other mechanisms to obtain adherence to its retail prices may well find that it is liable for unlawful resale price maintenance.

An unlawful vertical price-fixing agreement can be either express, as evidenced by written or oral agreements, or inferred from the course of conduct between the parties, such as withholding dealer allowances or increasing wholesale prices to dealers who do not comply with suggested prices.

[32] 551 U.S. 877 (2007).

[33] 250 U.S. 300, 307 (1919).

Most cases in this area are brought by private parties—usually dealers who claim that they were unlawfully terminated because they failed to adhere to the manufacturer's prices (see Case Illustration 4.3).

CASE ILLUSTRATION 4.3

MONSANTO CO. v. SPRAY-RITE SERVICE CORP., 465 U.S. 752 (1984)

FACTS Spray-Rite Service Corp., an agricultural herbicide distributor, sued Monsanto Co., a chemical manufacturer, under Section 1 of the Sherman Act, alleging that Monsanto and some of its distributors had conspired to fix the resale prices of Monsanto's herbicides and that Monsanto had terminated Spray-Rite's distributorship in furtherance of this policy and had encouraged distributors to boycott Spray-Rite.

From 1957 to 1968, Spray-Rite had sold agricultural herbicides manufactured by Monsanto. Spray-Rite was a family-owned discount operation, which bought in large quantities and sold at a low margin. In 1968, Monsanto refused to renew Spray-Rite's one-year distributorship term. At the time, Spray-Rite was Monsanto's tenth-largest distributor (out of approximately 100 distributors) and 16 percent of its sales were Monsanto products. Although Spray-Rite was subsequently able to purchase some Monsanto products from other distributors, it was unable to purchase as much of Monsanto's products as it wanted or as early in the growing season as it wanted,

Monsanto argued that it had terminated Spray-Rite's distributorship because of Spray-Rite's failure to hire trained salesmen and to promote sales to dealers.

DECISION At trial, the jury found that Spray-Rite's termination was the result of a conspiracy between Monsanto and its distributors to set resale prices and awarded $3.5 million in damages, which the District Court trebled to $10.5 million. The U.S. Court of Appeals for the Seventh Circuit affirmed on the grounds that there was sufficient evidence to show that there was a conspiracy to set resale prices because proof of termination following competitor complaints is sufficient to support an inference of concerted action. The evidence at trial had shown numerous complaints from distributors to Monsanto about Spray-Rite's price-cutting practices.

The U.S. Supreme Court also affirmed but found that the Court of Appeals had applied an incorrect standard to the evidence in the case. The Supreme Court stated:

> *[T]he fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market.*

Inferring a price-fixing agreement from the existence of complaints from other distributors, or even from the fact that termination resulted in response to complaints, could deter or penalize legitimate conduct. Something more than mere complaints is necessary.

Thus, the Supreme Court held, to support a finding of an unlawful contract, combination, or conspiracy, "the antitrust plaintiff should present 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.'"

The Supreme Court found that there was sufficient evidence for the jury to have concluded that Monsanto and its distributors had conspired to maintain resale prices and to terminate price cutters. The evidence included: (1) threats that Monsanto would not ship adequate supplies of Monsanto products to price-cutting distributors; (2) after Monsanto complained to a parent company about its subsidiary's price-cutting, the parent instructed the subsidiary to comply, and the subsidiary assured Monsanto that it would; and (3) a Monsanto distributors' newsletter, sent to its dealer-customers, which could reasonably have been interpreted as referring to agreements that distributors and dealers would maintain prices, that Monsanto's company-operated distributors would not undercut those prices, and that discounters would be terminated.

Moreover, there was circumstantial evidence showing that Spray-Rite's termination was made pursuant to a conspiracy between Monsanto and its competitors. Spray-Rite's president had testified that Monsanto made explicit threats to terminate Spray-Rite unless it raised its prices. In a post-termination meeting between Spray-Rite and Monsanto, Monsanto mentioned the many complaints it had received about Spray-Rite's prices as a factor in its termination decision.

Nonprice Agreements Between a Manufacturer and a Dealer

Arrangements in which the manufacturer imposes limitations on how or where a dealer may sell a product (i.e., such things as location restrictions, service obligations, or customer or territorial limitations) are judged under the rule of reason and are generally upheld.

These types of agreements may reduce *intrabrand competition* between local dealers selling a particular manufacturer's products but may well enhance *interbrand* competition between dealers selling competing manufacturers' products. Generally, courts are more concerned with protecting interbrand rather than intrabrand competition. If there is no interbrand competition for the product, however (i.e., the manufacturer has no competitors), the courts may view intrabrand competition as more critical and may thus restrict the manufacturer's right to pick and choose among its prospective dealers or distributors.

Similarly, *exclusive dealing* agreements, in which a supplier prohibits its distributors from selling the products of competing suppliers, are evaluated under the rule of reason and are generally legal if the supplier can show that that there is a legitimate business reason for the arrangement, such as a franchisor's need to protect its mark and goodwill. If the effect is to restrict competition, however, courts will likely find the agreement illegal.

As a practical matter, the vast majority of nonprice vertical restraint cases are decided in favor of the defendant. It is very difficult for a plaintiff to show an illegal nonprice vertical restraint.

Tying Arrangements

Tying arrangements or *tie-in sales* involve the sale of a desired product or service (the *tying product*) upon the condition that the buyer purchase a second product or service (the *tied product*) that the customer may not want or may be able to purchase elsewhere at lower cost. To get the desired product, the purchaser must accept the undesired product as well. For example, a PC manufacturer who requires a purchaser to buy an expensive printer in order to get access to a new and desirable computer would be tying the purchase of the computer (the tying product) to the purchase of the printer (the tied product).

Tying arrangements are governed by several of the antitrust acts. Section 3 of the Clayton Act prohibits tying arrangements involving goods but not those involving services, intangibles, or real property. Section 1 of the Sherman Act also applies to tying arrangements, including the services, intangibles, and real property instances not covered by the Clayton Act. Section 5 of the FTC Act covers tying arrangements that would be illegal under either the Clayton or the Sherman Acts. The analysis is the same under all of the acts.

A tying arrangement is illegal *per se* if:

1. the tying and tied products or services are two separate products or services;
2. the seller possesses sufficient economic power in the tying market to be able to restrain appreciably competition in the tied market; and
3. the arrangement involves a "not insubstantial" amount of interstate commerce.

The concern is that a seller in such a position can force out existing producers of tied products and can block new entrants by forcing them to enter both the tied and tying markets in order to compete.

Tying arrangements that do not meet these three standards are evaluated under the rule of reason and may be legal, though the courts generally view such arrangements with disfavor because of their potential anticompetitive effects. The courts often uphold tying arrangements in the franchisor-franchisee context, however, because of business justifications supporting such arrangements. Franchising law is discussed further in Chapter 5.

For the *per se* test to apply, the seller must have market power in the tying product market, usually defined by courts as at least a 30 percent share of an appropriately defined economic market. Until recently, case law had held that where the defendant holds a patent on the tying product, market power is presumed. This meant that the defendant had the burden of proving that market power did not exist, rather than the plaintiff having the burden of proving that it did.

In 2006, however, the Supreme Court ruled in *Illinois Tool Works, Inc. v. Independent Ink* that this presumption of market power is incorrect. The Court stated: "Congress, the antitrust enforcement agencies, and most economists have reached the conclusion that a patent does not necessarily confer market power upon the patentee."[34] Thus the plaintiff must now prove that the defendant has economic power in the tying market in order for the *per se* rule to apply.

Firms may attempt to use tying arrangements for a variety of reasons. If the firm has monopoly power in the tying product market, it may be able to use the tying arrangement to obtain monopoly power in the tied product market as well. Firms may also use this arrangement in an attempt to avoid price controls or to engage in price discrimination. Firms may engage in such behavior for legitimate reasons as well. For example, the firm may be attempting to take advantage of efficiencies or economies of scale. Similarly, the firm may attempt to protect its goodwill by refusing to provide replacement parts to nonauthorized service providers. The courts view such actions with a skeptical eye, however. As the Supreme Court stated, "The only situation … in which the protection of goodwill may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied."[35]

Monopolization and Attempts to Monopolize

Monopolization by a Single Firm

Antitrust law is concerned that firms with *monopoly power* will exclude competitors from the market, reduce output, and thus raise prices for goods and services. In a truly competitive market, a firm has no power to control the prices at which it sells its products as those prices are dictated by market conditions beyond its control. In an imperfect market, firms with monopoly or oligopoly power can raise their prices without losing all of their customers. Their *market power* (i.e., their power to profitably reduce output and raise prices above marginal costs) is limited only by the availability of other products that customers would find suitable substitutes or by the lack of barriers to entry by other firms.

It is not illegal for a firm to have a monopoly position in a market if that power results from a superior product or service, business acumen, or historical accident. As the U.S. Court of Appeals for the Second Circuit once noted: "The successful competitor, having been urged to compete, must not be turned upon when he wins."[36] However, Section 2 of the Sherman Act makes it illegal for a firm to maintain or to attempt to create a monopoly through actions that unreasonably exclude firms from the market or that significantly impair their ability to compete. Such antitrust violations may involve a single firm acting unilaterally or a group of firms acting together to monopolize a market. Conspiracies to monopolize are usually prosecuted under Section 1 of the Sherman Act and are discussed below. Section 2 of the Sherman Act applies to *monopsony* power (i.e., monopoly buying power), as well as to monopoly power.

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[34]547 U.S. 28, 45 (2006).

[35]*Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949).

[36]*United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

According to the U.S. Supreme Court, *monopolization* consists of two elements:

1. the possession of monopoly power in the relevant market; and
2. unfair attainment or maintenance of that power, "as opposed to growth or development as a consequence of a superior product, business acumen, or historic accident."[37]

Monopoly Power in the Relevant Market Firms that possess a large amount of market power in their relevant market are said to have "monopoly power." For purposes of the antitrust statutes, a firm does not have to have 100 percent of the market in order to have a monopoly position. Rather, a firm with a market share in excess of 70 percent is likely to be deemed to have monopoly power. A firm with a market share of less than 40 percent is unlikely to be found to have monopoly power. If the firm has between 40 percent and 70 percent market share, the court has to make a case-by-case determination as to whether the firm possesses monopoly power. Even where a firm has a high market share, it is not deemed to have monopoly power if the barriers to entry are so slight that other competitors could easily enter the market.

In determining whether a company has monopoly power, the relevant market must be defined. To answer this, the court must determine: (1) the relevant geographic market and (2) the relevant product market.

The defendant, of course, will try to define both of these markets broadly, which will reduce the defendant's relevant market share and make it less likely that the defendant will be found to have monopoly power. The plaintiff, on the other hand, will try to define each of these markets narrowly, which will increase the defendant's relevant market share and increase the likelihood that the court will find the defendant to be a monopolist. Thus, the definitions of the relevant geographic and product markets tend to be litigated vigorously.

The relevant *geographic market* can be international, national, regional, or local, depending upon the type of product or service at issue. It is usually defined as the area in which the defendant and competing sellers sell the product at issue, considering factors such as transportation costs, delivery limitations, customer convenience and preferences, and the locations and facilities of other producers and distributors. According to the U.S. Court of Appeals for the 11th Circuit: "A geographic market is only relevant for monopoly purposes where these factors show that consumers within the geographic area cannot realistically turn to outside sellers should prices rise within the defined area."[38]

The relevant *product market* is determined primarily by customer preferences and the extent to which customers view products as being reasonably interchangeable. Obviously, this determination is subject to a large amount of interpretation and is the subject of much litigation. While two brands of potato chips are logically viewed as being in the same product market, are potato chips and tortilla chips? Potato chips and pretzels? Potato chips and other salty snack foods, such as peanuts? Potato chips and all snack foods, including cookies, candy, and ice cream?

See Discussion Cases 4.4, 4.5.

Most products or services fall into the *multiple brand product market* in which several products or services are viewed as interchangeable substitutes and thus compete. However, in a 1992 case, *Eastman Kodak Co. v. Image Technical Services, Inc.*, the Supreme Court held that a single brand of a product or service could constitute a

[37] *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966).

[38] *T. Harris Young & Associates, Inc. v. Marquette Electronics, Inc.*, 931 F.2d 816, 823 (11th Cir. 1991).

separate market under certain circumstances. Kodak controlled nearly all of the parts market and 80 percent to 95 percent of the service market on its equipment. The Supreme Court found that: "Because service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed only of those companies that service Kodak machines."[39]

Unfair Attainment or Maintenance of Monopoly Power The second required element of illegal monopolization is that the firm has engaged in some form of prohibited market behavior. As already noted, the possession of monopoly power itself is not illegal; rather, it is the possession of monopoly power through predatory or coercive behavior that is prohibited. Judge Learned Hand, in a famous case known as *The Alcoa Case*,[40] stated that illegal monopoly power exists where the firm purposefully and intentionally acquired, maintained, or exercised that power, unless it is shown that the monopoly power was either: (1) attained by "superior skill, foresight, or industry" or (2) "thrust upon" the firm as a result of a thin market or economies of scale. This latter category encompasses "innocently acquired" or "natural" monopolies, such as those enjoyed by a small-town newspaper where the market will support only one such paper,[41] by a professional football team in a city in which there are insufficient fans to support more than one such team,[42] or when large economies of scale exist, such as those enjoyed by oil pipeline distribution networks or electricity suppliers.

The types of acts that constitute predatory or coercive behavior include conduct that excludes or bars competitors from the marketplace (such as increasing production capacity to supply all demand before a competitor can enter the field[43]), predatory pricing, and certain refusals to deal.

Predatory pricing is usually defined as pricing below average variable cost. The concern is that a firm attempting to create a monopoly will set prices low to eliminate competition and then raise prices once it has driven all of the other firms from the market. It can be difficult and expensive for a plaintiff to show that predatory pricing has occurred. According to the Supreme Court, for predatory pricing to occur under Section 2 of the Sherman Act: (1) the plaintiff must prove below-cost pricing by the defendant (measured by average variable cost) and (2) the defendant must have a dangerous probability of recouping the money that it lost on below-cost pricing (i.e., by increasing the market price after it has driven its competitors from the marketplace).[44] If the defendant is not in a position to recoup its losses, consumer welfare (and competition) is actually enhanced because consumers face lower aggregate prices in the marketplace. Individual competitors may be harmed by such a strategy but, as stated earlier, the antitrust laws are designed to protect consumers and competition as a whole, not individual competitive firms.

In 2007, the Supreme Court considered the related issue of *predatory bidding* in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*[45] Predatory bidding occurs when a buyer purchases its inputs at such unreasonably high prices that competitors are unable to purchase the inputs and still sell their end products at a profit. Thus, the buyer can drive weaker competitors out of the market and establish a buyer's monopoly

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[39] 504 U.S. 451, 482 (1992).

[40] *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

[41] *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582 (1st Cir. 1960).

[42] *American Football League v. National Football League*, 323 F.2d 124 (4th Cir. 1963).

[43] *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

[44] *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

[45] 549 U.S. 312 (2007).

(*monopsony*). The *Weyerhaueser* Court ruled that a plaintiff in a predatory bidding case must meet the same two-pronged test by showing that: (1) the increased bids "caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs" and (2) the defendant has "a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."[46]

Generally, as already discussed, firms may unilaterally *refuse to deal* with particular competitors or purchasers without violating the antitrust laws. There is an exception to this general rule, however, known as the *essential facilities doctrine*. If a firm has exclusive access to a facility that is "essential" to competition, the courts may require the firm to provide access to that facility to its competitors on a reasonable, nondiscriminatory basis. To prove monopolization of an "essential facility," the plaintiff generally must show: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[47] Because of the difficulties of meeting this standard of proof, this doctrine is seldom used.

See Discussion Case 4.5.

Attempted Monopolization

Section 2 of the Sherman Act also prohibits "attempts to monopolize." *Attempted monopolization* generally requires a showing that: (1) the defendant has engaged in predatory or anticompetitive conduct (2) with a specific intent to monopolize and (3) that there is a dangerous probability of the defendant's success.

The required specific intent can be proved by direct evidence (such as internal memos outlining the firm's plans to illegally obtain a monopoly) or by inference from unfair conduct on the part of the defendant, such as inducing other firms to boycott the defendant's competitors or discriminatory pricing. The same types of predatory or anticompetitive behavior that are condemned in monopolization cases are condemned in attempt-to-monopolize cases.

See Discussion Cases 4.4, 4.5.

Conspiracy to Monopolize

Section 2 of the Sherman Act states that it is illegal for any person "to conspire with any other person or persons to monopolize …." Any such violation is also a violation of Section 1's prohibition against conspiracies in restraint of trade. Such actions are almost always prosecuted under Section 1's broader language.

Price Discrimination

The Robinson-Patman Act prohibits discrimination in the prices charged or supplementary services offered to competing purchasers where such discrimination harms competition unless there is a legitimate business justification for the difference. It is intended primarily to protect small, independent businesses from injury caused by discriminatory pricing. *Price discrimination* is defined as identical or similar products being sold at prices that have different ratios to the marginal costs of producing the products.

Price discrimination can enhance profits for the seller who charges a higher price to those customers willing to pay more for the product or service and lower prices to those unwilling to pay. Price discrimination can exist only in markets with a few sellers or with

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[46] *Id.* at 325.

[47] *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

differentiated products or services. In competitive markets with homogenous products, firms do not have the ability to charge different prices to different buyers. Moreover, price discrimination is more common with services than with goods. If a buyer is able to resell the goods, for example, there is an opportunity for an arbitrageur to buy the good at the lower price and resell it at the higher price. Services, on the other hand, are more difficult to resell. However, the Robinson-Patman Act does not reach sales of services, only sales of goods.

As a practical matter, the DOJ and the FTC seldom take enforcement actions under the Robinson-Patman Act today. Private plaintiffs, on the other hand (particularly resellers charged the higher price), bring frequent suits. Private plaintiffs face a difficult burden of proof in Robinson-Patman Act suits. Even if the plaintiff wins at trial, it is likely to find its victory overturned by the appellate court.

Many states also have laws prohibiting price discrimination. Often, these laws are modeled on the Robinson-Patman Act, but they typically apply only to intrastate activities. Several state acts regulate price discrimination involving services as well as commodities.

Elements of Price Discrimination

The requirements of the Robinson-Patman Act are set forth in Section 2(a) of the Clayton Act. This section makes it unlawful for any person (1) engaged in commerce (2) to discriminate in price between different purchasers (3) of commodities of like grade and quality (4) where the effect may be to substantially lessen competition in any line of commerce, or tend to create a monopoly, or (5) to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with the customers of either of them. Thus, even if all other elements of a Robinson-Patman Act case are satisfied, there is no violation if there is no reasonable likelihood of injurious effects on competition.

There are some key points to recognize from this statutory language. First, both the seller who offers and the buyer who knowingly receives discriminatory prices or supplementary services are guilty of violating the Act. In addition, a buyer who knowingly induces an unlawful discriminatory price or supplementary service is in violation of the Act. Thus, a buyer cannot use its superior purchasing power to force sellers into granting discriminatory prices or supplementary services.

Second, the Robinson-Patman Act applies only to "commodities," which includes only tangible goods. Services and intangibles, such as brokerage services, newspaper advertising, cable television, cellular telephone services, mutual fund shares, patent licenses, leases, and real property, are excluded. Electricity, however, is considered a commodity for purposes of the Act.

Third, for a violation to occur, there must be at least two sales (leases, consignments, and license agreements do not count) to two different purchasers, at least one of which must be across a state line. The purchases must occur at fairly contemporaneous times, as determined by market conditions (see Case Illustration 4.4).

Fourth, the Robinson-Patman Act reaches indirect, as well as direct, price discrimination. Thus, discrimination that results from preferential credit terms, quantity discounts, or supplementary services, such as promotional assistance, is illegal. The Act also prohibits certain other types of discounts, rebates, and allowances and prohibits the selling of goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Fifth, to be of "like grade or quality," the two products need not be identical but must be viewed by buyers as being interchangeable and substitutable.

Sixth, the Act permits recovery for three categories of price discrimination. *Primary-line price discrimination* occurs when a seller's price discrimination harms competition with its direct competitors and usually takes the form of predatory pricing. (Recall that

CASE ILLUSTRATION 4.4

CROSSROADS COGENERATION CORP. v. ORANGE & ROCKLAND UTILITIES, INC., 159 F.3D 129 (3D CIR. 1998)

FACTS An electric cogenerator brought several antitrust allegations against a utility that had refused to purchase energy from it. One of the allegations involved price discrimination. Specifically, the cogenerator alleged that the utility had offered to sell electricity to the cogenerator's customers at a lower price than that offered by the cogenerator, that the reduced price was not offered to all customers, and that such an action violates the Robinson-Patman Act.

DECISION In affirming the trial court's dismissal of the claim, the appellate court stated:

> *The Robinson-Patman Act, which amended the Clayton Act, prohibits price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly." In order to state a claim under the Robinson-Patman Act, a plaintiff must allege facts to demonstrate that (1) the defendant made at least two contemporary sales of the same commodity at different prices to different purchasers; and (2) the effect of such discrimination was to injure competition.*

The appellate court found that the plaintiff had not satisfied the first element because it had alleged only that the defendant had "offered" to sell electricity at a rate lower than that charged by the plaintiff, rather than actually engaging in a sale. As the court noted, "Merely offering lower prices to a customer does not state a price discrimination claim."

Moreover, the plaintiff had not satisfied the second element either, as it had made no allegation of predatory conduct or other injury to competition, such as below-market prices. Merely approaching the plaintiff's customer does not constitute an antitrust violation.

predatory pricing may also violate the Sherman Act.) *Secondary-line price discrimination* occurs when a seller's price discrimination impacts competition among the seller's purchasers (i.e., there are purchasers who compete with each other, some of whom receive the favored price and some of whom do not). *Tertiary-line price discrimination* occurs when a seller's price discrimination harms competition between customers of the favored and disfavored purchasers, even though the favored and disfavored purchasers do not compete directly against one another. This occurs when the recipient of a favored price passes that lower price along to purchasers in the next level of distribution. Purchasers from other secondary-line sellers are injured because they do not receive the lower price. These purchasers may sue and recover damages from the discriminating secondary-line seller (see Case Illustration 4.5).

Finally, the Robinson-Patman Act does not apply to sales to federal, state, or local governments, nonprofit institutions, or cooperative associations, or to export sales.

Price discrimination in goods and services may also violate the Sherman Act if it constitutes a restraint of trade or an attempt to monopolize, or may violate Section 5 of the FTC Act if it is an unfair method of competition.

Defenses

There are three statutory *defenses* that sellers can raise in response to allegations of illegal price discrimination: (1) cost justification; (2) response to market conditions; and (3) meeting competition.

Section 2(a) of the Robinson-Patman Act states that "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are sold or delivered." If the defendant can prove a *valid cost justification*

CASE ILLUSTRATION 4.5

VOLVO TRUCKS NORTH AM., INC v. REEDER-SIMCO GMC, INC., 546 U.S. 164 (2006)

FACTS Reeder-Simco GMC, Inc. (Reeder), was a franchised regional dealer of Volvo heavy-duty trucks. It sold those trucks to retail customers. Generally, customers would solicit bids from dealers of various truck manufacturers; more rarely, a customer would solicit bids from two or more dealers franchised by the same manufacturer. The dealer would then request a discount off the wholesale price from the manufacturer.

Volvo Trucks North America, Inc. decided on a case-by-case basis whether to offer dealers a discount off the wholesale price, and if so, how much of a discount. Volvo's stated policy in the rare cases in which a retail customer solicited a bid from more than one franchised dealer was to offer the same discount to each dealer. The dealers would use the price offered by Volvo in preparing their bids to potential customers. The dealer would then place an order only for those trucks for which it had successfully obtained a buyer, and the trucks would be specially-built to the customer's specifications by Volvo.

Reeder filed a suit under the Robinson-Patman Act, alleging that its sales and profits had declined because Volvo offered other dealers more favorable price discounts. Reeder's claims were apparently fueled, at least in part, by its suspicion that it was one of several dealers that Volvo had targeted for termination as part of a cost-saving measure.

The trial court entered judgment for Reeder; the Court of Appeals for the Eighth Circuit affirmed. Volvo appealed to the U.S. Supreme Court.

DECISION The U.S. Supreme Court reversed, finding that Volvo was not liable for secondary-line price discrimination under the Robinson-Patman Act because there was no showing of discrimination between dealers competing to sell to the same retail customers.

The Court explained the purposes of the Robinson-Patman Act as follows:

> *[The] Robinson-Patman [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."*

To show price discrimination that injures competition among Volvo's dealerships, Reeder had to show, among other things, that (1) Volvo "discriminate[d] in price between" Reeder and another purchaser of Volvo trucks; and (2) "'the effect of such discrimination may be … to injure, destroy, or prevent competition' to the advantage of a favored purchaser." Volvo argued that Reeder had not identified any differentially-priced transaction in which it was both a "purchaser" under the Act and "in actual competition" with a favored purchaser for the same customer.

The Court agreed, concluding that Reeder had failed to bring in evidence to show that it had suffered an injury under the Robinson-Patman Act. The Court noted:

> *Reeder did offer evidence of two instances in which it competed head to head with another Volvo dealer. When multiple dealers bid for the business of the* same *customer, only one dealer will win the business and thereafter purchase the supplier's product to fulfill its contractual commitment ….*

However, the Court went on to note that Reeder did not show that Volvo had discriminated against it in these head-to-head transactions:

> *Reeder's evidence showed loss of only one sale to another Volvo dealer, a sale of 12 trucks that would have generated $30,000 in gross profits for Reeder. Per its policy, Volvo initially offered Reeder and the other dealer the same concession. Volvo ultimately granted a larger concession to the other dealer, but only after it had won the bid. In the only other instance of head-to-head competition Reeder identified, Volvo increased Reeder's initial 17% discount to 18.9%, to match the discount offered to the other competing Volvo dealer; neither dealer won the bid. In short, if price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition between Reeder and the "favored" Volvo dealer.*

The Court ultimately concluded that Reeder was asking it to expand the reach of the Robinson-Patman Act to cases of a type the Act was never intended to reach. Such an extension, the Court found, would be inconsistent with "broader policies of the antitrust laws."

for the price discrimination, it has an absolute defense to allegations of violation of the Act. This requires the defendant to make a detailed showing of *actual* cost savings attributable to the quantity sold, such as showing that the lower price simply represents the passing on of cost savings achieved through producing and shipping in large quantities. As a practical matter, it is difficult for defendants to calculate and prove such actual cost savings; thus, this defense is rarely used.

Section 2(a) also allows price variations designed to meet fluid product or market conditions, such as the deterioration of perishable goods, obsolescence of seasonal goods, a distress sale under court order, or a legitimate going-out-of-business sale. This defense, which is seldom used, is known as the *market conditions* defense.

Section 2(b) provides that a seller can defend by showing that its lower price was "made in good faith to meet an equally low price of a competitor"—the so-called "*meeting competition in good faith defense.*" To use this defense, the seller must show that: (1) at the time the price concession was made, the facts before it "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"[48] and (2) the price concession met but did not beat the competitive price for a similar product.

Antitrust and the Internet

The rapid growth of information technology and the Internet have raised new types of antitrust issues. Some commentators have argued that antitrust enforcement is less important in such an environment as new entrants can easily enter markets and supplant dominant market participants who try to assert market power or otherwise abuse their market position. The Antitrust Division of the DOJ, however, has taken the position that first-mover advantages associated with information technology systems raise special risks that dominant market participants will be able to capture markets and engage in anticompetitive behaviors. The Division believes that antitrust enforcement may well be even more important in such an environment.

State Antitrust Enforcement

Although the discussion in this chapter has focused primarily on federal antitrust laws, states are also active in antitrust enforcement. Most states have antitrust statutes, which are often patterned after the federal statutes. These statutes are enforced through the offices of the state attorneys general and, in many states, by private plaintiffs as well. These statutes address intrastate anticompetitive behavior rather than the interstate behavior targeted by the federal statutes. Over 40 states provide for criminal enforcement of state antitrust laws, with 25 of those states making antitrust violations felonies. Like the federal statutes, state antitrust law generally provides for recovery of treble damages, costs, and reasonable attorneys fees.

State antitrust laws can vary from federal law in some instances. For example, the State of Maryland has enacted a statute, effective October 1, 2009, that prohibits manufacturers from requiring retailers to charge minimum prices for their goods. The Maryland legislation was a direct response to the 2007 decision of the U.S. Supreme Court in *Leegin Creative Leather Products v. PSKS, Inc.* (discussed *supra*), in which the Court ruled that such agreements were no longer *per se* illegal under federal antitrust law.

In addition, state attorneys general may well use state antitrust laws to address the behavior of firms that might escape the attention of federal antitrust enforcement

[48] *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 760 (1945).

agencies. In January, 2009, for example, a Texas hospital agreed to pay $700,000 to settle claims of the Texas attorney general alleging that it had orchestrated agreements among several health plans not to do business with a new competitor hospital. In January 2008, an insurance firm entered into a consent decree with nine states and the District of Columbia, agreeing to pay $6 million to settle claims relating to a nationwide bid-rigging and price-fixing scheme for commercial insurance.

See Discussion Case 4.5.

International Implications of Antitrust Laws

The United States enforces its antitrust laws abroad, both civilly and criminally, and, in fact, is more aggressive than other countries in extending the extraterritorial reach of such laws. Under U.S. Supreme Court doctrine, conduct that would violate U.S. law if it occurred in the United States is also a violation if it occurred abroad but affected imports into the U.S.[49] The DOJ's *Antitrust Guidelines for International Operations*[50] state two purposes behind the extraterritorial application of U.S. antitrust law: (1) to protect U.S. consumers from conduct that raises prices or limits choices and (2) "to protect American export and investment opportunities against privately imposed restrictions."

The DOJ has specifically targeted international price-fixing and market-allocation cartels in its enforcement efforts, stating that it will focus its enforcement efforts primarily on boycotts and cartels that injure American exports or affect American consumers.[51] Not only have the cartel fines collected by the Antitrust Division risen dramatically in recent years, but top executives of cartels (including foreign nationals) have been sentenced to imprisonment and cartels have been subjected to civil treble-damage liability.[52] Many foreign nations have followed the United States' lead and are also focusing their antitrust enforcement efforts more intensely on international cartels. Over 100 jurisdictions have anti-cartel legislation. In addition, the United States has entered into cooperation agreements with several nations, including Australia, Brazil, Canada, the European Union, Germany, Israel, and Japan. These agreements are designed to enhance the abilities of governmental authorities to investigate and prosecute international cartel activities.

Cartel violations are treated seriously by most antitrust regulators. In November, 2008, the European Commission imposed a record fine of over €1.3 billion against car glass producers involved in a market-sharing cartel. At about the same time, three foreign electronics manufacturers pled guilty to violating U.S. antitrust law for engaging in price-fixing in the sale of LCD panels. One of the companies, LG Display Co., Ltd., a South Korean firm, agreed to pay a $400 million fine, the second-highest fine imposed to date by the DOJ's antitrust division. Both cases signal the importance that antitrust enforcement agencies around the world are placing on addressing cartel behavior.

As you can imagine, the extension of U.S. antitrust law to foreign firms has created some serious policy conflicts with foreign governments. Under the *sovereign immunity doctrine*, the United States does not apply its laws to foreign governments. Thus, if a foreign firm's activities are mandated (as opposed to merely tolerated) by its government, the U.S. antitrust laws do not apply to it.

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[49]*United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

[50]See www.usdoj.gov/atr/public/guidelines/guidelin.htm

[51]Department of Justice, Antitrust Division, 1999 Annual Report, at p. 5.

[52]See Gerald F. Masoudi, *Cartel Enforcement in the United States (and Beyond)*, at www.usdoj.gov/atr/public/speeches/221868.htm

Over 80 foreign nations also have antitrust legislation. Most Southeast Asian and Latin American countries have or are drafting antitrust laws. The European Union's competition policy is found within Articles 85 and 86 of the Treaty of Rome and is similar to Sections 1 and 2 of the Sherman Act. Most foreign antitrust laws, like the U.S. laws, provide for extraterritorial jurisdiction if the defendant's conduct affects markets in those nations. Thus, a company cannot assume that just because it has no assets in a particular foreign nation, it is not subject to that nation's antitrust provisions.

DISCUSSION CASES

4.1 Horizontal Price-Fixing, Horizontal Market Allocation
Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990)

OPINION: PER CURIAM. In preparation for the 1985 Georgia Bar Examination, petitioners contracted to take a bar review course offered by respondent BRG of Georgia, Inc. (BRG). [T]hey contend that the price of BRG's course was enhanced by reason of an unlawful agreement between BRG and respondent Harcourt Brace Jovanovich Legal and Professional Publications (HBJ), the Nation's largest provider of bar review materials and lecture services. The central issue is whether the 1980 agreement between respondents violated § 1 of the Sherman Act.

HBJ began offering a Georgia bar review course on a limited basis in 1976, and was in direct, and often intense, competition with BRG during the period from 1977 to 1979. * * * In early 1980, they entered into an agreement that gave BRG an exclusive license to market HBJ's material in Georgia and to use its trade name "Bar/Bri." The parties agreed that HBJ would not compete with BRG in Georgia and that BRG would not compete with HBJ outside of Georgia. Under the agreement, HBJ received $100 per student enrolled by BRG and 40% of all revenues over $350. Immediately after the 1980 agreement, the price of BRG's course was increased from $150 to over $400.

[T]he District Court held that the agreement was lawful. The United States Court of Appeals for the Eleventh Circuit, with one judge dissenting, agreed with the District Court that *per se* unlawful horizontal price fixing required an explicit agreement on prices to be charged or that one party have the right to be consulted about the other's prices. The Court of Appeals also agreed with the District Court that to prove a *per se* violation under a geographic market allocation theory, petitioners had to show that respondents had subdivided some relevant market in which they had previously competed. * * *

In *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940), we held that an agreement among competitors to engage in a program of buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful, even though there was no direct agreement on the actual prices to be maintained. We explained that "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*."

The revenue-sharing formula in the 1980 agreement between BRG and HBJ, coupled with the price increase that took place immediately after the parties agreed to cease competing with each other in 1980, indicates that this agreement was "formed for the purpose and with the effect of raising" the price of the bar review course. It was, therefore, plainly incorrect for the District Court to enter summary judgment in respondents' favor. Moreover, it is equally clear that the District Court and the Court of Appeals erred when they assumed that an allocation of markets or submarkets by competitors is not unlawful unless the market in which the two previously competed is divided between them.

In *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972), we held that agreements between competitors to allocate territories to minimize competition are illegal:

> One 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 …. This Court has reiterated time and time again that "[h]orizontal territorial limitations … are naked restraints of trade with

no purpose except stifling of competition." Such limitations are *per se* violations of the Sherman Act.

The defendants in *Topco* had never competed in the same market, but had simply agreed to allocate markets. Here, HBJ and BRG had previously competed in the Georgia market; under their allocation agreement, BRG received that market, while HBJ received the remainder of the United States. Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other. Thus, the 1980 agreement between HBJ and BRG was unlawful on its face.

The petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER took no part in the consideration or decision of this case.

QUESTIONS FOR DISCUSSION FOR CASE 4.1

1. What is the relevant market?
2. What do you think the purpose of the agreement between these two firms was? Do you think that the managers of these companies could have legitimately thought that their contract was not against the public interest?
3. Do you think that the result would have been the same if the companies had decided to form a joint venture in Georgia? What standard would the court use to review a joint venture?
4. Recall from the chapter discussion that a joint venture is illegal *per se* where its purpose is to engage in behavior that is illegal *per se.* Do you think that it is harder to prove that a joint venture has an illegal purpose or to prove the existence of a horizontal market allocation?
5. Does your answer to Question 4 suggest greater leeway for joint ventures? Can you think of reasons why courts might allow joint ventures greater freedom than two independent companies?

4.2 Vertical Price Restraints, Rule of Reason

Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877 (2007)

OPINION BY: Justice Kennedy delivered the opinion of the Court.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911), the Court established the rule that it is *per se* illegal under § 1 of the Sherman Act for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods. * * * The Court has abandoned the rule of *per se* illegality for other vertical restraints a manufacturer imposes on its distributors. Respected economic analysts, furthermore, conclude that vertical price restraints can have procompetitive effects. We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason.

I

Petitioner, Leegin Creative Leather Products, Inc. (Leegin), designs, manufactures, and distributes leather goods and accessories. In 1991, Leegin began to sell belts under the brand name "Brighton." The Brighton brand has now expanded into a variety of women's fashion accessories. It is sold across the United States in over 5,000 retail establishments, for the most part independent, small boutiques and specialty stores. * * * Leegin asserts that, at least for its products, small retailers treat customers better, provide customers more services, and make their shopping experience more satisfactory than do larger, often impersonal retailers. * * *

Respondent, PSKS, Inc. (PSKS), operates Kay's Kloset, a women's apparel store in Lewisville, Texas. Kay's Kloset buys from about 75 different manufacturers and at one time sold the Brighton brand. * * * Kay's Kloset became the destination retailer in the area to buy Brighton products. Brighton was the store's most important brand and once accounted for 40 to 50 percent of its profits.

In 1997, Leegin instituted the "Brighton Retail Pricing and Promotion Policy." Following the policy, Leegin refused to sell to retailers that discounted Brighton goods below suggested prices. The policy contained an exception for products not selling well that the retailer did not plan on reordering. * * *

Leegin adopted the policy to give its retailers sufficient margins to provide customers the service central to its distribution strategy. It also expressed concern that discounting harmed Brighton's brand image and reputation.

* * *

In December 2002, Leegin discovered Kay's Kloset had been marking down Brighton's entire line by 20 percent. Kay's Kloset contended it placed Brighton products on sale to compete with nearby retailers who also were undercutting Leegin's suggested prices. Leegin, nonetheless, requested that Kay's Kloset cease discounting. Its request refused, Leegin stopped selling to the store. The loss of the Brighton brand had a considerable negative impact on the store's revenue from sales.

PSKS sued Leegin in the United States District Court for the Eastern District of Texas. It alleged, among other claims, that Leegin had violated the antitrust laws by "enter[ing] into agreements with retailers to charge only those prices fixed by Leegin." Leegin planned to introduce expert testimony describing the procompetitive effects of its pricing policy. The District Court excluded the testimony, relying on the *per se* rule established by *Dr. Miles.* * * * The jury agreed with PSKS and awarded it $1.2 million. Pursuant to [federal statute], the District Court trebled the damages and reimbursed PSKS for its attorney's fees and costs. It entered judgment against Leegin in the amount of $3,975,000.80.

The Court of Appeals for the Fifth Circuit affirmed. * * * We granted certiorari to determine whether vertical minimum resale price maintenance agreements should continue to be treated as *per se* unlawful.

II

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." While § 1 could be interpreted to proscribe all contracts, the Court has never "taken a literal approach to [its] language." Rather, the Court has repeated time and again that § 1 "outlaw[s] only unreasonable restraints."

The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1. "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Appropriate factors to take into account include "specific information about the relevant business" and "the restraint's history, nature, and effect." Whether the businesses involved have market power is a further, significant consideration. In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

The rule of reason does not govern all restraints. Some types "are deemed unlawful *per se.*" The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work, and, it must be acknowledged, the *per se* rule can give clear guidance for certain conduct. Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, or to divide markets.

Resort to *per se* rules is confined to restraints, like those mentioned, "that would always or almost always tend to restrict competition and decrease output." To justify a *per se* prohibition a restraint must have "manifestly anticompetitive" effects.

As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. It should come as no surprise, then, that "we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." * * *

III

The Court has interpreted *Dr. Miles* as establishing a *per se* rule against a vertical agreement between a manufacturer and its distributor to set minimum resale prices. * * *

* * *

Dr. Miles … treated vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors. * * * Our recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements, differences the *Dr. Miles* Court failed to consider.

The reasons upon which *Dr. Miles* relied do not justify a *per se* rule. As a consequence, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices, and to determine whether the *per se* rule is nonetheless appropriate.

A

Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance. Even those more skeptical of resale price maintenance acknowledge it can have procompetitive effects.

* * *

The justifications for vertical price restraints are similar to those for other vertical restraints. Minimum resale price maintenance can stimulate 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 promotion of interbrand competition is important because "the primary purpose of the antitrust laws is to protect [this type of] competition." A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.

Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. Consumers might learn, for example, about the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. Or consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise. If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer's retailers compete among themselves over services.

Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands. "[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect.

Resale price maintenance can also increase interbrand competition by encouraging retailer services that would not be provided even absent free riding. It may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform. Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services.

B

While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever present temptation. Resale price maintenance may, for example, facilitate a manufacturer cartel. An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers.

Vertical price restraints also "might be used to organize cartels at the retailer level." A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement. Historical examples suggest this possibility is a legitimate concern.

A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

Resale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer. A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's distribution network. A manufacturer with market power, by comparison, might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants. As should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.

C

Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance "always or almost always tend[s] to restrict competition and decrease output." Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed. * * *

* * *

Resale price maintenance, it is true, does have economic dangers. If the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market. This is a realistic objective, and certain factors are relevant to the inquiry. For example, the number of manufacturers that make use of the practice in a given industry can provide important instruction. When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers. Likewise, a retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance. Interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price-fixing agreement over a single brand. Resale price maintenance should be subject to more careful scrutiny, by contrast, if many competing manufacturers adopt the practice.

The source of the restraint may also be an important consideration. If there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer. If, by contrast, a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct. A manufacturer also has an incentive to protest inefficient retailer-induced price restraints because they can harm its competitive position.

As a final matter, that a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.

* * *

For all of the foregoing reasons, we think that were the Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints.

IV

* * *

A

Stare decisis, we conclude, does not compel our continued adherence to the *per se* rule against vertical price restraints. As discussed earlier, respected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects. It is also significant that both the Department of Justice and the Federal Trade Commission—the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance—have recommended that this Court replace the *per se* rule with the traditional rule of reason. * * *

Other considerations reinforce the conclusion that *Dr. Miles* should be overturned. Of most relevance, "we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings." The Court's treatment of vertical restraints has progressed away from *Dr. Miles*' strict approach. We have distanced ourselves from the opinion's rationales. This is unsurprising, for the case was decided not long after enactment of the Sherman Act when the Court had little experience with antitrust analysis. * * *

* * *

B

* * *

For these reasons the Court's decision in *Dr. Miles Medical Co.* is now overruled. Vertical price restraints are to be judged according to the rule of reason.

V

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

QUESTIONS FOR DISCUSSION FOR CASE 4.2

1. What is the difference between the rule of reason and *per se* illegality in antitrust cases? Are these standards created by Congress or the courts?
2. What is the difference between interbrand and intrabrand competition? Which type of competition is antitrust law primarily designed to promote?
3. Vertical price restraints may lead to higher prices for the manufacturer's goods, but the Court does not find this particularly troubling. Why might higher prices not necessarily indicate anticompetitive conduct?
4. What types of activities might send a signal that resale price maintenance is being used for anticompetitive purposes?

4.3 Rule of Reason, Vertical Maximum Resale Price Maintenance
State Oil Co. v. Khan, 522 U.S. 3 (1997)

OPINION: JUSTICE O'CONNOR delivered the opinion of the Court.

Under § 1 of the Sherman Act, "[e]very contract, combination …, or conspiracy, in restraint of trade" is illegal. *In Albrecht v. Herald Co.,* 390 U.S. 145 (1968), this Court held that vertical maximum price fixing is a *per se* violation of that statute. In this case, we are asked to reconsider that decision in light of subsequent decisions of this Court. We conclude that *Albrecht* should be overruled.

I

Respondents, Barkat U. Khan and his corporation, entered into an agreement with petitioner, State Oil Company, to lease and operate a gas station and convenience store owned by State Oil. The agreement provided that respondents would obtain the station's gasoline supply from State Oil at a price equal to a suggested retail price set by State Oil, less a margin of 3.25 cents per gallon. Under the agreement, respondents could charge any amount for gasoline sold to the station's customers, but if the price charged was higher than State Oil's suggested retail price, the excess was to be rebated to State Oil. Respondents could sell gasoline for less than State Oil's suggested retail price, but any such decrease would reduce their 3.25 cents-per-gallon margin.

* * *

Respondents sued State Oil …, alleging in part that State Oil had engaged in price-fixing in violation of § 1 of the Sherman Act by preventing respondents from raising or lowering retail gas prices. According to the complaint, but for the agreement with State Oil, respondents could have charged different prices based on the grades of gasoline, … thereby achieving increased sales and profits. * * *

* * * [T]he District Court entered summary judgment for State Oil on respondents' Sherman Act claim.

The Court of Appeals for the Seventh Circuit reversed. * * *

We granted certiorari to consider … whether State Oil's conduct constitutes a *per se* violation of the Sherman Act. * * *

II

A

Although the Sherman Act, by its terms, prohibits every agreement "in restraint of trade," this Court has long recognized that Congress intended to outlaw only unreasonable restraints. As a consequence, most 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.

Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se. Per se* treatment is appropriate "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." * * *

A review of this Court's decisions leading up to and beyond *Albrecht* is relevant to our assessment of the continuing validity of the *per se* rule established in *Albrecht.* Beginning with *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911), the Court recognized the illegality of agreements under which manufacturers or suppliers set the minimum resale prices to be charged by their distributors. By 1940, the Court broadly declared all business combinations "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" illegal *per se. United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). Accordingly, the Court condemned an agreement between two affiliated liquor distillers to limit the maximum price charged by retailers in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951), noting that agreements to fix maximum prices, "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

In subsequent cases, the Court's attention turned to arrangements through which suppliers imposed restrictions on dealers with respect to matters other than resale price. In *White Motor Co. v. United States,* 372 U.S. 253 (1963), the Court considered the validity of a manufacturer's assignment of exclusive territories to its distributors and dealers. The Court determined that too little was known about the competitive impact of such vertical limitations to warrant treating them as *per se* unlawful. Four years later, in *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), the Court reconsidered the status of exclusive dealer territories and held that, upon the transfer of title to goods to a distributor, a supplier's imposition of territorial restrictions on the distributor was "so obviously destructive of competition" as to constitute a *per se* violation of the Sherman Act.* * *

Albrecht, decided the following Term, involved a newspaper publisher who had granted exclusive territories to independent carriers subject to their adherence to a maximum price on resale of the newspapers to the public. Influenced by its decisions in *Socony-Vacuum, Kiefer-Stewart*, and *Schwinn*, the Court concluded that it was *per se* unlawful for the publisher to fix the maximum resale price of its newspapers. * * *

Albrecht was animated in part by the fear that vertical maximum price-fixing could allow suppliers to discriminate against certain dealers, restrict the services that dealers could afford to offer customers, or disguise minimum price fixing schemes. * * *

* * *

Nine years later, in *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977), the Court overruled *Schwinn*, thereby rejecting application of a *per se* rule in the context of vertical nonprice restrictions. The Court acknowledged the principle of *stare decisis*, but explained that the need for clarification in the law justified reconsideration of *Schwinn:*

> Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of scholarly opinion has been critical of the decision, and a number of the federal courts confronted with analogous vertical restrictions have

sought to limit its reach. In our view, the experience of the past 10 years should be brought to bear on this subject of considerable commercial importance.

* * *

Subsequent decisions of the Court … have hinted that the analytical underpinnings of *Albrecht* were substantially weakened by *GTE Sylvania.* * * *

* * *

B

Thus, our reconsideration of *Albrecht's* continuing validity is informed by several of our decisions, as well as a considerable body of scholarship discussing the effects of vertical restraints. Our analysis is also guided by our general view that the primary purpose of the antitrust laws is to protect interbrand competition. "Low prices," we have explained, "benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." * * *

So informed, we find it difficult to maintain that vertically-imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation. * * *

* * *

After reconsidering *Albrecht's* rationale and the substantial criticism the decision has received, … we conclude that there is insufficient economic justification for *per se* invalidation of vertical maximum price-fixing.

* * *

C

Despite what Chief Judge Posner aptly described as *Albrecht's* "infirmities, [and] its increasingly wobbly, moth-eaten foundations," there remains the question whether *Albrecht* deserves continuing respect under the doctrine of *stare decisis.* The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents.

We approach the reconsideration of decisions of this Court with the utmost caution. *Stare decisis* reflects "a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" It "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." This Court has expressed its reluctance to overrule decisions involving statutory interpretation, and has acknowledged that *stare decisis* concerns are at their acme in cases involving property and contract rights. Both of those concerns are arguably relevant in this case.

But "*[s]tare decisis* is not an inexorable command." In the area of antitrust law, there is a competing interest, well-represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." * * * Accordingly, this Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question.

* * *

* * * In overruling *Albrecht*, we of course do not hold that all vertical maximum price-fixing is *per se* lawful. Instead, vertical maximum price-fixing, like the majority of commercial arrangements subject to the antitrust laws, should be evaluated under the rule of reason. * * *

* * * We therefore vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

QUESTIONS FOR DISCUSSION FOR CASE 4.3

1. What is the doctrine of *stare decisis?* Under what circumstances will the Supreme Court reverse its own precedents?
2. How could vertical maximum price-fixing benefit consumers?
3. Why would a company want to set a maximum price for its goods?
4. Do you think it would be legal for a company to set a maximum price for its distributors but not for itself?

4.4 Monopolization, Attempted Monopolization

Christy Sports, LLC v. Deer Valley Resort Co., Ltd., 555 F.3d 1188 (10th Cir. 2009)

When the Deer Valley Resort Company ("DVRC") was developing its world-renowned ski resort in the Wasatch Mountains, it sold parcels of land within the resort village to third parties, while reserving the right of approval over the conduct of certain ancillary businesses on the property, including ski rentals. For about fifteen years, DVRC granted permission to Cole Sports and plaintiff-appellant Christy Sports to rent skis in competition with its own ski rental outlet. More recently, however, DVRC revoked that permission, presumably in order to gain more business for its own newly-opened mid-mountain ski rental store. The question is whether this revocation violated the antitrust laws. We conclude that it did not.

I. Background

Deer Valley is one of three resorts in the vicinity of Park City, Utah. Many—indeed, "the vast majority," according to the Complaint—of Deer Valley's patrons are destination skiers who fly into Salt Lake City and then take a forty-five minute bus or shuttle ride to the resort. The resort itself is divided into two areas: the base area, located at the bottom of the mountain, and the ritzier mid-mountain village, located halfway up the slope. * * *

Originally, DVRC owned all the property at the mid-mountain village, but over the years it has sold parcels to third parties. In 1990, DVRC sold one such parcel to S.Y. and Betty Kimball, subject to a restrictive covenant that prohibited use of the property for either ski rental or real estate sales office purposes without DVRC's express written consent. The Kimballs built a commercial building and leased space in it to Christy's corporate predecessor, Bulrich Corporation. The lease expressly prohibited both the rental of skis and the operation of a real estate office. The next year, though, DVRC gave Bulrich permission to rent skis in return for 15% of the rental revenue. When Bulrich merged with another company in 1994 and formed Christy Sports, LLC, Christy continued to operate the rental business. According to the complaint, Christy stopped paying DVRC 15% of its rental revenue in 1995, though the reason for this change is unknown. Christy rented skis at the Deer Valley mid-mountain village with no objection from DVRC until 2005. During that time, DVRC was the sole purveyor of rental skis at the base area but did not have a ski rental operation at mid-mountain.

DVRC opened a mid-mountain ski rental outlet in 2005. In August of that year, the resort notified Christy that, beginning the following year's ski season, the restrictive covenant would be enforced and Christy would no longer be allowed to rent skis. * * * This leaves that majority of skiers who fly into Salt Lake City and then shuttle to Deer Valley with few choices: they can carry unwieldy ski equipment onto the plane, take a shuttle into Park City and hunt for cheaper ski rentals in town, or rent from the more conveniently located DVRC location. Christy predicts, not improbably, that most consumers will choose the third option.

Christy argues that DVRC's decision to begin enforcing its restrictive covenant is an attempt to monopolize the market of ski rentals available to destination skiers in Deer Valley, or, alternatively, to the destination skiers in the mid-mountain village itself. It alleges that by eliminating its competitors, DVRC will be able to increase prices and reduce output, thus harming consumers. The complaint states that the number of skis available for rental mid-mountain will decline by 620 pairs, and the price will increase by at least twenty-two to thirty-two percent.

* * *

II. Analysis

* * *

Christy has alleged that DVRC violated § 2 of the Sherman Act by either actual or attempted monopolization. "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power." Similarly, an attempt claim must show "(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," with the third element requiring "consider[ation] [of] the relevant market and the defendant's ability to lessen or destroy competition in that market." Under both types of § 2 claims Christy must therefore plead both power in a relevant market and anticompetitive conduct. The relevant market, according to Christy's complaint, is the market for ski rentals to destination skiers in Deer Valley in general or, even more narrowly, the market for ski rentals in the mid-mountain village. The alleged anticompetitive conduct is the enforcement of the restrictive covenant.

* * *

We begin our analysis with DVRC's original decision to impose the restrictive covenant.

A. Imposition of the Restrictive Covenant

We agree with the defendant that the creator of a resort has no obligation under the antitrust laws to allow competitive suppliers of ancillary services on its property. A theme park, for example, does not have to permit third parties to open restaurants, hotels, gift shops, or other facilities within the park; it can reserve to itself the right to conduct such businesses and receive revenues from them. Accordingly, if it sells land within the resort to third parties, the antitrust laws do not bar the resort owner from imposing a covenant against use of the property for competitive businesses. This is so even if food, rooms, gifts, or other ancillary goods and services would be cheaper and more plentiful if the resort owner allowed competition in these businesses.

This conclusion can be reached either by reference to the proper definition of a market or by reference to the absence of anticompetitive conduct. Some courts, faced with cases of this sort, have found the market definition implausible. The Seventh Circuit took this approach in Elliott v. United Center, 126 F.3d 1003 (7th Cir. 1997), when a peanut vendor challenged a sports arena's decision to ban outside food and thereby monopolize the market for food concessions within the arena. The court rejected that market definition as implausible, saying:

> The logic of [the] argument would mean that exclusive restaurants could no longer require customers to purchase their wines only at the establishment, because the restaurant would be "monopolizing" the sale of wine within its interior. Movie theaters, which traditionally (and notoriously) earn a substantial portion of their revenue from the sale of candies, popcorn, and soda, would be required by the antitrust laws to allow patrons to bring their own food.

Other courts agree. Hospitals alleged to have monopolized the market for medical services within that single hospital and a cemetery alleged to have monopolized the market for tombstones within that cemetery, were all declared too narrow to constitute a relevant market. Perhaps even closer to this case is Hack v. President & Fellows of Yale College, 237 F.3d 81, 85 (2d Cir. 2000), in which Yale University was alleged to have monopolized the market for on-campus housing within its sprawling complex of facilities. The Second Circuit rejected the idea that it is impermissible for an institution to monopolize one particular product within an establishment that provides a variety of interrelated services, the most important one of which is education. The alleged market was too narrow.

Although discussion of sports arenas and universities seems to suggest that Christy's shortcomings lie with its alleged geographic market, the actual problem lies with its product market. In these cases the two are difficult to disentangle because the product (rental skis, as here, or housing, as in *Hack*) is intimately related to the location. Consumers do not travel to Deer Valley for rental skis, just as they do not attend Yale to live in an Eero Saarinen-designed dormitory. The true product in these cases is the overall experience. Deer Valley offers a cluster of products that combine to create a destination ski experience; rental skis are only one small component. The complaint alleges nothing to suggest that destination skiers are choosing their ski resort based on the price of rental skis, separate and apart from the cluster of services associated with the destination-ski experience. To define one small component of the overall product as the relevant product market is simply implausible.

Alternatively, one could say that the monopolization claim would fail because the alleged conduct is not anticompetitive. Even if a firm has monopoly power in a relevant market, a plaintiff must also show "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." Deer Valley is not required to invite competitors onto its property to rent skis to its patrons, even if a failure to do so would mean it is the sole supplier of rental skis at the ski area.

* * *

Having invested time and money in developing a premier ski resort that attracts skiers from across the nation, DVRC could recoup its investment in a number of ways. It could increase the price of lift tickets, raise room rates, serve only high-priced food, or, as it seems to have chosen, delve more deeply into the rental ski market. This does not mean consumers have no protection. The ski resort industry is competitive (and Christy does not allege otherwise). Families contemplating ski vacations have many options, and they presumably compare quality and price. If they are rational, the price they are concerned about is the sum of all of their prospective vacation costs, including not just lift ticket prices and resort lodging, but air fare, food and drink, apres-ski entertainment, ski rentals, and the like. A resort that facilitates lower ski rental prices by allowing competition is able to price other aspects of the ski vacation experience more aggressively. The competitive discipline comes not from introducing competition with respect to each component of the experience, but from competition with other ski resorts with respect to the entire package. Christy has not alleged, and it would not likely be plausible to allege, that DVRC's decision to foreclose competition in the ski rental business at the mid-mountain village will have any effect on the market for ski resort vacations as a whole.

Indeed, allowing resorts to decide for themselves what blend of vertical integration and third party competition will produce the highest return may well increase competition in the ski resort business as a whole, and thus benefit consumers. This flexibility about business strategies induces entrants into the ski resort business by allowing them to reserve the benefits of their investments to themselves. * * *

* * *

[H]aving created a resort destination, antitrust will not force a resort developer to share its internal profit-making opportunities with competitors. The relevant market requirement reaches this result by finding implausible a market definition that singles out a small component of the cluster of services that constitutes the actual product; the anticompetitive conduct requirement reaches it by saying that it is not anticompetitive to refuse to grant access to competitors.

B. Revocation of Consent to Operate a Ski Rental Facility

* * *

[T]he plaintiff argues primarily that, having allowed third parties to engage in the ski rental business for almost fifteen years, DVRC violated § 2 of the Sherman Act when it revoked that permission and took over the ski rental business for itself.

We do not see the logic in this argument. If antitrust law permits a resort operator to organize its business in either of two ways, by providing ancillary services itself or by allowing third parties to provide the service on a competitive basis, we do not see why an initial decision to adopt one business model would lock the resort into that approach and preclude adoption of the other at a later time. * * *

* * *

DVRC should not be forever locked into a business decision made in 1990, especially when it took an affirmative step to preserve its future flexibility by bargaining for a restrictive covenant. This is so even if Christy is correct that by enforcing the restrictive covenant DVRC could increase the price and decrease the output of ski rentals at Deer Valley. It had the right to do so from the beginning, and the fact that it chose to do otherwise for some time does not eliminate that right. The antitrust laws should not be allowed to stifle a business's ability to experiment in how it operates, nor forbid it to change course upon discovering a preferable path.

* * *

III. Conclusion

Because Christy Sports has failed to plead a plausible claim for either attempted or actual monopolization under § 2 of the Sherman Act, we **AFFIRM** the district court's dismissal for failure to state a claim.

QUESTIONS FOR DISCUSSION FOR CASE 4.4

1. What are the required elements of a monopolization claim? Attempted monopolization?
2. To show a violation of Section 2 of the Sherman Act, the plaintiff must show both that the defendant has market power in a relevant market and that it has engaged in anticompetitive conduct. What arguments did Christy Sports put forth on these two elements? What conclusions did the court reach about these two elements?
3. Why does the court conclude that competition is not harmed if DVRC enforces its covenant and becomes the sole ski rental operator in this geographic area?
4. Do you think that this outcome is fair to Christy Sports? Could Christy Sports have planned its own business activities so as to avoid or minimize the financial ramifications of DVRC acting in this manner?

4.5 Monopolization, Attempted Monopolization, Definition of Market, Essential Facility, State Antitrust Law

Green County Food Market, Inc. v. Bottling Group, LLC, 371 F.3d 1275 (10th Cir. 2004)

Plaintiffs, retail grocery stores operating in the Tulsa, Oklahoma area, brought this diversity action under the Oklahoma Antitrust Reform Act against their local distributor of Pepsi and affiliated beverage products and its holding company ("Bottling Group" and "Holdings"). Plaintiffs alleged that Bottling Group unlawfully discontinued sales to Plaintiffs in response to a price discrimination lawsuit Plaintiffs had previously brought against Bottling Group's predecessor-in-interest. The district court granted summary judgment in favor of Bottling Group and Holdings. On appeal, Plaintiffs primarily challenge the district court's definition of the relevant product market. We … AFFIRM.

Background

Plaintiffs are corporations that operate grocery stores, each owned in whole or in part by either Steven Davis or Brian Honel. Plaintiff Brissa, Inc. (operated by Mr. Honel) and Plaintiff Plaza Redbud Inc. (operated by Mr. Davis) had purchased Pepsi and affiliated beverage products from Beverage Products Corporation ("BPC"), the exclusive distributor of these products in the Tulsa area. By 1997, Mr. Honel and Mr. Davis had recognized that they were often unable to sell their Pepsi products at prices competitive with other area grocery stores. Mr. Honel and Mr. Davis compared their invoices from BPC and discovered that BPC had been charging them different wholesale prices for the beverage products it distributed. On January 5, 1999, Plaintiffs Brissa and Plaza Redbud sued BPC for price discrimination under Oklahoma antitrust laws.

On February 8, BPC transferred all assets, liabilities, and stock to Bottling Group Holdings, Inc. ("Holdings"), which the same day transferred the same assets, liabilities, and stock to Bottling Group, LLC ("Bottling Group"). Bottling Group is majority owned by Holdings, and Holdings is indirectly wholly owned by The Pepsi Bottling Group, Inc.

On February 11, Bottling Group discontinued sales to Plaintiffs Brissa and Plaza Redbud because of a "distinct decrease in the level of trust" between Bottling Group and each grocery store stemming from the pending price discrimination lawsuit. Bottling Group has also refused to distribute its products to other Plaintiff grocery stores that Mr. Honel and Mr. Davis have acquired. Plaintiffs therefore have no access, other than retail purchase, to the 155 Pepsi and affiliated beverage products distributed by Bottling Group.

Plaintiffs filed this lawsuit against both Bottling Group and Holdings under §§ 203[2] and 205 of the Oklahoma Antitrust Reform Act. The complaint alleged monopolization, attempt to monopolize, and conspiracy to monopolize under § 203(B) and denial of access to an essential facility under § 203(C), and requested injunctive relief and monetary damages under § 205. All allegations were predicated on Bottling Group's refusal to deal with Plaintiffs following Plaintiffs' initiation of the price discrimination lawsuit against BPC.

The district court denied Plaintiffs' request for a preliminary injunction and granted summary judgment in favor of Bottling Group and Holdings. * * *

Plaintiffs timely filed this appeal. * * *

Discussion

Plaintiffs' allegations focused exclusively on alleged monopolization under § 203(B) and denial of access to an essential facility under § 203(C).

* * *

B. The Relevant Product Market

The Oklahoma Antitrust Reform Act is construed in accordance with federal antitrust law. Sections 203(B) and 203(C) of the Oklahoma Antitrust Reform Act both require that the plaintiff prove a relevant market.

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[2]Section 203 of the Oklahoma Antitrust Reform Act provides in relevant part:

> A. Every act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.
> B. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce in a relevant market within this state.
> C. [I]t is unlawful for any person in control of an essential facility to unreasonably refuse to give a competitor or customer of an entity controlling an essential facility access to it upon reasonable terms if the effect of such denial is to injure competition.

Under § 203(B), "it is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce in a relevant market within this state." Accordingly, to establish liability under § 203(B), a plaintiff must first define the relevant market.

Under § 203(C), "it is unlawful for any person in control of an essential facility to unreasonably refuse to give a competitor or customer of an entity controlling an essential facility access to it upon reasonable terms if the effect of such denial is to injure competition." Pursuant to the statute, an "essential facility" is a facility which, inter alia, "is controlled by an entity that possesses monopoly power." "Monopoly power" is "the power to control market prices or exclude competition." To prove monopoly power, the plaintiff must first define the relevant market.

Accordingly, both § 203(B) and § 203(C) require proof of a relevant market. The relevant market inquiry has two components: geographic market and product market. Only the latter is an issue in this appeal.

The Supreme Court articulated the standard for defining the relevant product market …. A relevant product market consists of "products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." The interchangeability of products is measured by, and is substantially synonymous with, cross-elasticity. A market is "cross-elastic" if rising prices for one product causes consumers to switch to the other product.

The Supreme Court has also recognized the existence of submarkets within a larger product market. The boundaries of such a submarket are defined by such factors as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, and sensitivity to price changes and specialized vendors. "The same proof which establishes the existence of a relevant product market also shows (or … fails to show) the existence of a product submarket." * * *

1. Products of a single manufacturer or brand

In general, a manufacturer's own products do not themselves comprise a relevant product market.

As the Supreme Court stated …:

> Where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market.

Similarly, we have said that "a company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product." Even where brand loyalty is intense, courts reject the argument that a single branded product constitutes a relevant market.

Nonetheless, products of a single manufacturer may in rare circumstances constitute a relevant product market. In Eastman Kodak Co. v. Image Technical Services, Inc., [504 U.S. 451 (1992)], the Supreme Court held that the relevant product market must be defined in terms of the choices of products and services available to Kodak equipment owners. Because Kodak equipment owners were locked into Kodak parts and services, Kodak parts and services were not interchangeable with the parts and services of other manufacturers. Accordingly, only those companies that serviced Kodak machines comprised the relevant product market.

The Supreme Court has acknowledged in dicta that the soft drink industry is a prototypical example of an industry in which products are so interchangeable that control over one brand cannot be an illegal monopoly. The Court said that "this power that … soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly." "There are certain differences in the formulae for soft drinks but one can hardly say that each one is an illegal monopoly."

Accordingly, Pepsi branded beverage products cannot alone comprise a relevant product market. Plaintiffs attempt to avoid this conclusion by offering evidence that consumers are "brand loyal" to Pepsi branded products. Mr. Davis, one of the grocery store owners in this case, testified that in his experience, people are brand loyal to Pepsi because instead of substituting Coke if they do not find Pepsi on the grocery store shelves they look elsewhere for Pepsi. Brand loyalty of consumers to particular soft drinks is an insufficient basis for concluding that Pepsi constitutes a relevant product market. Plaintiffs have offered no other evidence to show that Pepsi products are not reasonably interchangeable with Coke products or other branded soft drinks.

Nor have Plaintiffs offered any evidence pertaining to the specific factors listed by the Supreme Court in Brown Shoe, such as evidence that Pepsi prices are insensitive to price changes in other branded soft drinks. In short, Plaintiffs have offered no evidence other than their own testimony pertaining to brand loyalty to prove that Pepsi branded products constitutes a market distinct from other soft drink products.

* * *

Conclusion

We hold that Plaintiffs['] … claims under §§ 203(B) and 203(C) of the Act require proof of a relevant product market. We further hold that Plaintiffs have failed to establish a genuine dispute that the products distributed by Bottling Group alone constitute a relevant product market. Accordingly, the district court's grant of summary judgment in favor of Bottling Group and Holdings is AFFIRMED.

QUESTIONS FOR DISCUSSION FOR CASE 4.5

1. This case arose under the Oklahoma antitrust statute. How similar or dissimilar is the language of that statute to the corresponding federal statute?
2. The court discusses the "essential facilities" doctrine. What do you suppose the plaintiffs were alleging the "essential facility" at issue here was? Why did their argument fail?
3. Do you agree that Pepsi and Coca Cola products are interchangeable? Do you agree with the court's determination that Pepsi products are not their own relevant product market for purposes of the antitrust laws? Is there a way to reconcile consumer behavior with regard to this product with the rules of antitrust law?

DISCUSSION QUESTIONS

1. Russell Stover Candies, Inc., sells and ships its box chocolates and candies to more than 18,000 retailers throughout the country. Most of the retailers are department, drug, card, and gift stores. Russell Stover designates resale prices for all of its products and communicates those prices to retailers by price lists, invoices, order forms, and preticketing of all of its products. Russell Stover also announces to each prospective retailer the circumstances under which it will refuse to sell; i.e., whenever Russell Stover reasonably believes that a prospective retailer will resell Stover products at less than designated prices and whenever an existing retailer has actually sold Stover products at less than designated prices. Russell Stover does not request or accept express assurances from existing or prospective retailers regarding resale prices, however. Russell Stover has, in the past, refused to sell to prospective retailers or has terminated existing retailers based on these policies. As a result, 97.4 percent of Stover products are sold at or above the designated resale price.

   The FTC determined that Russell Stover had violated Section 1 of the Sherman Act by illegally combining with the retail dealers to fix retail prices.

   Russell Stover has appealed the FTC's decision to the Court of Appeals. How should the appellate court rule on this issue?
2. Anti-Monopoly, Inc., developed and marketed a family board game called Anti-Monopoly. It possessed less than 1 percent of the market for family board games. Hasbro, Inc., the leading manufacturer of family board games, has more than 80 percent of the market. Toys "R" Us is the largest retailer of family board games, with about 35 percent to 40 percent of the retail market. K-Mart is the second-largest such retailer, with about 15 percent of the retail market. Anti-Monopoly and Hasbro compete directly for space in retail stores such as these. Anti-Monopoly brought suit against Hasbro, alleging that Hasbro exercised control over Toys "R" Us and K-Mart by conditioning the sale of its family board games to such retailers on the retailers not purchasing family board games from Anti-Monopoly and other small competitors. Anti-Monopoly alleged that Hasbro's control of Toys "R" Us and K-Mart constituted monopolization of an essential facility in violation of Section 2 of the Sherman Act. How should the court rule on this claim?
3. Jimi Rose owned a business, first known as Hollywood Nights and then as Goodfellas, which he wanted to advertise in the *Morning Call*, a local newspaper. He alleged that space and layout restrictions were placed on his ads and that on several occasions, his ads were not run at all, while white competitors in similar businesses faced no such restrictions. He alleged that he was told by the *Morning Call* that his ads were prurient and inferior to those of his white competitors, yet the *Morning Call* accepted prurient and sexually suggestive ads

from those competitors. He further alleged that the *Morning Call* refused to accept his ads for over a year and that the ban extended to the classified want ads, which prevented him from seeking new employees. Finally, Rose alleged that the ban on his advertising cost him valuable business, as hotel guests and convention participants did not know that his business existed. Rose contended that the *Morning Call*'s behavior toward him was racially motivated.

Rose sued the *Morning Call*, alleging that the *Morning Call* enjoyed monopoly power over an essential facility, newspaper advertising, and that its use of that power to exclude Rose from advertising his business and from placing classified ads had an anticompetitive effect. Rose described the relevant geographic market as the Lehigh Valley in Pennsylvania and the relevant product market as advertising in the *Morning Call*. He alleged that the *Morning Call*'s actions diminished his ability to compete in the marketplace and caused "serious and permanent damage" to him and his business.

Is the *Morning Call* an essential facility? Has Rose defined the relevant markets correctly? If you were the judge, how would you rule on this claim, and why?

4. Cancall Communications, Inc., a distributor of prepaid wireless telephone services, acquired airtime on Omnipoint Corp.'s network that it then resold to its customers. In the prepaid wireless telecommunications industry, each consumer must use a telephone handset that is specifically programmed to access a specific network. The service providers supply Subscriber Identification Module Cards (SIM Cards) to each of their customers. The SIM cards contain specific information about each consumer and enable that consumer to access the network. Omnipoint refused to sell Cancall SIM cards alone, but instead required that Cancall's customers purchase new handsets, which were manufactured by three handset manufacturers (the Equipment Manufacturers) and supplied to Omnipoint for use with its network. While direct Omnipoint customers could purchase the handsets from Omnipoint for $49, Omnipoint charged Cancall $189 for the same handsets. The Equipment Manufacturers refused to sell the handsets directly to Cancall. Cancall has alleged that the Equipment Manufacturers have violated the Robinson-Patman Act. Have they? Why, or why not?
5. Digital Equipment Corp. (DEC) manufactures computer hardware. In April 1994, DEC introduced its Alpha line of mid-range servers. It offered a three-year warranty on the servers, even though the industry standard at the time was to offer a one-year warranty. DEC offered the longer warranty as part of its strategy to compete with its industry rivals, such as IBM, Sun Microsystems, and Hewlett-Packard.

   SMS Systems Maintenance Services, Inc., an independent service organization (ISO) that operates nationally and specializes in servicing DEC equipment, accused DEC of violating Section 2 of the Sherman Act, alleging that longer warranties unfairly constrained consumers' ability to choose their preferred service providers and thus paved the way for a monopoly in the services aftermarket for DEC computers. There is a strong aftermarket for servicing computers, and many ISOs compete vigorously with manufacturers for this business. SMS argued that a purchaser with a warranty will not use an ISO because the purchaser will not want to pay twice for the same service. In framing its argument, SMS alleged that the relevant market was the aftermarket for repair services for DEC computers. Has SMS defined the relevant market correctly? How should the court rule on its claim?
6. Full Draw Productions, an archery trade show promoter, held its first Bowhunting Trade Show (BTS) in 1990. At the time, it was the only merchandise mart devoted solely to archery equipment. Archery manufacturers and distributors purchased exhibition space, and dealers paid a fee to attend. The same year, Full Draw entered into a five-year agreement with AMMO, a trade association, in which Full Draw paid AMMO 10 percent of its BTS gross revenues in exchange for AMMO's endorsement of the show. In 1994, AMMO tried to increase this fee to 30 percent. AMMO also discussed buying the BTS from Full Draw and threatened to boycott the BTS unless Full Draw sold the show to AMMO on the terms offered by AMMO. AMMO and Full Draw did not reach an agreement.

   In 1995, AMMO decided that it would present its own archery trade show, to be held one week after the 1997 BTS. Several archery manufacturers and distributors, a publishing company, and a representative for archery manufacturers (the defendants) had supported and participated in AMMO's actions against Full Draw to date. The defendants decided to boycott the BTS to eliminate it as a competitor to AMMO's new trade show. The defendants allegedly: (1) advertised that they would attend only the AMMO trade show in 1997; (2) informed others at the 1996 BTS that they would attend only the AMMO show the following year; (3) persuaded others to boycott the BTS and attend only the AMMO show by repeatedly stating that key manufacturers and distributors would not attend the 1997 BTS and that the BTS would be a failure and probably not even occur; (4) created a "climate of fear of retribution and loss of business" for attending the BTS and retaliated against businesses that did attend the 1997 BTS; (5) agreed among themselves and caused other AMMO members to agree not to attend the 1997 BTS; and (6) actually boycotted the 1997 BTS.

The 1997 BTS failed financially and was eliminated as a competitor to future AMMO shows, leaving AMMO as the only supplier in the market of archery trade shows in the United States.

Full Draw sued the defendants, claiming a violation of the Sherman Act. The district court dismissed Full Draw's antitrust claims, noting that Full Draw had alleged that the defendants' actions had driven it out of business, but had not alleged that those acts caused harm to consumers or competition:

> and this is unsurprising where Defendants are many of the relevant consumers and their acts increased, albeit temporarily, competition. By definition, it would seem that where a majority of consumers believe that a monopoly producer is not performing adequately and decide to provide an alternative for themselves and other consumers, there can be no antitrust injury, particularly where, as here, there have been no allegations that harm was caused to any other consumers (e.g., the other exhibitors or the attendees of the shows) by reduced output or increased prices.

Full Draw has appealed. How should the appellate court rule? Is the trial court's analysis correct and persuasive? Why, or why not?

7. Plaintiffs operate lodges and provide lodging referral services in the Big Bear Valley recreational area. For years, the two ski resorts in the area, Snow Summit, Inc., and Bear Mountain, Inc., offered bulk discounts on lift tickets to lodges and tourist businesses, including Plaintiffs. Plaintiffs would then offer "ski packages" of lodging and lift tickets at attractive prices to consumers.

   Plaintiffs alleged as follows: In 1994, the president of Snow Summit helped form a local association to promote the Big Bear Valley. Plaintiffs were told that unless they joined the association (and paid up to 2.5 percent of their incomes as dues), neither Snow Summit nor Bear Mountain would sell them discount lift tickets nor honor any tickets purchased by them. Association members were also prohibited from selling, trading, or conveying discount lift tickets to Plaintiffs. The Association then adopted rules prohibiting members from belonging to other local referral services in which nonmembers participated and from referring business to nonmembers. Association members also agreed on uniform rates and charges for lodge accommodations, ski packages, and resort services and published advertising materials reflecting these rates. Plaintiffs alleged both price-fixing and group boycott violations on the part of the Association, Snow Summit and Bear Mountain, and certain other members of the Association.

   The district court dismissed Plaintiffs' complaint, stating: "This is not an antitrust case, period." Plaintiffs have appealed. How should the appellate court rule, and why?

8. National Parcel Service is a "zone shipper," a shipping company that receives packages from mail order and retail catalog merchants and delivers them in bulk to U.S. Postal Service (USPS) bulk mail distribution centers. This enables National to charge lower prices than United Parcel Service (UPS), because UPS charges a premium for residential deliveries, and to offer faster service than USPS.

   J. B. Hunt is an interstate trucking company. In mid-1994, a J. B. Hunt subsidiary entered the zone shipping market, targeting the customers of National and another zone shipper, GTC, with low prices. J. B. Hunt's initial strategy was to make "whatever price concessions you need to give or whatever, get us in the business quickly." J. B. Hunt's revenues grew quickly even though it lost money, while National lost business. National brought a suit, seeking damages for predatory pricing under Section 2 of the Sherman Act. Has J. B. Hunt engaged in predatory pricing? Why, or why not?

9. From 1992 to 1996, Generac Corp. served as a dealer of certain generators that it manufactured under license from Caterpillar, Inc. The license agreement gave Generac the right to develop and manufacture a line of generators that were

marketed under Caterpillar's Olympian trademark and that were distributed by Caterpillar dealers in specified territories. Generac was assigned North, Central, and South America, as well as 17 countries in the Far East. Caterpillar agreed not to license anyone else to sell generator sets within Generac's territory under the Olympian trademark but could sell or license others to sell generators in the Generac territory under a different trademark. In the United States and Canada, Generac was permitted to sell Olympian products only to Caterpillar dealers who had been designated by Caterpillar as a Power Systems Distributor (PSD). Generac also promised not to appoint any new distribution outlets for its own branded sets in a Caterpillar dealer's territory as long as the dealer was adequately covering its sales territory for Olympian sets. The agreement was for an indefinite duration and could be terminated by either party upon 24 months' written notice or with cause upon 120 days' notice.

Through June, 1996, Generac spent $10.5 million on sales, service, and warranties to promote and support the Olympian line and invested more than $660,000 in the engineering and development of the line. It constructed a new manufacturing facility at a cost of $5.24 million. It paid Caterpillar more than $5.6 million in fees and generated sales of Olympian products of more than $124.4 million. Ultimately, Olympian products represented about 58 percent of Generac's total industrial sales.

In May, 1996, Caterpillar informed Generac that it was terminating the agreement effective June 30, 1998, so that it could form a new business relationship with Emerson Electric Company. Generac felt that it was the victim of a "classic free ride"—that it had invested millions to develop the market for the Olympian line, only to be deprived of the opportunity to reap the long-term benefits.

Generac sued for antitrust violations, claiming that the restrictions placed on it violated Section 1 of the Sherman Act as a *per se* unlawful horizontal market division. Is Generac right? Why, or why not?

10. InvaCare Corp. is a competitor of Respironics, Inc., a manufacturer of positive airway pressure devices ("PAPs") and masks used to treat obstructive sleep apnea ("OSA"). Respironics is one of three major competitors in the OSA field; there are other, smaller competitors as well. Invacare alleged that Respironics had entered into agreements with sleep labs under which Respironics would sell its products to the labs at predatorily low prices; in exchange, the labs allegedly would agree to prescribe only Respironics' products. Although Invacare had no direct evidence of such exclusive agreements between Respironics and sleep labs, it pointed out that Respironics gave sleep labs almost 600,000 free masks over a four-year period, at a cost of $1.5 million. Respironics' sales training materials stated that the purpose of distributing free masks to sleep labs was to encourage the labs to prescribe its masks and PAPs and to discourage customers from buying competitive products. Some sleep labs received free masks from several companies and Invacare itself provided free or below-cost masks to sleep labs. Should Invacare succeed on its motion for summary judgment?

11. Richard Campfield owns an auto-glass repair shop and holds fourteen patents for processes to repair or prevent windshield cracks. Although industry practice is to replace, not repair, windshields with cracks longer than 6 inches, Campfield believes that it is not only feasible, but safer, to repair cracks between 6 and 18 inches, rather than to replace the windshield. After failing to convince auto insurance companies to alter their repair policies to allow repair instead of replacement, Campfield sued State Farm Insurance Company and its agent, Lynx Services, Inc., alleging that they had engaged in illegal cooperation that resulted in a group boycott that was sufficient to show a *per se* violation of the Sherman Act.

    State Farm is one of the largest automobile insurers in the United States. Its insureds make approximately 1.7 million claims for glass-related damage, such as windshield cracks and broken headlights, each year. State Farm contracts with glass shops to perform the needed services. State Farm outsourced management of the provision of these services to Lynx Services, Inc., a company that provides insurance claim processing services.

    How should the court rule on Campfield's allegation that State Farm and Lynx had engaged in a group boycott constituting a *per se* violation of the Sherman Act?

12. R.J. Reynolds sells cigarettes, including such well-known brands as Camel, Winston, Salem, and Doral. Cigarettes Cheaper! is a discounter and operates a chain of retail outlets. Cigarettes Cheaper! argued that Reynolds had violated the Robinson-Patman Act by charging different prices to different retail dealers, and in particular by refusing to sell cigarettes to Cigarettes Cheaper! at its greatest level of discounts.

Because cigarette manufacturers are unable to advertise through many normal promotional channels, such as television, radio, billboards, and many magazines, they rely heavily upon point-of-sale promotional efforts, such as signs, placards, product positioning, and shelf space commitments, and other devices. Typically, manufacturers will offer discounts to retailers who promote their products; the greater the promotion efforts, the greater the discounts in the wholesale price.

Reynolds admitted that it sold to other retailers for less than it sold to Cigarettes Cheaper! It justified this action however, by arguing that Cigarettes Cheaper! could have received these same discounts had it engaged in the same promotional efforts as did the other retailers, and that the discounts it offered were necessary to meet competition from its major competitor, Philip Morris. Cigarettes Cheaper! had entered in a marketing agreement with Philip Morris and did not engage in the level of marketing support needed to receive Reynolds' greatest level of discounts.

Is Reynolds permitted to vary the discounts its offers to competing retailers based upon considerations such as the promotional efforts made by the retailers?