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I. INTRODUCTION AND BACKGROUND.

A. Purpose of the Antitrust Laws.

1. To protect and promote competition as the primary method by which this country allocates resources.

   a. “Antitrust law is the study of competition. It is a body of law that seeks to assure competitive markets through the interaction of sellers and buyers in the dynamic process of exchange. . . . [T]he promotion of competition through restraints on monopoly and cartel behavior clearly emerges as the first principle of antitrust.” E. Thomas Sullivan & Jeffrey H. Harrison, Understanding Antitrust and Its Economic Implications 1, 4 (5th ed. 2008).

   b. “[C]ompetition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy.” United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 372 (1963).

   c. The antitrust laws “rest[] on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while . . . providing an environment conducive to the preservation of our democratic political and social institutions.” N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).


2. The antitrust laws are a “‘consumer welfare prescription,’” Reiter v. Sonotone Corp., 422 U.S. 330, 343 (1979), promoting low prices, high output, high quality, efficiency in production and distribution, innovation, and choice. See also Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 308 (3d Cir. 2007) (“The primary goal of antitrust law is to maximize consumer welfare by promoting competition among firms.”).

a. From the 1940s to the mid 1970s, the populist philosophy prevailed.

b. From the mid 1970s to the present, Chicago philosophy prevailed.

c. At present, the pendulum may be swinging back, given the Obama Administration’s promise to “reinvigorate” antitrust enforcement.

4. Crucially important, the antitrust laws protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). This cardinal antitrust principle means that unless the challenged conduct adversely affects market-wide competition (and thus consumers), it raises no antitrust problem, even if it destroys the defendant’s competitors. The antitrust laws do not prohibit unfair competition, aggressive competition, hostility toward competitors, or unethical conduct unless it rises to the point of substantially adversely affecting market-wide competition. *See, e.g.*, *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (noting that the antitrust laws “do not create a federal law of unfair competition or ‘purport to afford remedies for all torts’” and that “[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws”); *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr.*, 582 F.3d 1216, 1226 (10th Cir. 2009) (“[I]t is the ‘protection of competition or prevention of monopoly[.] which is plainly the concern of the Sherman Act,’ not the vindication of general ‘notions of fair dealing,’ which are the subject of many other laws at both the federal and state level.”).

5. So the purpose of the antitrust laws is not to protect small business. *Jebaco, Inc. v. Harrah’s Operating Co.*, 587 F.3d 314, 320 (5th Cir. 2009).

6. The ultimate task in most antitrust analysis is to assess the actual or likely effect of particular conduct on competition. This usually requires determining the effect of the conduct on the market power of the firms in question. The more the conduct increases their market power, the more likely are anticompetitive effects, and the more likely is an antitrust violation.

7. The antitrust laws protect consumers by prohibiting conduct by which sellers (and buyers) obtain or maintain market power, unless they obtain market power through means that benefit, rather than harm, consumers, such as providing higher quality or enhancing the efficiency by which goods and services are produced or distributed.

8. Antitrust is not just a “big firm” type practice of law limited to representing Fortune 500 corporations: “Knowledge of antitrust is relevant whether we work on Wall Street or Main Street.” *Understanding Antitrust and Its Economic Implications* at 2.

**B. Types of Antitrust Problems**—In beginning any antitrust analysis, it’s helpful to understand that almost every antitrust issue involves either:
1. “Collusion” (e.g., competitor price-fixing agreements), where the direct targets are usually consumers, or

2. “Exclusion” (e.g., refusals to deal with competitors), where the direct targets are competitors and the indirect targets are consumers. Exclusion can result from either unilateral action or collusion.

C. Role of Economics.

1. Antitrust law is, in large measure, applied microeconomic and industrial-organization economic theory.

2. “Today the union of antitrust and economics is so complete that one cannot study antitrust seriously without at least some exposure to economics.” Herbert Hovenkamp, *Federal Antitrust Policy* iii (Preface) (3d ed. 2005).


4. Professional-economist experts are necessary for almost every antitrust case and often even in antitrust counseling.

5. Econometric analysis is playing a larger and larger role in antitrust litigation.

D. What Makes Practicing Antitrust Difficult (but Fun, Interesting, and Challenging)?

1. It’s theoretical and esoteric, combining law, economic theory.

2. It’s dynamic, not static.

3. The necessary analysis tends to be predictive and speculative.

4. Its determinative variables are difficult, if not impossible, to measure.

5. Every antitrust principle has nuances, corollaries, exceptions, and exceptions to the exceptions.

6. Because little in antitrust is black or white, experience, judgment, and risk assessment are crucial.
E. The Antitrust Statutes.

1. The good news—very few of them.

2. The bad news—The statutes are very broad, general, and ambiguous, and the specifics are in the multitude of decisions:

   a. “As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape.” Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933).

   b. “From the beginning, the Court has treated the Sherman Act as a common-law statute. . . . Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibitions on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions.” Leegin Creative Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007).

3. The antitrust statutes:


      (1) Civil and criminal statute.

      (2) Penalties:

         (a) Individuals—Up to 10 years in prison and fines up to $1 million per violation.

         (b) Corporations—Fines up to $100 million per violation.


      (1) Civil and criminal statute; same criminal sanctions as above.

   c. Section 7 of the Clayton Act, 15 U.S.C. § 18 (enacted 1914)—Prohibits mergers and all other forms of acquisitions that may substantially lessen competition; purely a civil statute.

e. The Robinson-Patman Act, 15 U.S.C. §§ 13(a), 13(f) (enacted 1914; substantially amended 1936) (not discussed in this outline)—Prohibits the granting or receiving of certain price discriminations that may injure or destroy competition; civil remedies and one rarely enforced criminal provision.


   (1) Section 5 prohibits the same conduct as other antitrust laws, plus conduct that the Federal Trade Commission determines violates the “spirit” of the antitrust laws.

   (2) Enforced only by the Federal Trade Commission; no private right of action.

   (3) Civil injunctive relief only.

g. The various state antitrust laws.

   (1) Civil and criminal sanctions.

   (2) Every state except Pennsylvania has state antitrust laws.

   (3) Enforced primarily by state attorneys general.

   (4) Usually are almost identical to the federal antitrust laws.

4. Exemptions from the antitrust laws—See Section VI.

F. The Enforcers.

1. Antitrust Division, U.S. Department of Justice.


   b. Prosecutes civilly and criminally in federal court.


   a. Enforces FTC Act § 5, Clayton § 7, and (rarely these days) the Robinson-Patman Act; civil prosecutions only before FTC administrative law judges; issues cease and desist orders, but may go into federal court for preliminary injunctions.

   b. Five commissioners, appointed by the President, no more than two of whom may be of the same political party.
c. Three operating bureaus—(a) Bureau of Competition (antitrust), (b) Bureau of Consumer Protection (consumer protection), and (c) Bureau of Economics (supports the competition and consumer protection bureaus with research, advice, and testimony).

3. State attorneys general.

a. Civil and criminal prosecution under state antitrust laws in state court.


c. Civil-damage actions under state or federal law for damages suffered by the state and its subdivisions.


4. Private parties.

a. Civil-damage actions in federal court under federal antitrust laws, or in federal (given diversity jurisdiction) or state court for violation of state antitrust laws.

b. Very few antitrust cases are brought in state courts.

c. Treble damages and attorneys’ fees are mandatory for successful plaintiffs.

5. Effect of Obama Administration on antitrust enforcement—Reinvigoration.

**G. Antitrust Laws Are Applicable in the Health-Care Sector.**

1. See, e.g., *Boulware v. Nevada*, 960 F.2d 793, 796 (9th Cir. 1992): “We are somewhat surprised that members of the health care profession continue to press tired arguments seeking to avoid the clear competitive mandate of the Sherman Act. . . . The antitrust laws apply to hospitals in the same manner that they apply to all other sectors of the economy. Health care providers are exposed to the same liability and entitled to the same defenses as businesses in other industries.”

2. This wasn’t always true:

b. \textit{Goldfarb v. Va. State Bar}, 421 U.S. 773 (1975) (making clear for first time that there is no “learned professions” exemption from the antitrust laws, but also noting, \textit{id.} at 788 n.17, that “[t]he public service aspect, and other features of the professions, may require that a particular practice, which could be properly viewed as a violation of the Sherman Act in another context, be treated differently”).

c. \textit{Hosp. Bldg. Co. v. Trs. of Rex Hosp.}, 425 U.S. 738 (1976) (making clear that even the local activities of hospitals sufficiently affect interstate commerce so hospitals are subject to the Sherman Act).

d. But courts often apply antitrust rules more leniently in health-care antitrust cases than in others. One beauty of the antitrust laws is that they are sufficiently flexible to take into account the different contexts and characteristics of the different industries and markets in which antitrust issues arise.

II. \textbf{THRESHOLD ANTITRUST CONCEPTS.}

B. \textbf{Interstate Commerce}—Each federal antitrust statute, by its own terms, requires that the challenged conduct or parties affect interstate commerce to some extent. Additionally, absent the requisite effect on interstate commerce, a court lacks subject-matter jurisdiction because the antitrust laws were enacted pursuant to Congress’s power to regulate interstate and foreign commerce. But the standard for alleging and proving the interstate-commerce element, although confusing, is extremely lenient. \textit{See generally Summit Health v. Pinhas}, 500 U.S. 322 (1991); \textit{see also N. Tex. Specialty Physicians v. FTC}, 528 F.3d 346 (5th Cir. 2008). Very few cases today are dismissed for lack of effect on interstate commerce. Still, “some allegations regarding a defendant[’s] interstate dealings is required.” \textit{Villare v. Beebe Med. Ctr.}, 630 F. Supp. 2d 418, 425 (D. Del. 2009) (bold in original).


1. Usually, the relevant market must be defined before market power, and thus the conduct’s effect on competition, can be assessed. \textit{See, e.g., Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.}, 386 F.3d 485, 496 (2d Cir. 2004) (“Evaluating market power begins with defining the relevant market.”); \textit{SMS Sys. Main. Servs., Inc. v. Digital Equip. Corp.}, 188 F.3d 11, 16 (1st Cir. 1999) (“The purpose for defining a relevant market is to assist in determining whether a firm has market power.”); \textit{see also Craftsman Limousine, Inc. v. Ford Motor Co.}, 491 F.3d 380, 388 (8th Cir. 2007) (explaining that plaintiff’s “burden begins with the task of properly defining the relevant market”).

2. The purpose for defining the relevant market is to identify significant competitors of the firms in question—i.e., firms that can constrain the ability of the firm in question to exercise market power. \textit{See, e.g., Geneva Pharms. Tech. Corp.} 386 F.3d
at 496 (“The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm’s ability to raise prices or restrict output.”).

3. If the antitrust case focuses on seller market power, the relevant market is a function of alternative sources of supply available to purchasers if the sellers in question attempt to exercise market power by raising prices. E.g., Doctor’s Hosp. v. Se. Med. Alliance, 123 F.3d 301, 311 (5th Cir. 1997) (“To define a market is to identify producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant’s products or services.”).

4. If the case focuses on buyer market power (monopsony power), the relevant market is a function of the alternative buyers available to sellers if the buyers in question attempt to exercise monopsony power by reducing the price they pay sellers. See, e.g., Todd v. Exxon Corp., 275 F.3d 191, 202 (2d Cir. 2001) (“in such a case, ‘the market is not the market of competing sellers but of competing buyers. This market is comprised of buyers who are seen by sellers as being reasonably good substitutes.’”); Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111 (5th Cir. 2008) (same).

5. Another, more technical, way to define a relevant market: “A market is . . . a product or a group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm . . . that was the only present and future producer or seller of those products in that area likely would impose at least a ‘small but significant and nontransitory’ increase in price, assuming the terms of sale of all other products are held constant.” U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines § 1.0 (1997). This methodology is frequently referred to as the “hypothetical monopolist” or “small but significant and non-transitory price increase” (“SSNIP”) test. See generally Gregory J. Werden, The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm, 71 Antitrust L. J. 253 (2003).

6. So in defining a relevant market, the task is to identify those firms that could constrain the ability of the firm or firms in question from exercising market power by raising price—the alternative sellers to which consumers could turn to avoid the exercise of market power—“all sellers who have the actual or potential ability to deprive each other of significant levels of business.” Theme Promotions, Inc. v. News Am. Mktg. Fsi, 539 F.3d 1046, 1053 (9th Cir. 2008). To identify these firms, and thus to delineate the “relevant market,” the “relevant product market” and “relevant geographic market” must be delineated:

   a. Relevant product market—Generally speaking, the “relevant product market” includes those firms selling “reasonably interchangeable” products or services with significant price cross-elasticity of demand among those products—good substitutes. See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481-82 (1992) (explaining that the relevant product market is determined by product choices available to consumers and that it includes products having reasonable interchangeability in the eyes of consumers); Little Rock Cardiology Clinic PA v. Baptist Health, ___ F.3d ____, 2009
WL 5092933 at *3 (8th Cir. Dec. 29, 2009) (“A court’s determination of the limits of a relevant product market requires inquiry into the choices available to consumers.”).

(1) “Price cross-elasticity of demand” (frequently referred to as “demand substitutability”) measures the degree of substitutability between two products when the price of one changes—the percentage change in quantity demanded of one product resulting from a percentage change in the price of another. See generally United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956); Theme Promotions, 539 F.3d at 1054. For a more technical explanation, see Robert S. Pindyck & Daniel L. Rubinfeld, Microeconomics 34-35 (6th ed. 2005). If cross-elasticity is high (i.e., a change in the price of one product results in a greater than proportional change in the quantity demanded of another), the products are substitutes and in the same relevant product market. See, e.g., Theme Promotions, 539 F.3d at 1054 (“When demand for the commodity of one producer shows no relation to the price for the commodity of another producer, it supports the claim that the two commodities are not in the same relevant market.”); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 120 (D.D.C. 2004) (“If a slight decrease in the price of product A causes a considerable number of customers of product B to switch to A, that would indicate that a cross-elasticity of demand exists between A and B and that they compete in the same product market.”).

(2) Products that are reasonably interchangeable in use may lack significant cross-elasticity of demand and thus not be in the same relevant product market. For example, the price differential between a brand-name drug and its generic substitute may be so great that if the price of the generic were increased, consumers would not switch to the brand-name drug because the generic is still significantly less expensive. Similarly, many customers may be trusting of brand-name drugs while not trusting generics and thus be unwilling to switch to generics not withstanding their lower price. See Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485 (2d Cir. 2004); see also United States v. Archer-Daniels-Midland Co., 866 F.2d 242 (8th Cir. 1988) (sugar and high-fructose corn syrup not in same product market, although one is substitutable in use for the other; price of HFCS so much lower than price of sugar that if the price of HFCS were increased a small but significant amount, few of its consumers would switch to sugar).

b. Relevant geographic market—The “relevant geographic market” includes the firms in question and firms more geographically distant from consumers than the firms from which they are buying now, but to which consumers would turn to purchase if the closer firms attempted to exercise market power by raising price—i.e., the area in which the sellers in question operate and those areas to which their consumers can practically turn to obtain the relevant product or service. See, e.g., Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); Gordon v. Lewistown Hosp., 423 F.3d 184, 212 (3d Cir. 2005) (relevant geographic market “is that area in which a potential buyer may rationally look for the goods or services he or she seeks”).
(1) The relevant product market must be defined before the relevant geographic market can be defined; every relevant product market has its own relevant geographic market.

(2) The first step in defining the relevant geographic market is to identify those customers whose alternative sources of supply should be identified. \textit{E.g., Little Rock Cardiology Clinic PA v. Baptist Health}, ___ F.3d ____, 2009 WL 5092933 at *7 (8th Cir. Dec. 29, 2009); \textit{Surgical Ctr. v. Hosp. Servs. Dist.}, 2001-1 Trade Cas. (CCH) ¶ 73,215 (E.D. La. 2001), \textit{aff’d}, 309 F.3d 836 (5th Cir. 2002).

(3) But crucially important, the relevant geographic market includes not only the geographic area in which the sellers in question currently operate or from which they draw a large percentage of their customers (their “service areas”), but the additional geographical areas to which their customers would turn if the current sellers attempted to raise price. \textit{See, e.g. Surgical Ctr. v. Hospital Serv. Dist.}, 309 F.3d 836, 840 (5th Cir. 2002) (“Absent a showing of where people could practically go for inpatient services, [plaintiff] failed to meet its burden of presenting sufficient evidence to define the relevant geographic market’’); \textit{FTC v. Tenet Health Care Corp.}, 186 F.3d 1045, 1052 (8th Cir. 1999) (“the FTC must present evidence on the critical question of where consumers . . . could practically turn for alternative services should the merger be consummated and prices become anticompetitive’’). Thus, the second step is to identify the geographic area and suppliers therein to which consumers could switch if the firms in question attempted to exercise market power by raising price.

(4) Importantly, a firm’s service area is typically \textit{not} the relevant geographic market. \textit{See, e.g., Little Rock Cardiology Clinic}, ___ F.3d at ____, 2009 WL 5092933, at *7 (“we do not mean to endorse the idea that a firm’s trade area is equivalent to a relevant geographic market. There is voluminous case law cautioning against such a holding.”).

(4) An only by coincidence will political boundaries define a relevant geographic market. \textit{See United States v. Conn. Nat’l Bank}, 418 U.S. 656 (1974); \textit{Discon, Inc. v. NYNEX Corp.}, 86 F. Supp.2d 154, 162 (W.D.N.Y. 2000) (“The Supreme Court has expressly held that political boundaries, such as state and municipal boundaries, cannot be used artificially to circumscribe a relevant market, because relevant markets are defined in terms of economic realities not political divisions.”).

c. Other constraints on a firm attempting to exercise market power:

(1) Actual or potential new entrants into the product or geographic market, a function of the level of entry barriers. “For antitrust purposes, a barrier to entry is some factor in a market that permits firms already in the market to earn monopoly profits, while deterring outsiders from coming in.” Herbert Hovenkamp, \textit{Federal Antitrust Policy} § 1.6, at 39 (3d ed. 2005). These can include capital costs, economies of scale, governmental regulatory barriers, uniquely trained or talented employees, exclusive access to necessary inputs, exclusive contracts, and the like.
Incumbent firms’ (i.e., firms already in the market) expanding their output, a function of expansion barriers or the incumbent firms’ having excess capacity.

These factors reflect price-elasticity of supply or “supply substitutability”—the percentage change in quantity supplied resulting from a given percentage change in price. Rather than examining only “demand substitutability,” many courts hold that participants in the relevant market include firms that would enter the market in response to a price increase by firms currently in the market. See, e.g., United States v. Columbia Steel Co., 334 U.S. 495 (1948); Geneva Pharma’s. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 499 (2d Cir. 2004); Blue Cross & Blue Shield v. Marshfield Clinic, 65 F.3d 1406, ___ (7th Cir. 1995)( “[T]he definition of a market depends on substitutability on the supply side as well as on the demand side. Even if two products are completely different . . ., if they are made by the same producers, an increase in the price of one . . . will induce producers to shift production from the other product to this one . . .”).

C. Market Power.

1. Market power is the enemy of the antitrust laws—Satan, Darth Vader, etc.

a. Seller market power: The ability of a seller (or group of sellers acting jointly) to profitably raise price above the competitive level by a small but significant amount (for example, 5 or 10%) for a significant period of time by decreasing their output. The price increase will be profitable if the firm (or firms) obtain more revenues from the price increase than it loses from the loss of sales resulting from the price increase. If it loses so many sales as a result of the price increase that the price increase is unprofitable, the firm lacks market power. For an excellent explanation and discussion, see William M. Landes & Richard A. Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937, 937 (1981) (“‘market power’ refers to the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded”); Gregory J. Werden, Demand Elasticities in Antitrust Analysis, 66 Antitrust L. J. 363, 367-84 (1998) (excellent discussion of market power); U.S. Dep’t of Justice & Fed. Trade Comm’n, Merger Guidelines § 0.1 (1992, as amended 1997) (“Market power to a seller is the ability profitably to maintain price above competitive levels for a significant period of time.”).

(1) Market power results in misallocation of resources (a less-than-optimal amount of output).

(2) Seller market power “unfairly” transfers wealth from purchasers to sellers. Some call the exercise of unlawfully obtained market power by raising prices “white-collar” theft by sellers of purchasers.

b. Buyer market power (usually referred to as “monopsony” power): The ability of a buyer (or group of buyers acting jointly) to reduce the price they pay for a
good or service below the competitive price by a significant amount for a significant period of time by restricting the amount of the product or service they buy. See generally Roger D. Blair & Jeffrey H. Harrison, Monopsony: Antitrust Law & Economics (1993); Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1118 (5th Cir. 2008) (“In a monopsony, the buyers have market power to decrease market demand for a product and thereby lower prices.”).

(1) Monopsony power results in misallocation of resources (too little input purchased results in less-than-optimal output produced).

(2) Monopsony power “unfairly” transfers wealth from sellers to purchasers.

c. “[M]onopoly power . . . [is] a high degree of market power.” Landes & Posner, 81 Harv. L. Rev. at 937. Economists typically use the terms interchangeably.

d. Worth keeping in mind is that most firms have some degree of market power simply because their products and services are differentiated to some degree in the minds of some consumers from the products and services of their competitors. A firm has some market power unless its competitors’ products are perfect substitutes for its products in the minds of most, if not all, customers—i.e., its demand curve is perfectly elastic with no downward slope. The antitrust laws cannot and do not trouble themselves over trivial degrees of market power. See generally American Bar Association Section of Antitrust Law, Market Power Handbook 3-5 (2005).

2. In general, a firm’s (or group of firms’) degree of market power depends on:

a. Market share, after defining the relevant market. For an excellent explanation why, see Herbert Hovenkamp, Federal Antitrust Policy § 3.1b at 80 (3d ed. 2005).

b. Degree of available alternatives to consumers—e.g., the firm’s “own-price elasticity” of demand and supply. A seller’s own-price elasticity of demand measures the percentage change in the quantity demanded of the firm’s product resulting from a given change in the firm’s price. If, for example, a firm’s 1% price increase results in a 2% decrease in its sales, demand for the firm’s product is price elastic, and it likely lacks market power.

c. The more alternative suppliers that buyers have, the more elastic is demand and supply, and the less market power a seller has. In economics terms, the more price-inelastic a firm’s demand curve, the more market power it has. See Landes & Posner. A seller can have market power only when consumers have very limited actual and potential alternative sources of supply to which they can turn if the seller attempts to exercise market power. A buyer can have monopsony power only when sellers have very limited actual or potential alternative sources of purchases to which they can turn to sell if the buyer attempts to exercise buyer market power by restricting its purchases.
3. No magic market share is indicative of market power, but many courts suggest that 30% is a threshold requirement. *E.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 68 (1st Cir. 2004) (suggesting a 40% share is necessary).

4. A firm’s market share is merely the percentage of the relevant market that it controls. Market share can be measured based on percentage of sales revenue in dollars, percentage of production in units, or percentage of physical capacity.

5. There is no magic or certain market share proving market power because whether a firm has market power depends on other factors as well, particularly the level of any entry barriers.

6. A firm’s merely having market power violates no antitrust law. Rather, a violation may result when a firm engages in conduct by which it obtains, maintains, or increases its market power by excluding its actual and potential competitors from the market.

7. Proving market power—In most antitrust cases, the plaintiff must prove that the defendant has, or will obtain, substantial market power from the challenged conduct. The plaintiff can prove market power by either direct evidence or circumstantial evidence. *See FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986); *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

   a. Direct evidence—Proof of actual detrimental effects on competition, such as supracompetitive prices or sub-competitive output. *See Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 509 (2d Cir. 2004) (“If plaintiff can demonstrate an actual adverse effect on competition, such as reduced output . . . , there is no need to show market power in addition.”).

   b. Circumstantial evidence—Proof of the relevant market, defendant’s dominant share in that market, and significant entry and expansion barriers. *See, e.g.*, *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (“To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run.”).

**D. Market Concentration**—Market concentration is a measure of the number of firms in a relevant market and their relative market shares. *See* Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* 358 (6th ed. 2005) (“When only a few firms account for most of the sales in a market, we say that the market is highly concentrated.”).
1. Economic theory predicts an inverse relationship between the level of market concentration and the quality of market performance in allocating resources efficiently. *Id.* (“What matters, of course, is not just the total number of firms, but the number of ‘major players’—firms with significant market share. For example, if only two large firms account for 90 percent of sales in a market, with another 20 firms accounting for the remaining 10 percent, the two large firms might have considerable monopoly power.”).

2. Here’s the problem with high market concentration: The more concentrated a market is, the more likely it is that firms in the market will behave as an oligopoly—i.e., their pricing decisions will be interdependent rather than independent—and thus those firms, as a group, may exercise market power. See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715-16 (D.C. Cir. 2001) (explaining that antitrust “[m]erger law ‘rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels’”). The greater the level of market concentration, the easier explicit collusion among the firms becomes. See Richard A. Posner, *Antitrust Law* 63-64 (2d ed. 2001).

3. Methods for measuring market concentration:

   a. The Herfindahl-Hirschman Index (HHI)—To compute the HHI, (i) calculate the market share of each firm in the relevant market, (ii) square each market share, and (iii) sum the squares. This generates a number between approaching zero (an infinite number of firms in the market) and 10,000 (one firm—a true monopoly). Assume a relevant market with five firms with the following shares: A=20%, B=15%, C=35%, D=10%, and E=20%. The HHI would be 400+225+1225+100+400=2,350. The HHI takes into account not only the number of firms in the relevant market but also their relative market shares or sizes. As the number of firms in the market decreases or the size disparity among those firms increases, the HHI increases.

      (1) The federal enforcement agencies’ *Merger Guidelines* provide benchmarks for determining the degree of concentration based on the HHI. According to the *Guidelines*, a market is “unconcentrated” if the HHI is below 1,000 (roughly 10 equal-size firms), “moderately concentrated” if it is between 1,000 and 1,800 (roughly between 5 and 6 equal-size firms), and “highly concentrated” if it is above 1,800. Thus, the market above (with HHI=2,350) would be “highly concentrated.” U.S. Dep’t of Justice & Fed. Trade Comm’n, *Merger Guidelines* § 1.51

   b. Four-firm concentration ratio—A concentration ratio is simply the sum of the market shares of a given number of the largest firms in the market. The most useful concentration ratio is the four-firm concentration ratio (CR=4), which measures the aggregate market share of the four largest firms in the market. In general, a market is unconcentrated if the CR=4 is less than 50%, moderately concentrated if it is between 50% and 70%, and highly concentrated if it is greater than 70%.
E. Efficiencies

1. Conduct that increases market power also often generates “productive efficiencies,” typically by increasing a firm’s economies of scale or scope. Mergers between competitors, for example, often have both market-power and efficiency effects. The ultimate task in many antitrust analyses is balancing the “bad” market-power and “good” efficiency effects of the challenged conduct to determine which predominates.

2. Efficiencies—the technical definition: “Productive efficiency is most simply understood as a ratio of a firm’s output to its inputs. A firm that produces a product valued at $100 and requires inputs valued at $80 is more efficient than a firm that produces a product valued at $100 but requires inputs valued at $90.” Herbert Hovenkamp, Federal Antitrust Policy § 2.3c at 74-75 (3d ed. 2005). Efficiency generation can be viewed as getting “more bang for the buck.”

3. Efficiencies—the practical definition: Any effect benefitting consumers—e.g., higher output or quality, lower cost, wider choice, greater access, etc.

4. What role do efficiencies play in antitrust analysis? To the extent efficiencies reduce a firm’s marginal cost (and thus its profit-maximizing price), they may offset the market-power effect of particular conduct, resulting in a lower price. See Oliver Williamson, Economies as an Antitrust Defense: The Welfare Trade-Offs, 58 Am. Econ. Rev. 18 (1968).

5. But in the real world, thank goodness, very few antitrust cases reach the stage of balancing market-power and efficiency effects. Indeed, it is usually impossible to balance (or even measure) the effects empirically or objectively. As one commentator has explained, “We sometimes hear the deceptively simple proposition that all the court needs to do is to balance efficiency effects against anticompetitive effects and see which way the scale tips. But courts are not capable of measuring either efficiency or power with anything approaching scientific accuracy. Most such judicial measurements are simply hunches based on several presumptions about the nature and effects of certain practices.” Federal Antitrust Policy § 5.6b at 259.

6. Different in concept from productive efficiencies is “allocative efficiency.” Allocative efficiency results when all resources are allocated to their highest, best, and most-valued use so that societal or total welfare or wealth is maximized—i.e., resources are allocated such that they best meet the needs and desires of consumers by maximizing output. Market power detracts from allocative efficiency because it results in a reduction of output, which decreases societal wealth.

III. SECTION 1 OF THE SHERMAN ACT.

B. Essential Elements—Section 1 prohibits every (1) agreement that (2) unreasonably restrains competition. See generally Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 368 (5th Cir. 2008).

C. The “Agreement” Requirement.

1. For a violation of Section 1, the challenged conduct must result from an agreement or concerted action. Unilateral action (i.e., action by a single party) never violates Section 1. See, e.g., Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Fisher v. City of Berkeley, 475 U.S. 260 (1986); AT&T Corp. v. JMC Telecom, LLC, 470 F.3d 525, 530-31 (3d Cir. 2006).

2. Most agreements raising antitrust issues are either “horizontal” (i.e., among competitors) or “vertical” (i.e., between firms at different levels in the chain of production or distribution). Firms are “competitors” if they sell or buy in the same relevant market. Horizontal agreements are much more antitrust-sensitive than vertical agreements. E.g., Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1119 (10th Cir. 2008) (antitrust ‘concern is greatest when actual competitors enter agreements . . . Vertical arrangements . . . do not generally give rise to the same concerns and often have pro-competitive effects”).

3. Agreements can affect “interbrand competition” (i.e., competition among different brands of a product or service) or “inbrand competition” (i.e., competition among sellers of the same brand of product or service. Agreements affecting interbrand competition are more antitrust-sensitive than those affecting intrabrand competition because even if intrabrand competition is restrained, interbrand competition may remain strong. Indeed, the main focus of the antitrust laws is horizontal agreements affecting interbrand competition. Cf. Adam Smith, An Inquiry in to the Nature and Causes of the Wealth of Nations 55 (1776) (Great Books ed. 1952) (“People of the same trade seldom meet together, even for merriment of diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”).

4. To sustain Section 1’s agreement requirement, (1) the alleged conspirators must have the legal capacity to conspire, and (2) the conduct, as a factual matter, must have resulted from an agreement or conspiracy rather than from unilateral action.

a. The “capacity-to-conspire” requirement or “intraenterprise conspiracy defense”—In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court held that the different parts of an integrated entity, because they all share a unity of economic interests and lack divergent interests, are incapable of conspiring as a matter of law; rather, they are a single entity for antitrust purposes, and thus their internal “agreements” do not sustain Section 1’s requirement for an agreement. The Copperweld decision held only that a parent corporation and its wholly-owned subsidiary were legally incapable of conspiring. But lower courts have applied the Copperweld rationale, and
extended its holding, to many other situations involving affiliated entities. The following entities are generally incapable of conspiring as a matter of law:


(3) Substantial confusion exists as to whether parents and their less-than-wholly-owned subsidiaries constitute a single entity, and the decisions are not consistent. *See Livingston Downs Racing Ass’n v. Jefferson Downs*, 257 F. Supp. 2d 819, 835 (M.D. La. 2002) (“there can be no § 1 conspiracy between one corporation and another corporation that it legally controls”); *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211 (S.D. Ga. 1997) (51% control sufficient for single-entity status); *Square D Co. v. Schneider, S.A.*, 760 F. Supp. 362 (S.D.N.Y. 1991) (parent and such subs capable of conspiring); *Novatel Commc’ns, Inc. v. Cellular Tel. Supply, Inc.*, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. 1986) (51% control sufficient for single-entity status). Some courts require a fact-based analysis before deciding the issue, focusing on the degree of actual control one entity holds over another and whether their economic interests are divergent or identical.

(4) Merged firms. Once completely merged, the merging firms become a single entity for antitrust analysis.

(5) Usually, a corporation and its employees, officers, directors, and stockholders are incapable of conspiring either among themselves or with the corporation because they are deemed a single entity for antitrust purposes. *See, e.g., Patel v. Scotland Mem’l Hosp.*, 91 F.3d 132 (4th Cir. 1996) (per curiam unpublished opinion reprinted at 1996-2 Trade Cas. (CCH) ¶ 71,469 (“Under the doctrine of intraenterprise immunity, courts generally find that a company cannot conspire with its officers and employees because of the unity of economic interests between the company and its employees”); *Nurse Midwifery Assocs. v. Hibbett*, 927 F.2d 904 (6th Cir. 1991); *Solla v. Aetna Health Plans*, 14 F. Supp. 2d 252 (E.D.N.Y. 1998), aff’d, 182 F.3d 901 (2d Cir. 1999).

(a) Some courts apply an exception to this rule—the “independent personal stake” exception—where the employee has a personal economic interest in the success of the conspiracy separate from his or her employer. *See, e.g., Gregory v. Ft. Bridger Rendezvous Ass’n*, 448 F.3d 1195, 1200 (10th Cir. 2006) (“employees are capable of combining with their corporate employer when they have an ‘independent personal stake,’ and thus stand to benefit from conspiring with the corporation to restrain trade”); *Stark v. Ear Nose & Throat Specialists*, 185 Fed. App’x. 120, 124 (3d Cir. 2006) (“to trigger this limited exception, [plaintiff] must allege that [the owner] or an employee of [defendant] was acting outside [defendant’s] interests”); *Am. Chiropractic Ass’n v.*
Trigon Healthcare, Inc., 367 F.3d 212 (4th Cir. 2004) (recognizing the exception); New York Medscan, LLC v. New York Univ. Sch. of Med., 430 F. Supp. 2d 140, 150 n.5 (S.D.N.Y. 2006) (explaining that “[w]here an employer or an officer has a personal interest or an interest with another entity . . ., it may be possible for that individual to conspire with the board”). But some circuits, such as the Sixth Circuit, explicitly reject the exception. E.g., Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606 (6th Cir. 1999).


(7) The same is true of wholly-owned sister corporations of a common parent. E.g., Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430 (6th Cir. 2008); Advanced Health-Care Servs.


(9) Partners and their partnership are usually incapable of conspiring. E.g., Freeman v. San Diego Ass’n of Realtors, 322 F.3d 1133, 1147-48 (9th Cir. 2003).

(10) Different corporations controlled by the same shareholders are usually incapable of conspiring. E.g., Guzowski v. Hartman, 969 F.2d 211 (6th Cir. 1992); Century Oil Tool, Inc. v. Production Specialties, Inc., 737 F.2d 1316 (5th Cir. 1984); but see Fishman v. Wirtz, 807 F.2d 520 (7th Cir. 1986) (companies capable of conspiring absent total overlap in ownership); Am. Vision Ctrs., Inc. v. Cohen, 711 F. Supp. 721 (E.D.N.Y. 1989) (conspiracy possible between corporations where one was 100% owned by a group but group owned only 54% of the other).

(11) Whether a principal and its agents are capable of conspiring depends on their relationship, particularly the degree of control the principal exercises over its agent and whether they have divergent economic interests. See, e.g., Day v. Taylor, 400 F.3d 1272 (11th Cir. 2005); Seigel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125 (3d Cir. 1995); Ryco Mfg. Co. v. Eden Servs., 823 F.2d 1215 (8th Cir. 1987).

(12) Joint ventures, sports leagues, and trade and professional associations. In general, the actions of these entities result from joint action subject to Section 1. See, e.g., NCAA v. Bd. of Regents, 468 U.S. 85 (1984); National Hockey League Players’ Ass’n v. Plymouth Whalers Hockey Club, 419 F.3d 462 (6th Cir. 2005); Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 56 (1st Cir. 2002) (excellent discussion); Addamax Corp. v. Open Software Found., 152 F.3d 48, 52 (1st Cir. 1998) (explaining that “the operations of the joint venture represent collaboration of the separate entities that own or control it”); Jung v. Ass’n of Am. Med. Colls., 300 F. Supp.2d 119 (D.D.C. 2004) (holding that the actions of an association of competitors are subject to §1). But there is much confusion here and a number of exceptions and unanswered questions, including:
(a) In a joint venture where the participants totally integrate a line of business and cease competing with each other in that line of business, the joint venture’s pricing decisions may be treated as those of a single entity. *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).

(b) The joint venture may be treated as a combination subject to Section 1 with regard to functions in which participants compete against one another but not with regard to operations not implicating competition among the participants. See, e.g., *American Needle, Inc. v. NFL*, 538 F.3d 736 (7th Cir. 2008), cert. granted, 129 S.Ct. 2859 (2009); *Chicago Prof’l Sports Ltd. P’ship v. NBA*, 95 F.3d 593 (7th Cir. 1996).

(c) One court has held that a hospital “virtual merger”—that is, where operations of two hospitals are consolidated but the parties retain their assets and certain limited reserved powers—resulted in a single entity for antitrust purposes because the hospitals actually functioned as a single hospital entity would. *HealthAmerica Pa., Inc. v. Susquehanna Health Sys.*, 278 F. Supp.2d 423 (M.D. Pa. 2003).

(13) Provider-controlled contracting networks, such as physician independent practice associations (IPAs), are treated as combinations among their members whose actions are subject to Section 1. See *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 356 (5th Cir. 2008) (“When an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members”); *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 544 (2d Cir. 1993) (“As members of the [IPA], the doctors are not staff physicians employed by the HMO . . . Instead, these health care professionals are independent practitioners with separate economic interests.”). On the other hand, where a hospital or health plan employs physicians, all usually constitute a single entity.

(14) Attorneys and their clients are capable of conspiring when the attorney helps the client formulate strategies that violate the antitrust laws, but not where the attorney merely provides legal advice. *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1156 (9th Cir. 2003); *Amarel v. Connell*, 102 F.3d 1494, 1523 (9th Cir. 1996) (attorney capable of conspiring with client if “attorney ‘exerted [his] influence over [a client] so as to direct [the client] to engage in the complained of acts for an anticompetitive purpose’”); *Brown v. Donco Enters., Inc.*, 783 F.2d 644 (6th Cir. 1986); *United States v. Buzzard*, 540 F.2d 1383 (10th Cir. 1976); *Tillamook Cheese & Dairy Ass’n v. Tillamook County Creamery Ass’n*, 358 F.2d 115 (9th Cir. 1966).

(15) The circuits split on whether hospitals and their medical staffs constitute a single entity when engaging in medical-staff credentialing based on peer review. The Third, e.g., *Nanavati v. Burdette Tomlin Mem’l Hosp.*, 857 F.2d 96 (3d Cir. 1988); Fourth, e.g., *Oksanen v. Page Mem’l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc); Sixth, e.g., *Alba v. Marietta Mem’l Hosp.*, 202 F.3d 267 (6th Cir. 2000); and Seventh, e.g., *Pudlo v. Adamski*, 2 F.3d 1153 (7th Cir. 1993), Circuits have held that they are a single entity. The Ninth, see *Oltz v. St. Peter’s Cmty. Hosp.*, 861 F.3d 1440 (9th
(16) Before the Supreme Court right now is American Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008), cert. denied, 129 S.Ct. 2859 (2009). The issue is whether the NFL (a joint venture) and its teams should be deemed a single entity when agreeing to grant an exclusive license to one company to use all the teams’ logos.

5. The “Fact of Conspiracy” Requirement.

a. Assuming the parties are capable of conspiring, the question becomes whether the challenged conduct, as a factual matter, resulted from concerted or unilateral action. Typically, this is the most hotly contested issue in Section 1 cases. Cf. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553 (2007) (“‘[t]he crucial question’ [in a § 1 claim] is whether the challenged anticompetitive conduct ‘[s]tems from independent decision or from an agreement’”).

b. Although there is some authority to the contrary, “contract,” “combination,” and “conspiracy” are generally interchangeable terms meaning merely an “agreement,” “understanding,” or “concerted action.”

c. Technical definition of antitrust agreement or conspiracy: “a unity of purpose or a common design and understanding, or a meeting of the minds.” Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946); Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 271 (5th Cir. 2008) (“[C]oncerted action . . . [is] having ‘a conscious commitment to a common scheme designed to achieve an unlawful objective.’”).

d. No formal or express agreement is necessary, and the agreement can be inferred from the defendants’ conduct. For example, in Esco Corp. v. United States, 340 U.S. 1000, 1007 (9th Cir. 1965), the court explained:

A knowing wink can mean more than words. Let us suppose five competitors meet on several occasions, discuss their problems, and one finally states—“I won’t fix prices with any of you, but here is what I am going to do—put the price of my gidget at X dollars; now you all do what you want.” He then leaves the meeting. Competitor number two says—“I don’t care whether number one does what he says he’s going to do or not; nor do I care what the rest of you do, but I am going to price my gidget at X dollars.” Number three makes a similar statement—“My price is X dollars.” Number four says not one word. All leave and fix “their” price at X dollars.

We do not say the foregoing compels an inference . . . that the competitors’ conduct constitutes a price-fixing conspiracy . . ., but neither can we say, as a matter of law, that an inference of no agreement is compelled. As in so many other instances, it remains a question for the trier of fact to consider and
determine what inference appeals to it . . . as most logical and persuasive, after it has heard all the evidence of what these competitors had done before such meeting and what actions they took thereafter, or what actions they did not take.

e. See also Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) (inference of conspiracy permissible where, even absent an outright agreement, each defendant knew that concerted action was contemplated and invited, and that the other defendants were participating).

f. Agreements may be proved by direct evidence, circumstantial evidence, or both. E.g., Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954); Tunica Web Adver. v. Tunica Casino Operators Ass’n, 496 F.3d 403, 409 (5th Cir. 2007) (“[c]oncerted action may be shown by either direct or circumstantial evidence,” but “circumstantial evidence of a conspiracy must be strong in order to survive summary judgment”); Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003). Direct evidence usually, but not always, negates the need for additional circumstantial evidence. See Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073 (10th Cir. 2006).

g. But in antitrust cases, if the evidence of agreement is wholly circumstantial, several limiting principles come into play:


2. More evidence that otherwise is necessary if the plaintiff’s theory of conspiracy makes no economic sense, is implausible, or the defendants had no motive to conspire. Matsushita; Cosmetic Gallery, Inc. v. Schoeneman Corp., 495 F.3d 46, 51 (3d Cir. 2007) (“The Supreme Court has cautioned that fact finders should not be permitted ‘to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.’”).

3. No conspiracy can be inferred, and the court should grant defendants summary judgment, if the plaintiff’s evidence is as consistent with independent action by the defendants as with concerted action—if the evidence is in equipoise. Craftsman Limousine, Inc. v. Ford Motor Co., 363 F.3d 761 (8th Cir. 2004); Euromodas v. Zanella, Ltd., 368 F.3d 11 (1st Cir. 2004); Williamson Oil Co., 346 F.3d at 1300; Viazis v. Am. Ass’n of Orthodontists, 314 F.3d 758, 762 (5th Cir. 2002).

4. Rather, plaintiff must adduce evidence tending to exclude the possibility that the defendants were acting independently. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554 (2007) (“proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, . . . and at the summary judgment stage a § 1 plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were
acting independently”); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (same); *Viazis*, 314 F.3d at 762 (“evidence of conduct that is ‘as consistent with permissible competition as with illegal conspiracy’ cannot support an inference of conspiracy. . . . In essence, an antitrust plaintiff who is unable to present direct evidence of a conspiracy must introduce circumstantial evidence that ‘tends to exclude the possibility of independent action’”).

(5) Because “conscious parallelism”—i.e., competitors’ taking identical action knowing that others are likely to do likewise—is as consistent with lawful unilateral action (i.e., oligopolistic behavior) as with concerted action, it, standing alone, is insufficient to permit an inference of conspiracy. *E.g.*, *Twombly*; *Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 903 (6th Cir. 2009) (“Allegations of concerted action by competitors are frequently based on a pattern of uniform business conduct, which courts often refer to as ‘conscious parallelism.’ Conscious parallelism, however, is not in itself prohibited under § 1 of the Sherman Act.”); *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954); *see also Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 271 (5th Cir. 2008) (“Independent parallel conduct, or even conduct among competitors that is consciously parallel, does not alone establish the contract, combination, or conspiracy required by § 1.”).

(a) In addition to consciously parallel action by defendants, plaintiff must introduce evidence of certain “plus factors,” which can include (i) motive to conspire, (ii) opportunity to conspire, (iii) that the action would not be expected but for an agreement—i.e., that the action was against the individual economic interest of the defendants, (iv) that defendants can offer no legitimate explanation or business justification for the action, and (v) that the justification defendants did offer was a pretext. *See Twombly*; *Matsushita*; *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007); *Abraham v. Intermountain Health Care*, 461 F.3d 1249 (10th Cir. 2006); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350 (3d Cir. 2004); *Minn. Ass’n of Nurses v. Unity Hosp.*, 208 F.3d 655 (8th Cir. 2000).

(b) A plethora of decisions discuss these principles; they are gathered and cited in 1 John J. Miles, *Health Care & Antitrust Law* § 2A: 6 at 2A-81 n.23 (Supp. 2008).

(6) A recommendation by one party and the mere acceptance of that recommendation by a decision maker is not sufficient to permit an inference of conspiracy between the decision maker and the party making the recommendation. *Abraham*, 461 F.3d at 1259; *Gordon v. Lewistown Hosp.*, 423 F.3d 184 (3d Cir. 2005); *Podiatrist Ass’n, Inc. v. La Cruz Azul de Puerto Rico, Inc.*, 332 F.3d 6, 14-15 (1st Cir. 2003); *Oksanen v. Page Mem’l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991).
D. The “Unreasonable Restraint of Competition” Requirement.

1. Although read literally, Section 1 prohibits “[e]very conspiracy “in restraint of trade,” the courts have long held that it prohibits only agreements unreasonably restraining competition. See Standard Oil Co. v. United States, 221 U.S. 1 (1911); In re Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, 1331 (Fed. Cir. 2008) (“Although by its terms, the Act prohibits any ‘restraint of trade,’ the Supreme Court ‘has long recognized that Congress intended to outlaw only unreasonable restraints.’”) (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997); Craftsman Limousine, Inc. v. Ford Motor Co., 491 F.3d 380, 386 (8th Cir. 2007) (“The Supreme Court has long accepted that Congress did not intend a literal interpretation of that language, and it has read the law as prohibiting only those practices that ‘impose[] an unreasonable restraint on competition.’”)). This is because, as the Supreme Court explained long ago, almost every contract restrains competition to some extent. E.g., Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (“the legality of an agreement . . . cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade . . . restraints. To bind, to restrain, is of their very essence”); see also Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 687-88 (1978) (“restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law”).

2. The question in every Section 1 case is whether the agreement, on balance, has “substantial” or “significant” anticompetitive effects. See, e.g., United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (issue is whether agreement’s effect on competition is substantially adverse); National Hockey League Players Ass’n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 473 (6th Cir. 2005) (“a plaintiff alleging an unreasonable restraint of trade . . . must show significant anti-competitive effects of the challenged restraint”).

3. What constitute “anticompetitive effects”? Supracompetitive prices, sub-competitive output, and sub-competitive quality. See, e.g., Wallace v. Free Software Found., Inc., 2005-2 Trade Cas. (CCH) ¶ 75,060 (S.D. Ind. 2005) (“Anticompetitive effect has been described as a reduction in output, increase in price, or deterioration of quality of goods and services.”).

4. Many, if not most, agreements have some procompetitive effects—for example, efficiencies in production or distribution. If so, those effects usually must be balanced against any anticompetitive effects.

5. In determining an agreement’s effect on competition, courts, as a general matter, apply one of three standards: (a) the per se rule; (b) the rule of reason, or (c) a middle approach variously called the “quick-look,” “abbreviated,” or “truncated” rule of reason. But these standards are not discrete points on a spectrum but rather points on a continuum. The applicable standard depends on the nature and character of the agreement in question—i.e., how likely it is that the type of agreement in question has significant net anticompetitive effects.
a. Standard 1—The per se rule.

(1) Some types of agreements are so obviously unreasonably anticompetitive in almost all circumstances that no analysis of their actual effects on competition is needed, warranted, or permitted. These agreements are said to be “per se illegal.” See generally Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (“The per se rule, treating certain 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.”); Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 434 (6th Cir. 2008) (“The per se standard recognizes there are some methods of restraint that are so inherently and facially anti-competitive that an elaborate and burdensome inquiry into a demonstrable economic impact of competition in a relevant market is not required.”).

(2) The per se rule applies to agreements that, “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.” N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958); see also Leegin, 551 U.S. at 886 (“To justify a per se prohibition a restraint must have ‘manifestly anticompetitive’ effects, . . . and ‘lack any redeeming virtue.’”). The per se rule applies only to types of agreements that, on their face, appear to be ones that would always, or almost always, tend to restrict competition and decrease output rather than increase economic efficiency or promote competition. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985). But the per se rule does not apply to types of agreements with which courts have had little experience. State Oil Co. v. Khan, 522 U.S. 3 (1997); Ariz. v. Maricopa County Med. Soc’y, 457 U.S. 332 (1982). The per se rule applies only in “clear cut cases.” Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003).

(3) The per se standard has limited applicability. In general, it applies only to three types of agreements, discussed later: (i) horizontal price-fixing agreements, (ii) horizontal market-allocation agreements, and (iii) bid-rigging agreements. See generally Nitro Distrib., Inc. v. Alitor Corp., 565 F.3d 417, 422 (8th Cir. 2009) (noting that plaintiffs’ “claims of price-fixing and customer allocation agreements are among the ‘most elementary’ violations . . . and are generally subject to a per se analysis”). Moreover, courts have been somewhat hesitant to apply the per se rule to joint-venture activities, see Broadcast Music; rules of sports leagues, e.g., Brookins v. Int’l Motor Contest Ass’n, 219 F.3d 849 (8th Cir. 2000); educational activities, e.g., Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design, 244 F.3d 521 (6th Cir. 2001); professional and trade association activities, e.g., FTC v. Ind. Fed’n of Dentists, 476 U.S. 447 (1986); and health-care sector issues involving medical judgment, such as a hospital’s decision whether to grant a practitioner clinical privileges to treat patients in the hospital, e.g., Diaz v. Farley, 215 F.3d 1175 (10th Cir. 2000).
(4) But the per se rule applies only to so-called “naked” restraints—i.e., those without plausible efficiencies or other procompetitive justifications. *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1. For example, the per se rule does not apply to so-called “ancillary restraints”—i.e., restraints that are a part of a larger undertaking, such as a joint venture, and are reasonably necessary for the venture to operate efficiently. See, e.g., *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 63 (1st Cir. 2004) (“restraints that are truly ancillary to a larger efficiency-gaining enterprise . . . are not normally condemned per se without looking at likely consequences”); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001) (“it is commonly understood today that per se condemnation is limited to ‘naked’ . . . agreements, that is, those that are not part of a larger pro-competitive joint venture”); *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003 (N.D. Cal. 2008); see also Fed. Trade Comm’n & U.S. Dep’t of Justice, *Antitrust Guidelines for Collaborations Among Competitors* §§ 3.36, 3.36(b) (2000).

(5) If the per se rule applies, plaintiff need not prove that the agreement had any actual anticompetitive effect, and the defendants are not permitted to introduce evidence that the restraint had procompetitive effects or no effects on competition at all. Rather, the per se rule establishes a conclusive presumption of unreasonableness and thus unlawfulness. To prove liability, a plaintiff only need prove the agreement and that it is a type to which the per se rule applies. E.g., *Maricopa County Med. Soc’y; In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 906 (6th Cir. 2003) (when the per se rule applies, “no consideration is given to the intent behind the restraint, to any claimed pro-competitive justifications, or to the restraint’s actual effect on competition”); *Stop & Shop Supermarket Co.*, 373 F.3d at 61 (“liability attaches without need for proof of power, intent, or impact”). As one court explained, “The per se rule is the trump card of antitrust analysis. When the antitrust plaintiff successfully plays it, he need only tally his score.” *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1363 (5th Cir. 1980).

(6) Not surprisingly, plaintiffs make every effort to squeeze their allegations into a type of agreement to which the per se rule applies, while defendants do precisely the opposite.

b. Standard 2—The “rule of reason.”

(1) At the other end of the spectrum of standards used to determine whether an agreement “unreasonably” restrains competition is the “rule of reason.”

(2) Courts assess the effect on competition of most agreements by applying the so-called “full-blown” rule of reason. Indeed, there is a presumption that the rule of reason, rather than the per se standard, applies in assessing the reasonableness of a restraint on competition. E.g., *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“this Court presumptively applies rule of reason analysis”).

(3) Under the rule of reason, the ultimate question is whether, on balance, the challenged agreement has significant anticompetitive effects—whether, on balance, it
promotes or suppresses competition (or has no effect). FTC v. Ind. Fed’n of Dentists, 476 U.S. 447 (1986); see also Bd. of Trade v. United States, 246 U.S. 231 (1918). In essence, rule-of-reason analysis asks whether the agreement results in the defendants’ obtaining or maintaining market power and, if so, whether efficiencies from the agreement outweigh its adverse market-power effects.


Under the rule of reason, Sherman Act plaintiffs bear an initial burden to demonstrate the defendants’ challenged behavior had an actual adverse effect on competition as a whole in the relevant market; if the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the procompetitive effects of their agreement, and if the defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means. . . . Ultimately, the factfinder must engage in a careful weighing of the competitive effects of the agreement—both pro and con—to determine if the effects of the challenged restraint tend to promote or destroy competition.

See also In re Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323 (Fed. Cir. 2008); Nilavar v. Mercy Health Sys., 244 Fed. Appx. 690, 695 (6th Cir. 2007); Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1065 (11th Cir. 2005).

(a) Plaintiffs can sustain their initial burden—basically to prove that the defendants have market power—in either or two ways: (i) direct evidence of anticompetitive effects, such as supracOMPetitive prices or reduced output or quality, or (ii) circumstantial evidence—defining the relevant market, showing that defendants have a dominant share of that market, and showing the existence of significant entry and expansion barriers. See, e.g., Theme Promotions, Inc. v. News Am. Mktg. Fsi, 539 F.3d 1046, 1053 (9th Cir. 2008) (“Evidence of restricted output and supracOMPetitive prices is direct evidence of market power. . . . To establish circumstantial evidence of market power, a plaintiff must first define the relevant market and then show that the defendant plays enough of a role in the market to impair competition significantly.”); Gordon v. Lewistown Hosp., 423 F.3d 184 (3d Cir. 2005); CDC Techs., Inc. v. IDEXX Labs., Inc., 186 F.3d 74 (2d Cir. 1999). In fact, many courts require, in every rule-of-reason case, a threshold showing of market power to quickly dispose of cases with obvious lack of merit—because absent market power, no unreasonably adverse effect on competition is possible.
(i) As noted before, there is no magic, black-letter market-share figure from which market power can be inferred. But in general, concern begins to arise when the defendants’ market share is around 30 or 35%. See generally Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (indicating that firm must have at least 30% market share before market power can be inferred); Drug Emporium, Inc. v. Blue Cross, 104 F. Supp. 2d 184, 189 (W.D.N.Y. 2000) (stating the Supreme “Court has concluded that as a matter of law that a defendant with 30% or less of the relevant market share lacked market power for an antitrust violation”).

(ii) But never forget that a large market share, by itself, is not sufficient to prove market power. Even a firm with a 100% market share has no market power if there are no entry barriers. See, e.g., Discon, Inc. v. NYNEX Corp., 86 F. Supp. 2d 154, 164 (W.D.N.Y. 2000) (“The Supreme Court has repeatedly made clear that ‘without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended period of time.’”).

(iii) But proof of market power is not sufficient, by itself, to show the required anticompetitive effect. Rather, there must be a showing of some link between defendants’ market power and harm to competition. E.g., Spanish Broad. Sys. v. Clear Channel Commc’ns, Inc., 376 F.3d 1065, 1072 (11th Cir. 2004); Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50 (2d Cir. 1997) (explaining that market power, by itself, is not sufficient; rather, plaintiff must adduce additional reasons to believe that defendants’ conduct will adversely affect competition).

(b) If plaintiff fails to sustain its initial burden, no further analysis is necessary, and the case should be dismissed, without requiring defendants to posit procompetitive justifications. E.g., Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 96 (2d Cir. 1998) (“before a fact finder may consider the harms and benefits of the challenged behavior, a plaintiff initially must show that the challenged action had an actual adverse effect on competition”); Ill. Corporate Travel, Inc. v. Am. Airlines, Inc., 806 F.2d 722 (7th Cir. 1986) (explaining that defendants have no burden to justify their conduct unless and until plaintiff sustains its initial burden to show the conduct has anticompetitive effects).

(i) But to the extent that defendants must justify their conduct, their justifications must relate directly to the effect of the conduct on competition. Justifications based on other public-interest or social-welfare considerations do not count. E.g., Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 695 (1978) (“It is this restraint that must be justified under the Rule of Reason, and [defendant’s] attempt to do so on the basis of the potential public threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.”); Schering-Plough, 402 F.3d at 1065 (“A restraint on competition cannot be justified solely on the basis of social welfare concerns.”).

(c) Fortunately, very few antitrust cases reach the point that the fact finder must actually balance the procompetitive and anticompetitive effects of the
agreement. Rather, most cases are settled or terminate on Rule 12(b)(6) or summary-judgment motions. There is no established framework for the balancing function, and the result is almost always subjective. This is one reason why trying antitrust cases to juries can be very scary and unpredictable.


(1) The per se rule and full-blown rule of reason are polar extremes at opposite ends of the spectrum for determining whether an agreement results in an “unreasonable” restraint. Indeed, the standards are really different points on a continuum of standards. See NCAA v. Bd. of Regents, 468 U.S. 85, 104 n.26 (1984) (“There is often no bright line separating per se from rule-of-reason analysis.”). Professor Hovenkamp has explained this well:

In fact, all legal analysis is “per se” to one degree or another. The per se rule says that once we know a certain amount about a practice we can pass judgment on its legality without further inquiry. The difference between a “per se” and “rule of reason” standard lies in how much we need to know before we can make that decision. A rational decision maker will collect information beginning with that which is the most relevant and easiest to gather, until he reaches a point at which the marginal cost of acquiring any more information exceeds its marginal return. In this case, the “marginal return” is the increased accuracy of the final decision. If the cost of obtaining certain information is very high, and the chance is small that it will make the final decision more accurate, the rational decision maker will not seek the additional information. Even in so-called rule of reason cases, however, the parties will not produce all the marginally relevant information. They will produce sufficient information to satisfy some judicially created presumptions—for example—that a defendant with 90% of the market has monopoly power. . . . In sum, every inquiry is cut off at some point: the label “per se” simply refers to a class of situations where we find it appropriate to cut the inquiry off at a relatively early stage.

Herbert Hovenkamp, Federal Antitrust Policy § 5.6b at 255 (3d ed. 2005). See also Fed. Trade Comm’n & U.S. Dep’t of Justice, Antitrust Guidelines for Collaborations Among Competitors § 1.2 (2000) (“Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. The Agencies focus on only those factors, and undertake only that factual inquiry, necessary to make a sound determination of the overall competitive effect of the relevant agreement.”).

(2) One intermediate competitive-effects standard of analysis between the per se and full-blown rule-of-reason standards might be referred to as the “quasi-per se rule,” and it applies only to tying arrangements and concerted refusals to deal, discussed later. In essence, several courts summarily condemn these types of agreements, without any showing of an actual anticompetitive effect and without considering proffered justifications if the parties engaging in them have market power. But other courts reject
this approach. The trend is away from it, toward the full-blown rule of reason, which permits consideration of both actual effects on competition (if any) and defendants’ justification for the conduct.

(3) The more important and more frequently applied intermediate standard is the so-called “quick-look” rule of reason. Under this approach, certain types of agreements—typically agreements among competitors directly affecting price or output that could be considered per se unlawful or that are “inherently suspect” because they are a type of agreement that usually results in anticompetitive effects—receive a more extended examination than under the per se standard but a more truncated examination than under the full-blown rule of reason.

(a) Under the quick-look approach, the challenged agreement is conclusively presumed to have anticompetitive effects—the plaintiff need not prove these—but the court permits the defendants to attempt to put forth plausible procompetitive justifications for the agreement. If they do not, the court summarily condemns it as it would under the per se rule. But if the defendants do put forth plausible justifications, the court permits them the opportunity to prove them, and a more in depth analysis is required, up to and potentially including a full-blown rule-of-reason analysis. See generally Craftsman Limousine, Inc. v. Ford Motor Co., 363 F.3d 761 (8th Cir. 2004); Bogan v. Hodgkins, 166 F.3d 509 (2d Cir. 1999); Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998); Rossi v. Standard Roofing, Inc., 156 F.3d 452, 462 (3d Cir. 1998).

(b) The seminal “quick-look” decision is NCAA v. Bd. of Regents, 468 U.S. 85, 109 (1984), where the Supreme Court explained that “this naked restraint on price and output requires some competitive justification” to avoid summary or per se condemnation).

(c) But the quick-look approach is appropriate only when “the great likelihood of anticompetitive effects can be easily ascertained” and “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect.” Cal. Dental Ass’n v. FTC, 526 U.S. 756, 770 (1999).

(d) The approach is summarized well in ABA Section of Antitrust Law, Monograph No. 23, The Rule of Reason 12 (1999):

Like the per se rule, quick look analysis presumes competitive harm from the very nature of the challenged practice: the plaintiff does not have to establish proof of market power to make out a prima facie case because anticompetitive effects are either readily apparent or will be presumed from the conduct in question. But unlike the per se approach, proof of the challenged practice, without more, does not result in a determination that the practice is unlawful. Instead, the defendant is permitted to produce evidence of procompetitive benefits. If the defendant fails to offer a compelling procompetitive justification, the practice will be declared
illegal. If procompetitive effects can be demonstrated, the inquiry will proceed to a full rule of reason analysis.

For an extended discussion of the different versions of the rule of reason, including the “quick-look” version, carefully read the FTC’s recent decision in *Realcomp II, Ltd.*, 2009-2 Trade Cas. (CCH) ¶ 76,784 (FTC Oct. 30, 2009).

(e) The D.C. Circuit, in *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2004), explained the analysis in a case brought by the FTC as follows:

First, the Commission must determine whether it is obvious from the nature of the challenged conduct that it will likely harm consumers. If so, then the restraint is deemed “inherently suspect” and unless the defendant comes forward with some plausible (and legally cognizable) competitive justification for the restraint, it is summarily condemned.

If the defendant does offer such an explanation, the Commission “must address the justification” in one of two ways. First the Commission may explain why it can confidently conclude, without adducing evidence, that the restraint very likely harmed consumers. . . . Alternatively, the Commission may provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely. . . . If the Commission succeeds in either way, then the evidentiary burden shifts to the defendant to show that the restraint in fact does not harm consumers or has “procompetitive virtues” that outweigh its burden upon consumers.

(f) Thus, there is no “rigid template” for applying quick-look analysis; rather, “[i]t must be tailored to fit the circumstances presented in each case.” *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 361 (5th Cir. 2008). Full market analysis under the full-blown rule of reason may or may not become necessary, depending on the depth of analysis necessary to determine the restraint’s net effect on competition. *Cal. Dental Ass’n*. In terribly ambiguous language, providing counselors and courts with little guidance, the Supreme Court has explained that “[w]hat is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.” *Id.* at 781.

**E. The Role of Intent in Section 1 Cases.**

1. In criminal antitrust cases: Anticompetitive intent is an essential element in criminal antitrust cases, but the standard of proof is lenient. In cases to which the per se rule applies, the government need only prove that the defendant knowingly joined the conspiracy; the requisite criminal intent may be inferred from that. *E.g., United States v. Therm-All, Inc.*, 373 F.3d 625 (5th Cir. 2004). In criminal cases to which the rule of reason applies, the government must prove that the defendant knew that the probable consequences of the agreement would be to restrain competition. *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978). Rarely does the Antitrust Division criminally prosecute conduct analyzed under the rule of reason.
2. In civil antitrust cases: Anticompetitive intent is not an essential element of a Section 1 violation (although some decisions, in loose language, suggest otherwise, see, e.g., William O. Gilley Enters. v. Atl. Richfield Co., ___ F.3d ____, 2009-2 Trade Cas. (CCH) ¶ 76,818 (9th Cir. 2009) (listing “intent[] to harm or restrain trade or commerce” as an essential element in a Section 1 case). Nor does an anticompetitive intent, by itself, result in a violation (again, not withstanding some loose language in some cases, e.g., U.S. Gypsum Co., 438 U.S. at 436 n.13 (stating that the “general rule” is that “a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect”). But neither is a benign or procompetitive intent a defense: “[g]ood intentions will not save a plan otherwise objectionable.” Appalachian Coals, Inc. v. United States, 288 U.S. 344, 372 (1933). The crucial issue in civil antitrust cases is always the challenged conduct’s effect on competition (whether presumed or proven), not the reason it was undertaken. See, e.g., Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 239 F. Supp. 2d 180, 189 (D.R.I. 2003) (“while motive is a relevant consideration in determining whether concerted actions violate the Sherman Act, the ultimate question is whether the challenged conduct unreasonably restrains trade”), aff’d, 373 F.3d 57 (1st Cir. 2004).

3. Intent, however, often helps predict or determine whether the alleged conduct would have, or has had, anticompetitive effects. Appalachian Coals, 288 U.S. at 372 (“knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences”); United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993) (explaining that courts often examine defendants’ intent to aid in judging the likely effect of the challenged conduct).

G. Problematic Types of Agreements Under Section 1.

1. Horizontal price-fixing agreements.

   a. A horizontal price-fixing agreement is any agreement among competitors directly affecting the price they charge for their product or service—“any combination which tampers with price structures.” United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940). The Supreme Court has stated that “[n]o antitrust offense is more pernicious than price fixing.” FTC v. Ticor Title Ins. Co., 504 U.S. 621, 639 (1992).

   b. The definition of price-fixing cuts very broadly. The agreement need not set a specific or final price. E.g., Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 990 (9th Cir. 2000) (“To constitute horizontal price fixing, the agreement among competitors need not involve the ultimate price.”). Rather, price-fixing agreements include agreements as to:

      (1) Minimum prices, Goldfarb v. Va. State Bar, 421 U.S. 773 (1975);

      (2) Maximum prices, Ariz. v. Maricopa County Med. Soc’y, 457 U.S. 332 (1982);
(3) Discounts or not to offer discounts, *Sugar Inst. v. United States*, 297 U.S. 553 (1936); *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133 (9th Cir. 2003);

(4) Credit terms or not to grant credit, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980);

(5) Pricing formulae, *Food & Grocery Bureau v. United States*, 139 F.2d 973 (9th Cir. 1943);

(6) Profit margins, *id.*;

(7) Starting prices then subject to negotiations, *Plymouth Dealer Ass’n v. United States*, 279 F.3d 128 (9th Cir. 1960);

(8) Fee schedules, *Goldfarb*;


(10) Suggested prices, *Plymouth Dealer Ass’n*;

(11) Reducing output, *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2001);

(12) Purchasing surplus supply to keep it off the market, *Socony-Vacuum Oil Co.*;

(13) Allocating amounts of sales among competitors, *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000);

(14) For a more complete list, see 1 John J. Miles, *Health Care & Antitrust Law* § 3.2 at 3-9 through 3-13 (Supp. 2008).

c. The principle that naked horizontal price-fixing agreements are per se unlawful is probably the most well-established of all antitrust principles. *See, e.g., Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“Price-fixing agreements between two or more competitors . . . fall into the category of arrangements that are per se unlawful.”); *Maricopa County Med. Soc’y; Krumen v. Christie’s Int’l, Inc.*, 284 F.3d 384 (2d Cir. 2002); cf. *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1144 (9th Cir. 2003) (“No antitrust violation is more abominated than the agreement to fix prices.”).

d. As in all Section 1 cases where the per se rule applies, it is the agreement itself that is unlawful. *E.g., Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991). Thus, as a technical matter, it does not matter if the agreement is never executed, implemented, or

e. The same rule applies to naked price-fixing agreements among competing *buyers* with regard to prices they pay—they are per se unlawful. *Mandeville Is. Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948); *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (Sotomayor, J.) (noting that an agreement among employers about employee salaries would be per se unlawful); *All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740, 747 (11th Cir. 1998) (“That price fixing is equally violative of antitrust laws whether it is done by buyers or sellers is . . . undisputed.”); *Doe v. Ariz. Hosp. & Healthcare Ass’n*, 2009-1 Trade Cas. (CCH) ¶ 76,591 (D. Ariz. 2009) (“Price-fixing agreements among buyers, like those among sellers, are prohibited by the Sherman Act, even where the damage caused by the agreement is to sellers and not consumers.”).

f. But for the per se rule to apply, the price-fixing agreement must be “naked.” The rule of reason applies to “ancillary” price-fixing agreements—i.e., those that are part of an integration among competitors achieving efficiencies and that are reasonably necessary for the efficient operation of their integration. *Broadcast Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1 (1979) (literal price-fixing agreement tested under rule of reason because it was essential for the service to be offered at all); *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 334-41 (2d Cir. 2008) (Sotomayor, J., concurring); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (2001) (“it is a standard form of joint venture for local firms to combine to provide offerings—here, one stop shopping for large buyers—that none could as easily provide by itself, and a joint venture often entails setting a single price for the joint offering”); *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206 (9th Cir. 1992) (explaining that price-fixing agreements are analyzed under the rule of reason when necessary for the service to be available at all); see also *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006) (joint-venture participants’ agreeing on prices for the joint-venture’s products not per se unlawful).

g. The Antitrust Division often prosecutes hard-core price-fixing agreements criminally. E.g., *United States v. Rose*, 449 F.3d 657 (5th Cir. 2006).

2. Agreements among competitors to exchange pricing information.

a. Competitors might exchange or verify their prices with one another in several ways—directly over the telephone, in meetings, on the golf course, at association gatherings and the like, or indirectly through trade-association price or wage surveys.

b. Exchanges of price or wage information can raise two potential antitrust problems. See *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1046 (8th Cir. 2000): “Price verification communications can violate section 1 in one of two ways. First, an agreement to exchange such communications can constitute an unreasonable restraint of trade under the rule of reason if the anticompetitive effects of the agreement
outweigh its beneficial effects. . . . Second, the exchange of such information can be evidence of the existence of an agreement to fix or stabilize prices.”).

(1) Thus, these types of exchanges can be a first step in, facilitate, or constitute circumstantial evidence of, a per se unlawful price-fixing agreement. See United States v. Citizens & S. Nat’l Bank, 422 U.S. 86 (1975) (agreements to exchange pricing information are probative of price-fixing agreements); Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001) (“Information exchange is an example of a facilitating practice that can help support an inference of a price-fixing agreement.”); Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1956) (noting that price exchanges can lead to agreements fixing prices); Jung v. Ass’n of Am. Med. Colls., 300 F. Supp. 2d 119 (D.D.C. 2004) (exchanges of pricing information support inference of a price-fixing agreement).

(2) But even absent a resulting per se unlawful price-fixing agreement, the exchange of price information by competitors might facilitate oligopolistic, interdependent pricing conduct among competitors and thus have the effect of stabilizing or raising prices, resulting in a violation. See generally United States v. Container Corp. of Am., 393 U.S. 333 (1969).

(a) Absent a price-fixing agreement, the rule of reason applies to agreements among competitors to exchange price information because they can generate procompetitive effects. United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978) (“The exchange of price data . . . among competitors does not invariably have anti-competitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more rather than less competitive. For this reason, we have held that such exchanges . . . do not constitute a per se violation of the Sherman Act.”); Citizens & S. Nat’l Bank; United States v. Giordano, 261 F.3d 1134, 1143 (11th Cir. 2001) (“Exchange of price information is analyzed under the rule of reason.”); Todd, 275 F.3d at 198 (explaining that “[t]his exchange of information is not illegal per se, but can be found unlawful under a rule of reason analysis”).

(b) Courts examine a number of factors to assess whether an agreement to exchange price information is likely to facilitate interdependent pricing decisions by competitors and thus violate Section 1. This effect is more likely if (1) the market is highly concentrated; (2) the prices exchanged are current or future prices; (3) the prices exchanged are firm- or transaction-specific rather than masked; (4) the prices exchanged are specific prices rather than some form of aggregated price information such as averages, means, or percentiles; (5) the products whose prices are exchanged are homogeneous rather than differentiated; and (6) demand for the products is inelastic. See U.S. Gypsum Co., 438 U.S. at 441 n.16; Container Corp.; Todd; see generally Herbert Hovenkamp, Federal Antitrust Policy § 5.3b at 218 (3d ed. 2005).

(c) These antitrust principles apply equally to exchanges of prices by sellers and to exchanges of prices by buyers (e.g., employee wages). For example, as to the antitrust ramifications of hospitals’ exchanging information about their nurses’

3. **Horizontal market-allocation agreements and agreements not to compete.**

   a. Horizontal market-allocation agreements are agreements among actual or potential competitors as to (1) the types of *services* they will and will not offer, (2) the *geographic areas* they will and will not serve, or (3) the types of *customers* they will and will not serve. The participants simply agree not to compete against one another, or one agrees not to compete against the other.

   b. “Naked” horizontal market-allocation agreements are *per se* unlawful. *Palmer v. BRG of Ga.*, 498 U.S. 46 (1990) (per curiam); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *Nitro Distrib., Inc. v. Alitor Corp.*, 565 F.3d 417, 423 (8th Cir. 2009) (“Claims of price fixing and customer allocation agreements are among the ‘most elementary’ violations . . . and are generally subject to a *per se* analysis.”); *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 292 (4th Cir. 2002) (“market division rings the same alarm bells as price fixing; indeed both constitute *per se* Sherman Act violations”); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001) (“it is commonly understood today that *per se* condemnation is limited to ‘naked’ market division agreements, that is, to those that are not part of a larger pro-competitive joint venture”). The Antitrust Division frequently prosecutes horizontal market-allocation agreements criminally. *E.g.*, *United States v. Rose*, 449 F.3d 627 (5th Cir. 2006) (holding that the *per se* rule applies to agreements allocating customers).

   c. Market-allocation agreements are even more detrimental to competition than price-fixing agreements because they prevent competition based on any variable, not just on price. *See Blue Cross & Blue Shield v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (“It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating all competition among them.”).

   d. But as in the case of price-fixing agreements, market-allocation agreements may constitute ancillary restraints and thus be subject to rule-of-reason analysis. *See, e.g.*, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985); *Rozema v. Marshfield Clinic*, 977 F. Supp. 1362, 1374, 1378 (W.D. Wis. 1997) (“Market allocations that accompany and promote the success of larger endeavors are considered ‘ancillary’ trade restraints and warrant more in-depth analysis under the Rule of Reason . . . Market allocations are *per se* illegal only if they do not facilitate cooperative and productive activity.”).

   e. Covenants not to compete part of employment arrangements, sales of businesses, and the like are usually ancillary restraints subject to rule-of-reason analysis. *See, e.g.*, *Eichorn v. AT&T Corp.*, 248 F.3d 131, 144-46 (3d Cir. 2001); *cf. Hu v. Huey,*

a. Bid-rigging agreements are agreements among prospective bidders on contracts as to which will win a given bid. The other bidders typically submit artificially high “complimentary” bids to ensure the bidding procedure looks competitive. Often, on various contracts, the winning bid is rotated, so each conspiracy participant wins its fair share of the contracts, but at supracompetitive prices. See generally United States v. Reicher, 983 F.2d 168 (10th Cir. 1992) (explaining that bid rigging is any agreement among competitors by which bids are to be submitted to or withheld from a third party).

b. Bid-rigging agreements are per se unlawful and almost always prosecuted criminally by the Antitrust Division. See United States v. Rose, 449 F.3d 627 (5th Cir. 2006).

c. The per se rule applies whether those rigging bids are sellers (e.g., road builders bidding on construction contracts) or buyers (e.g., bidders at auctions).

5. Horizontal group boycotts or concerted refusals to deal.

a. A group boycott or concerted refusal to deal (the terms are usually used interchangeably) is an agreement among competitors not to deal with another competitor or not to deal with customers who deal with that competitor. See, e.g., NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998) (explaining that a “group boycott in the strongest sense” results where “[a] group of competitors threatens to withhold business from third parties unless those third parties would help them injure their directly competing rivals”). Some courts apply the term more broadly to include an agreement among competitors not to deal with any type of party.

b. Group boycotts are ubiquitous, and their antitrust analysis is not always clear. Early decisions, with little thought or analysis, labeled them as one of the per se unlawful violations, e.g., Fed. Maritime Comm’n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968). But courts frequently found excuses not to apply a strict per se standard, see, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), because, so often, they have no effect on competition or there is some strong justification for them.

c. Finally, in Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985), the Supreme Court held that for the per se rule to apply, plaintiff must show, at a minimum, that the boycotting parties have market power or access to some trade relationship needed by competitors to compete effectively. Of course, if a plaintiff must prove that the defendants have market power, the conduct is not per se unlawful.
d. Today, most courts apply either a full-blown rule of reason, see, e.g., *Palladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1155 (9th Cir. 2003), or a truncated approach that requires the plaintiff to prove market power or the essential nature of competitor access for effective competition and also permits the defendants to offer procompetitive justifications for their agreement not to deal. *E.g., Tunica Web Adver. v. Tunica Casino Operators Ass’n*, 496 F.3d 403, 414 (5th Cir. 2007) (“to determine the applicability of the per se rule . . ., the district court should have analyzed the following factors: (1) whether [defendants] hold a dominant position in the relevant market; (2) whether the [defendants] control access to an element necessary to enable [plaintiff] to compete; and (3) whether there exist plausible arguments concerning procompetitive effects”). This is almost a full-blown rule-of-reason analysis.

e. Courts are particularly reluctant to apply the per se standard to refusals to deal by professional associations, sports leagues, standard-setting bodies, joint ventures, and health-care credentialing decisions because their effect on competition is so uncertain and strong justifications for the agreement often exist.

f. The rule of reason applies to vertical group boycotts—i.e., agreements between parties at different levels in the chain of production or distribution not to deal with some other party. *NYNEX*, 525 U.S. at 135 (“precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors”).


a. There is no universally accepted definition of “joint venture.” But in general and for purposes of antitrust analysis, a joint venture might be best described as an agreement resulting in collaboration among separate entities, through partial integration of their businesses, to engage in research and development, production, marketing, sales, or purchasing jointly.

(1) Economic integration typically generates efficiencies—i.e., the whole becomes greater than the sum of its parts.

(2) A joint venture, on the spectrum of business integration, is between a cartel (no, or almost no, integration) and a merger (complete business integration).


b. Both the formation of joint ventures and subsequent agreements among the participants in operating the venture (for example, in marketing its products or services) generally result from agreements subject to Section 1 of the Sherman Act. The venture’s formation is also an “acquisition” and thus subject to Section 7 of the Clayton Act; it is analyzed as a merger, discussed below in Section V. For an excellent discussion of joint-
venture antitrust analysis, see ABA Section of Antitrust Law, Joint Ventures: An Antitrust Analysis of Collaborations Among Competitors (2006).

c. But if the joint venture effectively merges the participants’ businesses (or a particular line of their businesses) into the joint venture so that the participants no longer compete as to that line of business, the joint venture’s subsequent decisions about the venture’s business (such as an agreement among the participants on the price for the venture’s products) are treated as those of a single entity. E.g., Texaco, Inc. v. Dagher, 547 U.S. 1 (2006).

d. Even assuming the venture is not treated as a single entity for antitrust purposes, the venture’s decisions, even if resulting from a type of agreement to which the per se rule usually applies, frequently will constitute ancillary restraints subject to rule-of-reason analysis. A restraint is ancillary when (1) the parties have substantially integrated their operations in a way likely to achieve significant efficiencies, and (2) the restraint is reasonably necessary for the efficient operation of the venture. For detailed discussions, see Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008); Am. Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008), cert. granted, 129 S.Ct. 2859 (2009); In re ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003 (N.D. Cal. 2008). See generally Broadcast Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1 (1979).

e. It’s difficult to generalize about the antitrust analysis of joint ventures because they can take so many forms, include so many different participants, undertake so many different functions, and include so many types of internal agreements.

7. Vertical price-fixing agreements.

a. A vertical price-fixing (or “resale price-maintenance”) agreement is an agreement between a seller and a buyer (e.g., a manufacturer and retailer) directly affecting the price at which the buyer must resell the product. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

b. The antitrust analysis of vertical price-fixing agreements has a tortuous history. From 1911 until 1937, all vertical price-fixing agreements were per se unlawful. See Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). In 1937, Congress passed antitrust-exemption legislation permitting states to allow vertical price-fixing agreements in certain circumstances (so-called “Fair Trade” laws). In 1975, Congress repealed that legislation so that all vertical price-fixing agreements were again per se unlawful. In its 1988 Business Electronics, decision, however, the Supreme Court clarified that the per se rule applied only to vertical price-fixing agreements that required retailer adherence to specific prices or price levels. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 486 U.S. 717. The Court modified the rule again in State Oil Co. v. Khan, 522 U.S. 3 (1997), holding that the per se rule did not apply to vertical price-fixing agreements establishing maximum prices and overruling a prior decision, Albrecht v. Herald Co., 390 U.S. 145 (1968), in reaching this result. Finally, because the effect of vertical price-fixing agreements on competition is so uncertain, the Supreme Court, in its
2007 decision in Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S 877 (2007), held that the rule of reason, rather than the per se rule, applies to all vertical price-fixing agreements. That is the rule today, but Congress is considering legislation that would overrule the result in Leegin.

c. There is no in depth discussion of the rule-of-reason framework for analyzing vertical price-fixing agreements. But cf. Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204 (3d Cir. 2008) (including some discussion); Christine A. Varney, A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason, Antitrust, Fall 2009, at 22. Because they affect only intrabrand, rather than interbrand, competition, it would seem that vertical price-fixing agreements should present no antitrust problem unless interbrand competition for the product in question is weak. Additionally, because vertical price-fixing agreements can generate procompetitive effects, these would be balanced against any anticompetitive effects.


a. A vertical market-allocation agreement results where a supplier or other type of upstream seller designates the geographic area in which its downstream customer may resell the seller’s product, the location from which it can sell the product, or the types of customers to which it can sell the product, or the products that it can sell.

b. As is true regarding vertical price-fixing agreements, vertical market-allocation agreements restrain intrabrand competition and, as is true of all vertical restraints, are tested under the rule of reason. See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). They raise antitrust issues only if the seller has market power in the interbrand market so that the agreement unreasonably restrains competition in the interbrand market as well as restraining competition in the intrabrand market. See, e.g., Generac Corp. v. Caterpillar, Inc., 172 F.3d 971 (7th Cir. 1999); Ajir v. Exxon Corp., 185 F.3d 865 (9th Cir. 1999) (unpublished opinion reprinted at 1999-2 Trade Cas. (CCH) ¶ 72,609). In most situations, interbrand competition will be sufficiently strong so that the restraint on the intrabrand market will have an insufficient effect on competition to raise concern.


a. A tying agreement is a vertical agreement between a seller and buyer in which the seller conditions the sale of one product (the “tying” product) on the buyer’s purchasing a separate second product (the “tied” product) from the seller or from a source designated by the seller. E.g., Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

b. The requisite concerted action for purposes of Section 1 is the agreement between the buyer and seller by which the buyer agrees to purchase the tied product as a condition of obtaining the tying product. Systemcare, Inc. v. Wang Lab. Corp., 117 F.3d 1137 (10th Cir. 1997) (en banc).
c. The competitive concern with tying agreements is their ability to foreclose competitors in the market for the tied product. If the foreclosure is sufficiently substantial, the seller may obtain market power in the market for the tied product. See, e.g., Rick-Mik Enters., Inc. v. Equilon Enters., LLC, 532 F.3d 963, 971 (9th Cir. 2008) (“The injury is reduced competition in the market for the tied product.”); Reifert v. S. Cent. Wis. MLS Corp., 450 F.3d 312 (7th Cir. 2006).

d. The framework for analyzing tying arrangements is not crystal clear and depends to some extent on the court. Many courts refer to tying agreements, incorrectly, as per se violations. The traditional principle is that tying arrangements are unlawful, without proof of actual adverse effects on competition (a “quasi-per se” standard), if:

   (1) The arrangement involves the sale of two separate, distinct products or services—i.e., there are separate demands for the tying and tied products and they can be offered separately efficiently. E.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); Rik-Mik Enters.;

   (2) The seller has significant market power in the market for the tying product. This can be inferred from a substantial market share, Eastman Kodak, but not from a market share less than 30%, Jefferson Parish. The requisite market power cannot be inferred merely because the tying product is patented. Ill. Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006). The market-power requirement usually mandates that plaintiff define the relevant market for the tying product. E.g., Surgical Ctr. v. Hosp. Servs. Dist., 309 F.3d 836 (5th Cir. 2002);

   (3) The seller actually coerces the buyer to purchase the tied product as a condition of obtaining the tying product. E.g., Palladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1159-60 (9th Cir. 2003) (“Essential to . . . a tying claim is proof that the seller coerced a buyer to purchase the tied product.”). Strong persuasion, encouragement, or cajolery to the point of obnoxiousness is not sufficient. E.g., Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186 (2d Cir. 1992). But pricing the products so that purchasing them together is the only viable economic option for the purchaser may be sufficient. E.g., Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483 (8th Cir. 1992); see also Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008) (remanding case to district court for determination whether defendant’s bundled discounts constituted coercion); and


e. Some courts apply additional requirements and permit the defendant to justify the agreement:

   (1) Where the tying-product seller designates a source other than itself from which the buyer must purchase the tied product, almost all courts require that the seller of
the tying product have a “direct economic interest” in the sale of the tied product—e.g., share in the revenues or profits from the sale of the tied product by the designated source. E.g., Reifert v. S. Cent. Wis. MLS, 450 F.3d 312 (7th Cir. 2006); Abraham v. Intermountain Health Care, Inc., 461 F.3d 1249 (10th Cir. 2006).

(2) More recent tying decisions also suggest or hold that plaintiff must show some actual adverse effect on competition in the market for the tied product—for example, evidence that other competitors exist and were actually foreclosed from the tied-product market by the arrangement; or that, absent the tie, the buyer would have purchased the tied product from someone else. E.g., Blough v. Holland Realty, Inc., 574 F.3d 1084, 1089 (9th Cir. 2009) (“Zero foreclosure exists where the tied product is completely unwanted by the buyer. . . . In such a case, there is no unlawful tying arrangement because there is no adverse effect on competition in the tied product market.”); Reifert, v. 450 F.3d at 318 (“Forcing a buyer to purchase a product he otherwise would not have purchased is insufficient to establish the foreclosure of competition [and thus a tying violation].”); U.S. Philips Corp. v. Int’l Trade Comm’n, 424 F.3d 1179, 1193-94 (Fed. Cir. 2005) (“to show that a tying arrangement is per se unlawful, a complaining party must demonstrate that it . . . has an anticompetitive effect in the market for the second product”); Buyer’s Corner Realty, Inc. v. N. Ky. Ass’n of Realtors, 410 F. Supp. 2d 574 (E.D. Ky.), aff’d, 198 Fed. App’x. 485 (6th Cir. 2006).

Older decisions suggest or hold otherwise. E.g., Barber & Ross Co. v. Lifetime Doors, Inc., 810 F.2d 1276 (4th Cir. 1987).

(3) Some courts have permitted defendants to assert legitimate business justifications for the tying arrangement. E.g., PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811 (6th Cir. 1997).

f. If plaintiff fails to meet the requirements above, it can still prove a violation through the usual full-blown rule-of-reason analysis. E.g., Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494 (3d Cir. 1998).

g. It’s often said that tying arrangements are per se unlawful. As the above indicates, they are not. See generally Sheridan v. Marathon Petrol. Co., 530 F.3d 590 (7th Cir. 2008).

h. A variant of tying is “full-line forcing,” under which a manufacturer requires its distributors to purchase its full line of products as a condition to purchasing its more popular products. Full-line forcing arrangements are usually analyzed under the rule of reason. E.g., S. Card & Novelty, Inc. v. Lawson Mardon Lable, Inc., 138 F.3d 869 (11th Cir. 1998).

10. Exclusive dealing agreements.

a. Exclusive dealing agreements are vertical agreements between a buyer and seller by which the buyer agrees to purchase all its needs of a product or service from the seller and not from the seller’s competitors (a “requirements contract”), or the seller
agrees to sell its product or service only to the buyer and not to the buyer’s competitors. See generally Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961); Apani Sw., Inc. v. Coca-Cola Enters., Inc., 128 F. Supp. 2d 988, 992 (N.D. Tex. 2001) (“Exclusive dealing . . . occurs when a seller agrees to sell its output of a commodity to a particular buyer, or when a buyer agrees to purchase its requirements of a commodity exclusively from a particular seller.”).

b. A variant of exclusive contracting is selective contracting, under which a firm contracts with some, but not all, parties wishing to contract with it. This is a common arrangement in relationships between health plans and health-care providers, where a health-maintenance organization might contract with some, but not all, providers wishing to provide services to its subscribers. See, e.g., Abraham v. Intermountain Health Care, Inc., 461 F.3d 1249 (10th Cir. 2006); Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 373 F.3d 57 (1st Cir. 2004).

c. The potential competitive concern with exclusive dealing agreements is foreclosure of the contract beneficiary’s competitors from the market. For example, a health insurer might contract with only a single hospital to treat its subscribers, agreeing not to enter into contracts with that hospital’s competitors. The beneficiary-hospital’s competitors are “foreclosed” from the percentage of the market (i.e., all patients) represented by the health plan’s subscribers. Or a hospital might contract with a health plan to treat its subscribers but agree not to contract with other health plans. The beneficiary-health plan’s competitors are thus “foreclosed” from that hospital’s services.

d. If a sufficient percentage of buyers or sellers are foreclosed from a sufficient percentage of the market, if the duration of foreclosure is sufficiently long, and if the arrangement precludes new entry, the contract beneficiary might obtain or maintain market power by effectively excluding its competitors from the market. See, e.g., Stop & Shop Supermarket Co., 373 F.3d at 66 (“If an exclusive dealing contract cuts off stores like [plaintiff] from an unduly large percentage of the available market for its goods, it and others like it may cease to provide [the relevant product]. And if this led or was likely to lead to a shortage of competing [sellers] (and new entry was difficult), the few remaining existing competitors might then be able to conspire or otherwise misbehave without being disciplined by competition.”); E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass’n, 357 F.3d 1, 8 (1st Cir. 2004) (“at a minimum, substantial foreclosure is essential”); Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997); see generally Jonathan M. Jacobson, Exclusive Dealing, “Foreclosure,” and Consumer Harm, 70 Antitrust L.J. 311 (2002) (excellent discussion).

e. For a contract to be “exclusive,” exclusivity need not be spelled out explicitly in the contract. Exclusivity may be inferred if, as a factual matter, the parties actually deal on an exclusive basis. E.g., Tampa Elec.; Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1058 (8th Cir. 2000) (“Section 1 claims that allege only de facto exclusive dealing may be viable”); White & White, Inc. v. Am. Hosp. Supply Corp., 540 F. Supp. 951 (W.D. Mich. 1982), rev’d on other grounds, 723 F.2d 495 (6th Cir. 1983).

g. In assessing an exclusive dealing agreement’s effect on competition, courts consider a number of factors, including:

(1) As noted before, the percentage of the market foreclosed by the contract. This, by far, is the most important variable, and most courts require proof of substantial market foreclosure as a “threshold” requirement to quickly weed out obviously unmeritorious claims. As a general rule, foreclosure of less than 30% of the market should not warrant serious antitrust concern. E.g., Theme Promotions, Inc. v. News Am. Mktg. FSI, 539 F.3d 1046, 1054 (9th Cir. 2008) (suggesting that 40%-70% may be sufficient); Stop & Shop Supermarket Co., 373 F.3d at 68 (“For exclusive dealing, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent.”). In the case of selective contracting, an important consideration, in addition to the percentage of the market foreclosed, is the percentage of otherwise competing sellers foreclosed by the arrangement.

(2) The duration of the contract. The longer the term of the exclusive arrangement, the more adverse its effect on competition is likely to be. But the actual duration of a contract with a long nominal term may be short if the contract can be terminated on short notice without cause—e.g., a 20-year exclusive contract that either party may cancel on 60-days notice. In general, an exclusive contract of two years or less should not warrant serious antitrust concern. But there is a trade-off between the level of market foreclosure and the contract’s duration: the greater the degree of foreclosure, the shorter the duration of the contract should be and vice versa.

(3) The market power of contract beneficiary. The greater the firm’s market power, the greater the anticompetitive effect from the exclusive contract is likely to be.

(4) Whether the contract beneficiary has exclusive contracts with other firms in the market. The more exclusive arrangements a firm has, the greater the likelihood of anticompetitive effects because the greater the degree of foreclosure.

(5) A hodge-podge of other factors, including (a) level of relevant-market concentration, (b) level of entry barriers into the market (one of which might be the exclusive contract), (c) whether competitors of the contract beneficiary also have exclusive contracts, (d) whether contract beneficiary’s competitors have other channels of
distribution through which they can distribute their product or service, (e) whether the exclusive contract was let pursuant to competitive bidding, (f) reasons for the exclusive arrangement, and (g) the party initiating the exclusive arrangement.

(6) Efficiencies from the exclusive arrangement—an extremely important variable in the analysis.

g. Typically, merely replacing one exclusive contractor with another raises no antitrust concern because it does not reduce the degree of competition from its previous state. E.g., NicSand, Inc. v. 3M Co., 507 F.3d 442 (6th Cir. 2007) (en banc).

h. For important decisions applying these principles, see Jefferson Parish; Tampa Elec.; Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485 (2d Cir. 2004); Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717 (7th Cir. 2004); Stop & Shop Supermarket Co.; Morales-Villalobos v. García-Llorens, 316 F.3d 51 (1st Cir. 2003); Apani Sw., Inc. v. Coca-Cola Enters., 300 F.3d 620 (5th Cir. 2002); United States v. Microsoft, Corp., 253 F.3d 34 (D.C. Cir. 2001) (per curiam); Minn. Ass’n of Nurse Anesthetists v. Unity Hosp., 208 F.3d 655 (8th Cir. 2000); CDC Techs., Inc. v. IDEXX Labs., Inc., 186 F.3d 74 (2d Cir. 1999); Omega Envt’l: Paddock Publ’ns, Inc. v. Chicago Tribune Co., 103 F.3d 42 (7th Cir. 1996); U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589 (1st Cir. 1993); Roland Mach. Co. v. Dresser Indus., 749 F.2d 380 (7th Cir. 1984).

IV. SECTION 2 OF THE SHERMAN ACT.

A. Text of the Statute: “Every person who shall monopolize, 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 . . . shall be deemed guilty of a felony . . . .” 15 U.S.C. § 2 (emphasis added). Thus, Section 2 encompasses three distinct violations: (1) monopolization, (2) attempted monopolization, (3) and conspiracies to monopolize.

B. Single-Firm Violations—Monopolization and attempted monopolization violations require no agreement as Section 1 violations do. E.g., Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454 (1993) (“while § 1 . . . forbids contracts or conspiracies . . ., § 2 addresses the actions of single firms that monopolize or attempt to monopolize”).

C. Market Power Plus Bad Conduct—In general, the monopolization and attempted monopolization provisions apply to the exclusionary conduct of firms that already have substantial market power. See Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) (explaining that Section 2 applies when “a defendant’s possession of substantial power, combined with his exclusionary or anticompetitive behavior, threatens to defeat or forestall the corrective forces of competition and thereby sustain or extend the defendant’s agglomeration of power”).
D. Monopsonization—Monopsonization is the mirror image of monopolization on the buyer side. See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007). “Monopsonistic practices by buyers are included within the practices prohibited by the Sherman Act.” Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1118 (10th Cir. 2008); Telecor Commc’ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124 (10th Cir. 2002). A firm would must have a substantial market share as a buyer and engage in predatory or exclusionary conduct with respect to other actual or potential buyers.

E. Monopolization and Attempted Monopolization by Non-Competitors—In general, a firm is unable, as a matter of law, to monopolize or attempt to monopolize (or monopsonize) a relevant market in which it is not a competitor. E.g., Lucas v. Citizens Commc’ns Co., 244 Fed. App’x. 774 (9th Cir. 2007) (per curiam); Spanish Broad. Sys. v. Clear Channel Commc’ns, Inc., 376 F.3d 1065 (11th Cir. 2004).

F. Monopolization—The essential elements: (1) monopoly power; (2) willful acquisition or maintenance of that power as distinguished from growth resulting from a superior product, business acumen, or historic accident. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); see also Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297 (3d Cir. 2007); Heerwagen v. Clear Channel Commc’ns, 435 F.2d 219 (2d Cir. 2006). This means, in essence, monopoly power plus predatory or exclusionary conduct to obtain, maintain, or increase that power. E.g., A.I.B. Express, Inc. v. FedEx Corp., 358 F. Supp. 2d 239, 249 (S.D.N.Y. 2004) (“The ‘willful acquisition or maintenance’ of monopoly power refers to anticompetitive conduct.”). The essential elements are the same for monopsonization claims against firms with substantial market power as purchasers. White Mule Co. v. ATC Leasing Co., 540 F. Supp. 2d 869 (N.D. Ohio 2008).

1. Monopoly power.

   a. Legal definition—“the power to control prices or exclude competition.” E.g., United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956); see also Morris Commc’ns Corp. v. PGA Tour, Inc., 364 F.3d 1288 (11th Cir. 2004). But this definition is both redundant and overinclusive because a firm cannot control prices without the ability to exclude competition, but the ability to exclude competition, per se, is not sufficient to provide a firm with monopoly power. See also Sheridan v. Marathon Petrol. Co., 530 F.3d 590, 594 (7th Cir. 2008) (“Monopoly power . . . is a seller’s ability to charge a price above the competitive level (roughly speaking, above cost, including the cost of capital) without losing so many sales to existing competitors or new entrants as to make the price increase unprofitable.”).

   b. Monopoly power is simply a substantial degree of market power. E.g., Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481 (1992) (“Monopoly power under § 2 requires . . . something greater than market power under § 1.”); Reazin v. Blue Cross & Blue Shield, 899 F.2d 951 (10th Cir. 1990) (explaining that market power and monopoly power differ only in degree). There is no bright dividing line between market power and monopoly power; in fact, economists often use the terms
interchangeably. In law, the difference depends on size of market share: monopoly power requires a larger market share than market power.

c. As with market power, monopoly power can be proved either directly or circumstantially. *Heerwagen; Harrison Aire, Inc. v. Aerostar Int’l, Inc.*, 423 F.3d 374 (3d Cir. 2005). Typically, plaintiff must define the relevant market. *Chapman v. New York State Div. for Youth*, 546 F.3d 230 (2d Cir. 2008).

(1) Direct evidence—Plaintiff must prove supracompetitive prices and restricted output. *Broadcom*, 501 F.3d at 307; *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1999). Courts disagree on whether plaintiff must define the relevant market when proving monopoly power by direct evidence. *Compare Broadcom*, 501 F.3d at 307 n.3 (“direct proof of monopoly power does not require a definition of the relevant market”) *with Heerwagen*, 435 F.3d at 229 (“plaintiff cannot escape proving her claims with reference to a particular market even if she intends to proffer direct evidence of controlling prices or excluding competition”).

(2) Circumstantial evidence—Plaintiff must prove (1) the relevant market; (2) that defendant has a very dominant share in that market, and (3) existence of significant entry and expansion barriers. *See HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 547 (8th Cir. 2007) (“To establish that a defendant possesses the requisite market power required for monopolization liability, a plaintiff must establish that the defendant has a dominant position in a well-defined relevant market.”); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam).

(a) How large a market share is sufficient? The classic statement comes from *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945): “[ninety percent] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.” The general rule today is that, all else equal, a fact finder may infer monopoly power if defendant’s market share is 70% or higher. Cases listing market shares in monopolization cases are collected at 1 John J. Miles, *Health Care & Antitrust Law* § 5.3 at 5-29 n.10 (Supp. 2008).

(b) Worth emphasizing, however, is that market share, per se, is not itself determinative of monopoly power because other variables affect the ability of firms to exercise monopoly power—particularly the level of entry and expansion barriers. *E.g.*, *Rambus, Inc.*, 2006-2 Trade Cas. (CCH) ¶ 75,364 (FTC 2006) (“When barriers to entry are low, any attempt to exercise monopoly power (even by a firm with a 100 percent market share) quickly would be countered by competition from new entrants.”), *remanded on other grounds*, 522 F.3d 456 (D.C. Cir. 2008).

2. *Predatory, unreasonably exclusionary, or “anticompetitive” conduct.*

a. Monopoly or monopoly power, by itself, is not unlawful. *E.g.*, *Pac. Bell Tel. Co. v. LinkLine Commc’ns, Inc.*, 129 S.Ct. 1109, 1118 (2009) (“Simply possessing monopoly power and charging monopoly prices does not violate § 2 . . . .”); *Verizon*...

b. Accordingly, in addition to monopoly power, a plaintiff must prove that the defendant acquired or maintained its monopoly power by competitively inappropriate conduct—referred to in antitrust jargon as “predatory,” “unreasonably exclusionary,” or “anticompetitive” conduct. E.g., Verizon Commc’ns, 540 U.S. at 407 (“the possession of monopoly power will not be found to be unlawful unless it is accompanied by an element of anticompetitive conduct”); Morris Commc’ns Corp. v. PGA Golf Tour, Inc., 364 F.3d 1288, 1294 (11th Cir. 2004) (“The second element requires predatory or exclusionary acts or practices that have the effect of preventing or excluding competition in the relevant market.”). Note that the second element is always directed against defendant’s competitors, not its customers.

c. But precisely defining predatory conduct or delineating a standard for identifying it has eluded antitrust courts and commentators because it is often difficult to distinguish aggressive, but procompetitive, conduct from predatory and anticompetitive conduct. E.g., Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458-59 (1993) (“It is somewhat difficult to distinguish robust competition from conduct with long-term anticompetitive effects.”); United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (per curiam) (“Whether a particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern . . . .”). Even competition on the merits is “exclusionary” when the firm with the best products or lowest prices drives less efficient competitors from the market. As one court stated, “the concept of predation defies simple definition.” Rebel Oil Co. v. Atl. Richfield Co., 133 F.R.D. 41, 43 (D. Nev. 1990).

d. Numerous standards or tests for identifying predatory conduct have been put forth, but none appear to fit all situations. For an excellent and very helpful discussion, see U.S. Dep’t of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008), a report the Department of Justice officially withdrew in 2009 but that still includes helpful commentary and discussion. The report is available at http://www.usdoj.gov/atr/public/reports/236681.pdf.

e. The Supreme Court has defined predatory conduct as (or at least said that predatory conduct includes) conduct that “impair[s] competition in an unnecessarily restrictive way,” conduct “‘attempting to exclude rivals on some basis other than efficiency,’” or conduct that “‘not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.’” Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985); see also Microsoft (conduct is predatory when it harms the competitive
process (not just competitors), has no legitimate business justification, and its anticompetitive effects outweigh its procompetitive effects).

f. Perhaps the most that can be said as a general matter is that a defendant’s conduct is predatory for purposes of Section 2 if it has a significant exclusionary effect on the defendant’s competitors and generates none of the benefits of competition, such as lower prices, greater output, higher quality, greater choice, increased access, or efficiency in production or distribution.

g. Worth emphasizing is that some types of conduct may be lawful when implemented by firms without market power but predatory when implemented by firms with substantial market power. See, e.g., Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 488 (1992) (Scalia, O’Connor & Thomas, JJ., dissenting) (“Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist.”).

h. Numerous courts have held that conduct is not predatory when the defendant has a “valid business reason,” “legitimate business justification,” or “procompetitive justification” for the conduct. E.g., Eastman Kodak, 504 U.S. at 483 (“liability turns . . . on whether ‘valid business reasons’ can explain [defendant’s] actions”); In re Elevator Antitrust Litig., 502 F.3d 47 (2d Cir. 2007); Rambus, Inc., 2006-2 Trade Cas. (CCH) ¶ 75,364, 105,505 (FTC 2006) (explaining that once plaintiff establishes a prima facie case of exclusionary conduct, the burden shifts “to [defendant] to establish nonpretextual procompetitive justifications for its conduct,” which requires showing “that its conduct indeed is a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal”), remanded on other grounds, 522 F.3d 456 (D.C. Cir. 2008).

1. But the cases are in conflict about whether a legitimate business justification, per se, renders conduct non-predatory or whether the court must balance the procompetitive and anticompetitive effects of the conduct as in a Section 1 rule-of-reason case. Compare Microsoft, 253 F.3d at 59, 66-67 (holding that balancing the effects is necessary) with Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group LP, ___ F.3d ____, ____., 2009 WL _______ at ___ (9th Cir. 2010) (rejecting the balancing requirement, at least in the context of the facts there).

i. Don’t place too much stock on defendant’s documents or oral statements indicating its subjective intent “to monopolize,” “kill the competition,” “crush competitors,” “flush those turkeys,” and the like.

1. Every firm wants to (and probably intends to if it can) obtain a monopoly, and the antitrust laws encourage it to try as long as it does so in ways that benefit consumers. See generally R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690, 696 (7th Cir. 2006) (“Yet as we remark frequently in antitrust litigation, ‘cutthroat competition’ is a term of praise rather than condemnation. . . . Businesses need not
love their rivals . . .; consumers gain when firms try to ‘kill’ the competition and take as much business as they can. . . . The question is not whether the defendant has tried to knock out other businesses but whether the means it has employed to that end are likely to benefit or injure consumers.”); *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1199 (3d Cir. 1995) (“The antitrust statutes do not condemn, without more, such colorful, vigorous hyperbole; there is nothing to gain by using the law to mandate ‘commercially correct’ speech within corporate memoranda and business plans. Isolated and unrelated snippets of such language ‘provide no help in deciding whether a defendant has crossed the elusive line separating aggressive competition from unfair competition.’”); *Gen. Leaseways, Inc. v. Nat’l Truck Leasing Ass’n*, 744 F.2d 588, 595-96 (7th Cir. 1984) (“We attach rather little weight to internal company documents used to show anticompetitive intent, because, though they sometimes dazzle a jury, they cast only a dim light on what ought to be the central question in an antitrust case: actual or probable anticompetitive effect.”).

(2) But documents and statements relating to the defendant’s intent can help predict effect. *E.g. Aspen Skiing; Microsoft* (“Evidence of intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist’s conduct.”).

j. What types of conduct by a firm with substantial market power can (or cannot) constitute predatory conduct?

(1) **Monopoly pricing**—A monopoly’s charging a supracompetitive, even the monopoly, price is not predatory because it is not exclusionary; indeed it is the opposite. *Verizon Commc’ns*, 540 U.S. at 407 (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”); *Arroyo-Melecio v. Puerto Rico Am. Ins. Co.*, 398 F.3d 56, 69 (1st Cir. 2005) (“A monopolist ‘is free to exploit whatever market power it may possess when that exploitation takes the form of charging uncompetitive prices.’”).

(2) **Monopsony pricing**—The same principle applies. A firm with a legitimately obtained monopsony may lawfully bargain for the lowest price it can get. *E.g., Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield*, 883 F.2d 1101 (1st Cir. 1989).

(3) **Predatory pricing**—Predatory pricing results where a firm (a) charges a price below its costs (most courts deem the firm’s average variable cost the appropriate cost benchmark) for a significant period of time to drive its competitors from the market and (b) then can recoup its losses after competitors are gone by raising price to supracompetitive levels. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 318 (2007) (focusing on predatory buying, but explaining that “[i]n a typical
predatory-pricing scheme, the predator reduces the sale price of its product . . . to below cost, hoping to drive competitors out of business. Then, with the competition vanquished, the predator raises output prices to supracompetitive levels.”).

(4) *Price Squeezes*—A price squeeze results where the defendant is both an input supplier to, and a competitor of, the plaintiff and prices the input at a sufficiently high price in the upstream market so that the plaintiff cannot compete against it in the downstream market. *Pac. Bell Tel. Co. v. LinkLine Commc’ns, Inc.*, 129 S.Ct. 1109 (2009); *see also Doe v. Abbott Labs.*, 571 F.3d 930 (9th Cir. 2009). Earlier decisions held that price squeezes could constitute predatory conduct, but *linkLine* holds the opposite.

(5) *Bundled discounts*—A bundled discount results where a seller charges less for a bundle of products or services than the aggregate price when the products or services are sold separately. In some cases, the price for the bundled product is sufficiently low that a seller of only one product or service in the bundle cannot effectively compete in selling that product. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008); *LePage’s, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). The circumstances under which bundled discounts are predatory are a complex and unsettled subject in antitrust law.

(6) *Refusals to deal with competitors*—A huge number of Section 2 cases involve a plethora of different situations where a firm with substantial market power refuses to deal in some form with its competitors that allegedly need some form of cooperation to compete effectively. As a general matter, a firm, even a monopoly, has no duty to deal with or otherwise aid its competitors. *Verizon Commc’ns*, 540 U.S. at 408 (explaining that “as a general matter, the Sherman Act ‘does not restrict the long recognized right of [a firm] . . . freely to exercise his own independent discretion as to parties with whom he will deal’”); *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188 (10th Cir. 2009); *Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006) (“antitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals compete. . . . Cooperation is a *problem* in antitrust, not one of its obligations.”).

(a) But this right to refuse to deal is not absolute. *E.g., Aspen Skiing.* The circumstances under which a duty to deal exists are not clear, however. For example, some courts hold or suggest that a refusal to deal is predatory only if there is profitable pre-existing dealing that the defendant terminates for no justifiable reason. *E.g., Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr.*, 582 F.3d 1216, 1223 (10th Cir. 2009) (noting that the key fact resulting in liability is the defendant’s terminating a profitable relationship without any justification other than an anticompetitive one); *LiveUniverse, Inc. v. MySpace, Inc.*, 304 Fed. App’x. 554 (9th Cir. 2008) (per curiam).

(b) Some courts indicate that a refusal to deal is predatory if done for the purpose of monopolizing and the defendant has no legitimate business justification for the refusal. *E.g., Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 483 (1992).
("If Kodak adopted its . . . policies [not to deal] as part of a scheme of willful acquisition of monopoly power, it will have violated § 2."); Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117 (2d Cir. 2007); Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297 (3d Cir. 2007).

(c) One variant of refusal-to-deal theory is the so-called “essential facilities doctrine,” which holds that a firm with a monopoly over a facility or trade relationship has a duty to provide competitors with access to that relationship where (1) access is necessary for effective competition; (2) competitors cannot, as a practical matter, duplicate the facility or relationship; and (3) providing access is feasible. See, e.g., MCI Commc’ns Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983) (the seminal case); MetroNet Corp. v. Quest Corp., 383 F.3d 1124 (9th Cir. 2004); Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C., 148 F.3d 1080 (D.C. Cir. 1998). The doctrine has been heavily criticized, see, e.g., Phillip Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L. J. 841 (1990), and the Supreme Court has emphasized that it has “never recognized such a doctrine,” Verizon Commc’ns, 540 U.S. at 411. See also Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr., 582 F.3d 1216, 1222 (10th Cir. 2009) (noting “the Supreme Court’s skepticism about the ‘essential facilities doctrine’”).

(d) Courts universally hold that a refusal to deal is not predatory if the defendant has a “legitimate business justification” for its refusal. E.g., United States v. Dentsply Int’l, Inc., 399 F.3d 181 (3d Cir. 2005); Covad Commc’ns Co. v. Bell Atl. Corp., 398 F.3d 666 (D.C. Cir. 2005). But what constitutes a “legitimate business justification” is not clear.

(7) Refusals to deal with non-competitors—A firm has no duty to deal with non-competitors because refusing to do so does not affect its market power. E.g., Official Air Line Guides v. FTC, 630 F.2d 920 (2d Cir. 1980).

(8) Refusals to deal with customers that deal with competitors—It almost always constitutes predatory conduct for a firm with substantial market power to condition its dealing with customers on their not dealing with that firm’s competitors. Lorain J. v. United States, 342 U.S. 143 (1951); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).

(9) Leveraging—Leveraging results when a firm with substantial market power in one market uses that power to induce customers to purchase not just that product but a second product as well. See generally Eastman Kodak Co.; AD/SAT v. Associated Press, 181 F.3d 216 (2d Cir. 1999) (per curiam). Tying arrangements are a form of leveraging, but Section 2 leveraging is a broader concept. While a tying arrangement requires the seller of the tying product to coerce the buyer to purchase the tied product as well, leveraging requires only that it provide some type of improper inducement to do so. See Covad Commc’ns Co. v. Bell South Corp., 299 F.3d 1272, 1284 (11th Cir. 2002) (“Monopoly leveraging occurs when a firm uses its market power in one market to gain market share in another market other than by competitive means.”), vacated on other grounds, 540 U.S. 1147 (2004). The doctrine is controversial, and a
plaintiff must show, at a minimum, that defendant’s leveraging would result in its obtaining a monopoly in the second market or at least in a dangerous probability of its doing so, e.g., *Verizon Comm’ns*, 540 U.S. at 415 n.4; *Four Corners Nephrology Assocs.*

(10) **Vertical integration**—Vertical integration results where a firm integrates to operate at different levels in the chain of production or distribution—e.g., a manufacturer’s integrating into the distribution of its product or a wholesaler’s integrating into manufacturing the product it sells. Vertical integration, per se, rarely raises an antitrust issue because it is typically procompetitive. *See Port Dock & Stone*, 507 F.3d at 124 (explaining that “[v]ertical expansion by a monopolist, without more, does not violate section 2 of the Sherman Act” because “when a monopolist has acquired its monopoly power at one level of a product market, its vertical expansion into another level . . . will ordinarily be for the purpose of increasing its efficiency”). But there are actions that vertically integrated firms might take that can raise antitrust questions.

(i) One situation is the vertically integrated firm’s implementing a “price squeeze” arrangement. As one court explained, “[T]he traditional price squeeze involves a defendant who as a monopolist supplies the plaintiff at one level (e.g., wholesale), competes at another (e.g., retail), and seeks to destroy the plaintiff by holding up the wholesale price to the plaintiff while depressing the retail price to common customers.” *Town of Norwood v. New Eng. Power Co.*, 202 F.3d 408, 418 (1st Cir. 2000). In other words, the defendant is a monopolist over an upstream input that its downstream competitors need to compete against it in a downstream market, but its price in the downstream market is so close to the price that it charges its competitors for the upstream needed input that they cannot survive. Numerous courts have held that price squeezes constitute predatory conduct, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), but the Supreme Court recently held otherwise. *Pac. Bell Tel. Co. v. LinkLine Commc’ns, Inc.*, 129 S.Ct. 1109 (2009).

(ii) A firm’s terminating its independent distributors and vertically integrating by taking over the distribution function itself does not constitute predatory conduct.

(11) **Certain violations of Section 1**—Forms of exclusionary conduct suspect under Section 1 of the Sherman Act, such as tying and exclusive dealing arrangements, can also constitute predatory conduct for purposes of a monopolization or attempted monopolization claim. E.g., *Highland Capital, Inc. v. Franklin Nat’l Bank*, 350 F.3d 558, 565 (6th Cir. 2003) (“A tying arrangement may also support a claim for monopolization.”); *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) (“Although not illegal in themselves, exclusive dealing arrangements can be an improper means of maintaining monopoly.”).

(12) **Sham Litigation**—Baseless litigation undertaken merely to damage the plaintiff. *See Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993); *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395 (3d Cir. 2000).

Horizontal mergers—While horizontal mergers are not exclusionary, they can serve as the predicate conduct for a monopolization violation if, indeed, they result in (or would result in) a firm with monopoly power. E.g., United States v. Grinnell Corp., 384 U.S. 563 (1966); Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 61 (1st Cir. 2002) (“merger to monopoly’ . . . is a feasible section 2 claim”); Complaint, FTC v. Ovation Pharms., Inc., No. 0:2008cv06379 (D. Minn., Dec. 16, 2008).

The above is only a partial list of conduct that might be deemed predatory for purposes of Section 2. For a more complete list, see 1 John J. Miles, Health Care & Antitrust Law § 5:12 at 5-120 n.15.

G. Attempted Monopolization—The essential elements: (1) specific intent to monopolize, (2) predatory conduct implementing that intent, and (3) a dangerous probability of actual monopolization if the predatory conduct continues. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993); Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008); Andrx Pharms., Inc. v. Elan Corp., 421 F.3d 1227 (11th Cir. 2005). The only practical difference between monopolization and attempted monopolization is in the necessary size of the defendant’s market share.

1. Specific intent to monopolize—Specific intent in this context means the “specific intent to destroy competition or build monopoly,” Times-Picayune Publ’g Co. v. United States, 345 U.S. 594, 626 (1953), or “something more than an intent to compete vigorously,” Spectrum Sports, 506 U.S. at 459. The requirement in large part is redundant to that of predatory conduct because the requisite specific intent can be inferred from predatory conduct. Id. (“Such conduct may be sufficient to prove the necessary intent to monopolize . . . .”); Confederated Tribes v. Weyerhaeuser Co., 411 F.3d 1030 (9th Cir. 2005), vacated and remanded on other grounds, 549 U.S. 312 (2007). Or, specific intent to monopolize can be proved by defendant’s statements or documents. Id.

2. Predatory conduct—Same meaning and types of conduct as for monopolization claims. Conduct not predatory for purposes of a monopolization claim cannot be predatory for purposes of an attempted monopolization claim. Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370 (7th Cir. 1986).

3. Dangerous probability of actual monopolization—Even if defendant specifically intended to monopolize the market and engaged in predatory conduct, if it could not actually monopolize the market, no attempted monopolization violation results. E.g., Abraham v. Intermountain Health Care, 461 F.3d 1249 (10th Cir. 2006).

a. The primary indicator of a dangerous probability of monopolization is the defendant’s market share, HDC Med., Inc. v. Minntech Corp., 474 F.3d 543, 550 (8th Cir. 2007) (“Dangerous probability of success is ‘examined by reference to the offender’s share of the relevant market.’”); indeed, some courts require proof of a sufficient market
share as a “‘threshold showing,’” AD/SAT v. Associated Press, 181 F.2d 216, 226 (2d Cir. 1999) (per curiam). No magic market-share percentage is sufficient because other variables are relevant as well, but most courts require a market share in the 40% to 50% range. AD/SAT, 181 F.3d at 229 (33% insufficient); Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997); M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., 981 F.2d 160 (4th Cir. 1992). Because market share is an important factor for the dangerous-probability determination, plaintiff must define the relevant market. E.g., E. Portland Imaging Ctr., P.C. v. Providence Health Sys., 280 Fed. App’x. 584 (9th Cir. 2008); United States v. Microsoft Corp., 253 F.3d 34, 81 (D.C. Cir. 2001) (per curiam) (“A court’s evaluation of an attempted monopolization claim must include a definition of the relevant market.”).

b. No precise market share is determinative because the court must consider a number of factors, none of which is itself determinative: defendant’s market share, defendant’s conduct, entry barriers, strength of the competition, probable development of the industry, and elasticity of demand. Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 318 (3d Cir. 2007); Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745 (10th Cir. 1999).

c. But regardless of these factors, other evidence might show that defendant could never actually monopolize the market. E.g., Ind. Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989) (no dangerous probability of monopolization where plaintiff admitted that defendant would never have the ability to control prices).


1. As in Section 1 cases, the different parts of a single integrated entity are incapable of conspiring to monopolize. E.g., Total Renal Care, Inc. v. W. Nephrology & Metabolic Disease, P.C., 2009 WL 2596493 at *14 (D. Colo. Aug. 21, 2009) (explaining that “numerous cases have extended Copperweld to Section 2 conspiracy claims”).

2. For a violation, the alleged conspirators must share an intent to monopolize. No violation results where only one intends to monopolize. E.g., Total Renal Care, 2009 WL 2596493 at *16.

3. Conspiracy-to-monopolize claims are largely redundant to Section 1 claims. See JTC Petrol. Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 779-80 (7th Cir. 1999) (noting that the violation “is a puzzling offense, as it seems entirely duplicative of a claim under section 1”).
4. Arguably, the difference between a Section 1 violation and a Section 2 conspiracy-to-monopolize violation (in addition to the specific intent to monopolize required for the latter) is that to prove a conspiracy to monopolize, plaintiff need not prove the relevant market, market power, or any actual or likely effect on competition. Indeed, many decisions so hold. E.g., Lantac, Inc. v. Novell, Inc., 306 F.3d 1003 (10th Cir. 2002); Morgan, Strand, Wheeler & Biggs v. Radiology Ltd., 924 F.2d 1484 (9th Cir. 1991). But the Supreme Court has explained that “[u]nless those agreements harmed the competitive process, they did not amount to a conspiracy to monopolize,” NYNEX Corp. v. Discon Corp., 525 U.S. 128, 139 (1998), and since NYNEX, the circuits have split on whether plaintiff must show an effect on competition. See Gregory v. Fort Bridger Rendezvous Ass’n, 448 F.3d 1195 (10th Cir. 2006) (indicating plaintiff must prove that the alleged conspiracy harmed the competitive process); Spanish Broad. (dismissing conspiracy-to-monopolize claim because plaintiff failed to allege anticompetitive effects); Dickson v. Microsoft Corp., 309 F.3d 193 (4th Cir. 2002) (indicating plaintiff must prove anticompetitive effect).

5. If plaintiff must prove an anticompetitive effect, it follows that it must prove the relevant market and that defendants have or will obtain market power.

6. Some courts hold that for a viable conspiracy-to-monopolize claim, at least one of the defendants must be a competitor in the relevant market. E.g., Hackman v. Dickerson Realtors, Inc., 595 F. Supp. 2d 875 (N.D. Ill. 2009); Boczar v. Manatee Hosps. & Health Sys., 731 F. Supp. 1042, 1047 (M.D. Fla. 1990). But both or all conspirators need not be competitors.

7. In most antitrust suits, conspiracy-to-monopolize claims are “throw-away claims” and often afterthoughts by plaintiffs.

V. SECTION 7 OF THE CLAYTON ACT.

A. Text of the Statute: “No person . . . engaged in any activity affecting commerce shall acquire, directly or indirectly, the . . . stock . . . and no person . . . shall acquire . . . the assets of another person . . ., where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18 (emphasis added). In sum, Section 7 prohibits mergers and all other forms of acquisition that may have significant anticompetitive effects.

1. Importantly, the merger need not actually lessen competition. There only need be a “reasonable probability” that it will substantially lessen competition. See generally Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (noting that Congress used the term “may” “to indicate that its concern was with probabilities, not certainties”); United States v. Dairy Farmers of Am., Inc., 426 F.3d 850 (6th Cir. 2005).

2. Although private plaintiffs may challenge mergers, almost all cases are enforcement actions brought by the Antitrust Division or FTC. The vast majority of
cases are brought prior to consummation as preliminary-injunction actions to block the merger, e.g., FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008), but the agencies have also challenged consummated mergers, e.g., Evanston Nw. Healthcare Corp., 2007-2 Trade Cas. (CCH) ¶ 75,814 (FTC 2007) (merger consummated in 2000, challenged by the FTC in 2004, and final order issued in 2008).

3. The government’s burden in obtaining preliminary injunctions blocking mergers is fairly lenient. See FTC v. WholeFoods Mkt., Inc., 548 F.3d 1028, 1035 (D.C. Cir. 2008) (explaining that “the FTC will usually be able to obtain a preliminary injunction blocking a merger by ‘rais[ing] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation’”; emphasizing that, at the preliminary-injunction stage, “a district court must not require the FTC to prove the merits”).


5. Because mergers typically generate significant procompetitive effects resulting from integration, a rule-of-reason analysis applies in determining their likely effect on competition.

6. If the merger is sufficiently large, the parties, prior to consummation, may have to report it to both the Antitrust Division and FTC pursuant to the Hart-Scott-Rodino pre-merger notification requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a. For a discussion of these requirements, see ABA Section of Antitrust Law, Antitrust Law Developments 388-96 (6th ed. 2007).

B. Categories of Mergers.

1. Horizontal—Between competitors—i.e., either competing sellers or competing buyers.

2. Vertical—Between firms at different levels in the chain of distribution—i.e., a firm and its customer or supplier. See generally Ford Motor Co. v. United States, 405 U.S. 562 (1972). This outline does not discuss vertical mergers, but see Antitrust Law Developments 379-85 (6th ed. 2007).

3. Conglomerate—Between firms lacking a horizontal or vertical relationship; the merging firms may be potential competitors or have no relationship to each other at all. See generally Antitrust Law Developments at 371-379, 386. This outline discusses only horizontal mergers, which are the main concern of the antitrust law because they directly destroy competition between the merging firms.

C. Horizontal Mergers.

1. The Antitrust Division and FTC Merger Guidelines—The single most important resource for analyzing horizontal mergers are the Antitrust Division and FTC
Merger Guidelines (1992, as amended 1997), available at http://www.usdoj.gov/atr/public/guidelines/1791.pdf. The Merger Guidelines are not “the law,” but they explain how the Antitrust Division and FTC analyze horizontal mergers and the circumstances under which they likely will be challenged, and courts frequently apply them in deciding merger cases. See Chicago Iron & Bridge Co. v. FTC, 515 F.3d 447, 469 (5th Cir. 2008) (“the Merger Guidelines are not binding on the courts and agency during adjudication but are only highly persuasive authorities as a ‘benchmark of legality.’”). The Antitrust Division and FTC are holding public workshops at present to determine whether revisions to the Merger Guidelines are warranted.

2. Reasons for antitrust concern—The Merger Guidelines encapsulate the antitrust concern with mergers: “mergers should not be permitted to create or enhance market power or to facilitate its exercise.” Merger Guidelines § 0.1 (emphasis added).

3. Potential anticompetitive effects—The two potential antitrust concerns arising from horizontal mergers: (1) “coordinated interaction,” id. § 2.1; and (2) “unilateral effects,” id. § 2.2.

a. “Coordinated interaction”—The merger may generate high market concentration, resulting in an oligopoly; i.e., the firms’ competitive decisions (such as pricing decisions) become interdependent, resulting in stabilized or higher prices. Economic theory predicts that, all else equal, the more concentrated a market is, the worse the market is likely to perform. See generally FTC v. H.J. Heinz Co., 246 F.3d 708, 724 n.23 (D.C. Cir. 2001) (“In an oligopolistic market characterized by few producers, price leadership occurs when firms engage in interdependent pricing, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests with respect to price and output decisions.”). As the Merger Guidelines explain, “Coordinated interaction is comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of others. This behavior includes tacit or express collusion, and may or may not be lawful in and of itself.” Merger Guidelines § 2.1 (emphasis added). See FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 123 (D.D.C. 2004) (“the theory of merger law is that in a market with few rivals, firms are able to coordinate behavior, ‘either by overt collusion or implicit understanding,’ to restrict output and achieve anticompetitive profits.”).

b. “Unilateral effects”—The second concern is that the merger may result in a dominant firm that, by itself, may be able to raise prices, regardless of its competitors’ actions. See Merger Guidelines § 2.2. Another concern is that if the merging firms, themselves, can raise their price, their higher price may serve as a price “umbrella,” permitting other firms in the market to raise their prices as well.

(1) There are several different scenarios under which this might occur, but the simplest is that where the products or the services of the merging firms are relatively homogenous and the merger results in a firm with a large market share. Id. § 2.22. Here, the most important consideration is the merging parties’ post-merger market share, but other factors must be examined as well, particularly entry barriers and the excess capacity (if any) of other firms in the market.
(2) Other theories of unilateral effects, particularly when the merging firms’ products are differentiated rather than homogeneous, are significantly more complex. See, e.g., *Evanston Nw. Healthcare Corp.*, 2007-2 Trade Cas. (CCH) ¶ 75,814 (FTC 2007) (discussing differentiated-products unilateral-effects merger analysis); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); Carl Shapiro, *Mergers with Differentiated Products*, Antitrust, Spring 1996 (same); *Merger Guidelines* § 2.21 (same).

4. Steps in analyzing a horizontal merger.

a. **Step 1**—Define the relevant product market.

   (1) The Supreme Court and lower courts have stated repeatedly that definition of the relevant market is an essential step in every merger case. E.g., *United States v. Marine Bancorp.*, 418 U.S. 602 (1974); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999). But in *Evanston Nw. Healthcare Corp.*, the FTC suggested that market definition might not be essential in cases involving consummated mergers where direct evidence shows that the merger actually resulted in supracompetitive prices. The logic is that the purpose for defining a relevant market is help assess the merger’s effect on competition, so there is no need to define the relevant market if plaintiff can prove the anticompetitive effect of the merger directly by, for example, its actually resulting in supracompetitive prices. Or, stated differently, proof that the merged firm was actually able to raise prices as a result of the merger, itself, proves the relevant market includes only the merging firms. See *Evanston Nw. Healthcare Corp.*, 2007-2 Trade Cas. (CCH) at 108,586; 108,587; 108,602; 108,608 (Rosch, Comm’r, concurring).

   (2) The *Merger Guidelines* define the relevant product market based solely on “demand substitution,” i.e., in terms of products (and their suppliers) to which consumers would switch if the post-merger firm attempted to exercise market power by raising price. The *Guidelines* explain that the analysis begins with the product or service of the merging firms (the “provisional” or “tentative” product market) and asks whether a hypothetical monopolist of that product could profitably raise price—i.e., whether the merged firms, if they attempted to raise price post merger, would lose too few sales to force them to rescind their price increase because too few of their customers would switch to substitute products to avoid the price increase. If so, the price increase would be profitable and that product, by itself, constitutes the relevant product market. But if the price increase would be unprofitable because the firm would lose too many sales to other products, the next-best-substitute product is added to the provisional market, and the profitability test is repeated. Next-best-substitute products are added to the provisional product market just to the point at which the hypothesized price increase would be profitable because too few consumers would switch to yet other substitute products. *Merger Guidelines* § 1.2; see generally *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008) (“If a small price increase would drive consumers to an alternative product, then that product must be reasonably substitutable for those in the proposed market and must therefore be part of the market properly defined.”); *United
b. **Step 2**—Define the relevant geographic market. The *Merger Guidelines* require the same type of analysis. The analysis begins with, for example, the service area of the merging firms (the “provisional” relevant geographic market) and asks if a hypothetical monopolist in that area could profitably raise price because few customers would switch to more distant sellers to render the price increase unprofitable. If so, the price increase would be profitable and that area, by itself, constitutes the relevant geographic market. In that situation, the merging firms are the only competitors in the relevant market. For example, this was the case in *Evanston Nw. Healthcare Corp.*, where the FTC found that the relevant geographic market included only the merging hospitals. But if the price increase would be unprofitable because too many customers would switch patronage to more distant sellers, the next-closest seller is added to the provisional market, and the profitability test is repeated. More distant sellers are added to the relevant geographic market just to that point at which a hypothetical price increase would be profitable because too few additional customers would switch to yet more-distant sellers. *Merger Guidelines* § 1.21.

(1) Note, very importantly, that if the merged firm is able (or would be able) to raise prices as a result of the merger, the relevant market includes *only* the merging firms.

c. **Step 3**—Identify competitors in the relevant market.

(1) Always remember that market definition is not an end in itself. Its purpose is to identify those competitors of the merged firm that would prevent it from exercising market power by raising price as a result of the merger. *See, e.g., Evanston Nw. Healthcare Corp.*, 2007-2 Trade Cas. (CCH) at 108,601 (explaining that “market definition is not an end in itself but rather an indirect means of assisting in determining the presence or likelihood of the exercise of market power”).

(2) Taking into account “supply substitutability” as many decisions do, the *Merger Guidelines* also include as competitors “firm[s with] existing assets that likely would be shifted or extended into production and sale of the relevant product within one year, and without incurring significant sunk costs of entry and exit, in response to a ‘small but significant and nontransitory’ increase in price.” *Merger Guidelines* § 1.321. In other words, include as competitors firms not currently producing the product in question in the geographic area in question, but which would quickly begin to do so within a year without incurring significant sunk costs if firms in the market attempted to exercise market power by raising price.

d. **Step 4**—Compute the market shares of the firms in the relevant market. Typically, market shares are calculated in terms of revenues, physical units produced, and physical capacity.
e. **Step 5**—Calculate the merging firms’ post-merger market share, the post-merger level of market concentration, and the extent to which the merger would increase these figures. In calculating the post-merger level of market concentration, use the Herfindahl-Hirschman Index (HHI) as the measure—i.e., add the merging firms’ market shares, square the market share of each firm in the market, and sum the squares. To calculate the amount by which the merger would increase the HHI, multiply the shares of the merging firms by each other, and multiply that product by 2. **See Merger Guidelines §§ 1.5, 1.51 & nn.17, 18.** So if firms with 10% market shares merge, the HHI would increase by 200. Remember in merger analysis to add the shares of the merging firms before squaring market shares.

f. **Step 6**—Determine the potential competitive concern from the merger—either (i) coordinated interaction or (ii) unilateral effects (or both).

   (1) If the concern is coordinated interaction, the level of post-merger market concentration and the amount by which the merger increases market concentration are the most important variables. Compare the post-merger HHI and its increase resulting from the merger with the concentration-level benchmarks of **Merger Guidelines § 1.51.** The Guidelines provide that mergers resulting in HHIs of less than 1,000 (an unconcentrated market) raise no problem; HHIs of between 1,000 and 1,800 (a moderately concentrated market) raise no problem unless the increase in the HHI is 100 or more, in which case further analysis (discussed below) is warranted; and HHIs of 1,800 or above (a highly concentrated market) still raise no problem if the increase in the HHI is less than 50. But as to the last, more analysis is necessary if the increase in the HHI is between 50 and 100, and the merger is rebuttably presumed unlawful if the increase is more than 100. These figures, however, are only guidelines, and the agencies have passed on challenging mergers with significantly higher HHI figures.

   (2) If unilateral effects are the potential concern, the most important statistic is usually the merging firms’ post-merger market share. More analysis is warranted if the post-merger market share is 35% or higher. The **Merger Guidelines** state that “[w]here the merging firms have a combined market share of at least thirty-five percent, merged firms may find it profitable to raise price and reduce joint output below the sum of their premerger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.” **Merger Guidelines § 2.22.**

g. **Step 7**—Determine whether the merger is prima facie, or rebuttably presumed, unlawful. If the statistical tests above are met, a rebuttable presumption arises that the merger is unlawful, shifting the burden of going forward to the merging parties to provide evidence of other factors indicating that the merger would not substantially lessen competition. **See United States v. General Dynamics Corp.,** 415 U.S. 486 (1974); **Chicago Iron & Bridge Co. v. FTC,** 515 F.3d 447, 458 (5th Cir. 2008) (“Typically, the Government establishes a prima facie case by showing that the transaction will significantly increase concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition. . . . .” Once the Government establishes the **prima facie** case, the respondent may rebut it by producing evidence to cast doubt on the

h. **Step 8**—Consider defendants’ rebuttal evidence: “A defendant can make the required [rebuttal] showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government’s favor.” United States v. Baker Hughes, Inc., 908 F.2d 981, 991 (D.C. Cir. 1990). Defendants’ rebuttal evidence may consider numerous variables, but the most common and important are the following:

(1) Low entry and expansion barriers.

(a) The Merger Guidelines explain that “[a] merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels.” Merger Guidelines § 3.0; see also Chicago Iron & Bridge Co.; FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); United States v. Waste Mgmt., Inc., 743 F.2d 976 (2d Cir. 1984). Thus, if new entry (or output expansion by incumbent firms) would replace the decrease in output resulting from the merged firm’s attempt to exercise market power by increasing price, the merger should have no anticompetitive effects, even if the merger would result in very high concentration or a very high post-merger market share.

(b) But to rebut plaintiff’s prima facie case, entry must be (i) **likely**, (ii) **timely**, and (iii) **sufficient**. Merger Guidelines § 3.0.

(i) Likely entry—For entry to be likely, it must be profitable for new entrants based on premerger prices. Id. § 3.3; see also Chicago Iron & Bridge Co.

(ii) Timely entry—The Merger Guidelines consider entry timely if the new entrants would become viable competitors within two years from the time of the merger. Merger Guidelines § 3.2.

(iii) Sufficient entry—The new output from new entry must be sufficient to counteract the anticompetitive effect from the merger—i.e., it must increase output to at least its premerger level. Id. § 3.4; FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1, 42 (D.D.C. 2007) (“For entry to be sufficient, it must replace the competition that existed prior to the merger), rev’d and remanded on other grounds, 548 F.3d 1028 (D.C. Cir. 2008); Chicago Iron & Bridge Co., Dkt. No. 9300 (FTC Dec. 21, 2004) (“entry must restore the competition lost from the merger”), petition for review denied on other grounds, 515 F.3d 447 (5th Cir. 2008).
(2) Substantial efficiencies from the merger.

(a) Most horizontal mergers generate procompetitive efficiencies that must be balanced against the merger’s anticompetitive effects. *Merger Guidelines* § 4 (“Indeed, the primary benefit of mergers to the economy is their potential to generate efficiencies.”; “mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction”); *H.J. Heinz*, 246 F.3d at 720 (“a merger’s primary benefit . . . is to generate efficiencies”); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

(b) In some situations, efficiencies from a merger may be sufficient to offset its likely market-concentration or market-power effects by lowering the merged firm’s marginal cost so that its profit-maximizing price is no greater than the premerger price. *See Merger Guidelines* § 4 (“In a coordinated interaction context . . . , marginal cost reductions may make coordinated interaction less likely or effective . . . . In a unilateral effects context . . . , marginal cost reductions may reduce the merged firm’s incentive to elevate price.”; “The Agency will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.”; “The Agency considers whether cognizable efficiencies likely would be sufficient to reverse the merger’s potential harm to consumers . . . , e.g., by preventing price increases in the market.”); *see generally* Oliver Williamson, *Economies as an Antitrust Defense: The Welfare Trade-Offs*, 58 Am. Econ. Rev. 18 (1968) (discussing circumstances in which efficiency effects offset market-power effects of mergers).

(c) But under the *Merger Guidelines*, the efficiencies must meet certain stringent requirements to count in favor of the merger. *Id.*

(i) The efficiencies must be “merger specific”—i.e., they must be efficiencies that would not be achieved but for the merger.

(ii) The efficiencies must be “net”—i.e., the costs of achieving the efficiencies must be subtracted from the amount of the efficiencies arising from the merger.

(iii) The efficiencies must be “verifiable”—i.e., “the merging firms must substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), and how each would enhance the merged firm’s ability and incentive to compete, and why each would be merger-specific.” *Id.*
(iv) In sum, the efficiencies must be “cognizable”—i.e., they must be net, verifiable, merger-specific efficiencies “that do not arise from anticompetitive reductions in output or service.” *Id.*

(d) Many courts require, for the efficiencies to count in favor of the merger, that their benefit be passed-on to consumers in the form of, for example, lower prices. E.g., *FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991); *United States v. Long Is. Jewish Med. Ctr.*, 983 F. Supp. 121 (E.D.N.Y. 1997).

(e) In assessing the effect of efficiencies on the lawfulness of the transaction, the *Merger Guidelines* apply a sliding scale: the greater the potential anticompetitive effects from the merger, the greater the efficiencies must be. The *Guidelines* state explicitly that “[e]fficiencies almost never justify a merger to monopoly or near monopoly.” *Merger Guidelines* § 4.

(3) Weakness of the acquired firm—either of two doctrines may apply:

(a) The “failing-firm” defense—If one of the firms is, as a technical matter, a “failing firm,” the merger is lawful—period. This defense is a determinative affirmative defense regardless of the merged firm’s post-merger market share or the post-merger level of market concentration, but its requirements are strict. The merging parties bear the burden to show that business failure is imminent, that the firm could not successfully reorganize under the Bankruptcy Act, and that the failing firm made a good-faith effort to find an acquiring firm whose acquisition of it would have a less anticompetitive effect than that of the acquiring firm. The *Merger Guidelines* and some courts also require proof that, but for the merger, the failing firm’s assets would exit the market. *Merger Guidelines* § 5.1; *Gulf States Reorg. Group v. Nucor Corp.*, 466 F.3d 961 (11th Cir. 2006); see generally *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549 (1971); *Cal. v. Sutter Health Sys.*, 130 F. Supp. 2d 1057 (N.D. Cal. 2001).

(b) The “flailing-firm” or “weakened competitor” defense—Situations frequently arise where the acquired firm is not “failing” in the technical sense above but is sufficiently weak that it is unlikely to continue as a strong competitor in the future. In this situation, that firm’s financial status and future strength are factors (just as efficiencies are) that the court considers in balancing the likely effect of the merger on competition. The weak firm’s current market share overstates its future competitive significance. But unlike the failing-firm defense, its competitive weakness is not a determinative affirmative defense. See *FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991); *Evanston Nw. Healthcare Corp.*, 2007-2 Trade Cas. (CCH) ¶ 75,814 (FTC 2007); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 153 (D.D.C. 2004) (“several courts have relied on the weak and worsening position of the proposed acquired firm as a significant factor in declining to enjoin a proposed merger”); see generally *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) (seminal decision holding that a merging firm’s future competitive strength is relevant notwithstanding its current market share).
(4) Other considerations when the potential problem is coordinated interaction—factors affecting the ease or success of interdependent competitor decision making or tacit collusion:

(a) Product homogeneity—The more homogeneous the products of the competitors, the easier collusion is. Merger Guidelines § 2.11; United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1989); Evanston Nw. Healthcare Corp., 2007-2 Trade Cas. (CCH) ¶ 75,814 at 108,585 (FTC 2007) (“Generally, coordination is more likely in markets with homogeneous products because it is easier for competitors to reach agreements on terms of coordination and to detect or punish deviations from those terms.”). Thus, the standardization of products, through, for example, a standard-setting body, facilitates competitor coordination.

(b) The firms’ cost structures—The more similar the firms’ costs, the easier is collusion. E.g., United States v. Archer-Daniels-Midland Co., 781 F. Supp.1400 (S.D. Iowa 1991).

(c) Buyer size and sophistication—The smaller and less sophisticated the buyers, the more likely is successful collusion among sellers. Merger Guidelines § 2.12; FTC v. Cardinal Health, Inc., 12 F. Supp.2d 34 (D.D.C. 1998). On the other hand, large purchasers may be able to exercise “countervailing power.”

(d) Competitor availability of information about one another—The more information competitors have about the competitive actions and reactions of others, the greater is the likelihood of collusion. Merger Guidelines § 2.11 (“Key information about rival firms and the market . . . may also facilitate reaching terms of coordination.”). The better the ability and actions of competitors to hide their competitive actions from one another, the less likely collusion is. Id. § 2.12 (“if key information about specific transactions or individual price or output levels is available routinely to competitors, it may be difficult for a firm to deviate secretly”); United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004). This is why competitor agreements to exchange competitively sensitive information such as prices can facilitate collusion and sometimes violate Section 1 themselves. The more detailed the information, the more firm-specific, and the more transaction-specific the information is, the more likely is interdependent decision making—“tacit collusion.” E.g., Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001).

(e) The size and frequency of transactions—The larger and less frequent are the transactions, the more likely collusion is. E.g., Merger Guidelines § 2.12; B. F. Goodrich Co., 110 F.TC. 207 (1988).

(f) Level of industry technology—Collusion is less likely in high-tech industries than in low-tech industries because products change more quickly in the former, making coordinated action more difficult.
(g) Importance of price as opposed to non-price variables in buyer decision making and number of competitive variables—interdependent decision making is more difficult when non-price variables (e.g., quality and service) are important and the number of competitive variables is large. E.g., *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995).

(h) In general, any factor that inhibits the competitors from “cheating” on the tacit agreement by, for example, lowering their price, tends to facilitate interdependent action. The more likely a competitor will be caught cheating on the interdependently arrived at decision, the less likely it is to deviate from the tacit agreement. *See generally Merger Guidelines* § 2.12 (“Where detection [of cheating] and punishment likely would be rapid, incentives to deviate are diminished and coordination is likely to be successful.”).

**D. Premerger Notification Requirements.**

1. Section 7A of the Clayton Act, 15 U.S.C. § 18a, requires that the parties to certain large acquisition transactions notify both the FTC and Antitrust Division of the transaction on forms prescribed by the agencies and then wait at least 30 days before consummating the transaction to provide one of the agencies the opportunity to investigate it.

2. By the end of the 30-day waiting period, the agency must either “clear” the transaction, or issue a request for additional information (called a “second-request letter”) to the parties, seeking more information about the transaction. If the agency issues a second-request letter, the parties cannot consummate the transaction until 30 days after they provide the agency with the information it requested.

3. Whether a transaction is reportable depends on the size of the parties and the size of the transaction. The acquiring party must pay a filing fee of between $45,000 and $280,000, depending on the size of the transaction. In general, the transaction is reportable if:

   a. The transaction would result in the acquiring party’s holding a total of the acquired party’s assets or voting securities of more than $253.7 million; or

   b. The acquiring party would hold a total of the acquired party’s assets or voting securities of more than $63.4 million but less than $253.7 million; and

      (1) a party with total assets or total annual sales of $126.9 million or more would hold the assets or voting securities of a party with assets or annual sales of $12.7 million or more; or

      (2) a party with total assets or annual sales of 12.7 million or more would hold the voting securities or assets of a party with assets or annual sales of $126.9 million or more.
c. The dollar figures above are indexed to U.S. gross domestic product and are adjusted yearly.

4. Sanctions for failure to comply with the premerger reporting requirements can be substantial. See, e.g., United States v. Malone, 2009-1 Trade Cas. (CCH) ¶ 76,659 (D.D.C. 2009) ($1.4 million fine).

5. See generally ABA Section of Antitrust Law, Antitrust Law Developments 388-96 (6th ed. 2007).

VI. ANTITRUST-LAW COVERAGE AND ANTITRUST EXEMPTIONS.

A. In General—There are a number of persons, actions, and situations to which the antitrust laws simply do not apply—i.e., the antitrust laws do not cover them, or they are “exempt” or “immune” from antitrust liability or damages.

1. Exemptions from antitrust coverage can be “express” (i.e., explicit in a federal statute) or “implied” (i.e., created through judicial decision making).

2. Because of this nation’s strong commitment to competition as a national economic policy, exemptions from antitrust coverage are disfavored and strictly construed. FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992); Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982); First Am. Title Co. v. Debaugh, 480 F.3d 438 (6th Cir. 2007).

B. Specific Exemptions or Lack of Coverage—The more important antitrust exemptions are the following:

1. Non-commercial activity—Because the antitrust laws, by their own terms, apply only to “trade or commerce,” they do not apply to non-commercial activity. See generally Bassett v. NCAA, 528 F.3d 426 (6th Cir. 2008); Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998), vacated in part on other grounds, 525 U.S. 459 (1999). But the antitrust laws do apply to the commercial activities of nonprofit entities. E.g., NCAA v. Bd. of Regents, 468 U.S. 85 (1985); Eleven Line, Inc. v. N. Tex. Soccer Ass’n, Inc., 213 F.3d 198 (5th Cir. 2000). Nonprofit entities are not exempt from the antitrust laws.

3. **Implied repeal**—Where an industry is heavily regulated under a federal regulatory scheme and an irreconcilable conflict exists between the antitrust laws and that regulatory scheme, the federal antitrust laws are “impliedly repealed,” but only to the minimum extent necessary to permit the regulatory scheme to work as Congress intended. E.g., *Credit Suisse Secs. (USA) v. Billing*, 551 U.S. 264 (2007); *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378 (1981); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659 (1975).

4. **State action**—In its 1943 *Parker v. Brown* decision, the Supreme Court explained that there is “nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . The Sherman Act was not intended to restrain state actions or official action directed by a state.” *Parker v. Brown*, 317 U.S. 341, 350-51 (1943); see also *Trident Int'l Corp. v. Ky.*, 467 F.3d 547, 554 (6th Cir. 2006) (explaining that “[t]he rationale behind Parker immunity is that Congress, in enacting the Sherman Act, evidenced no intent to restrain state behavior”). The state-action exemption is based not only on statutory interpretation of the Sherman Act but also on principles of federalism. From *Parker* has evolved an antitrust exemption with different requirements based on the status of the parties undertaking action that would otherwise violate the antitrust laws:

   a. Sovereign branches of state governments—Actions of the sovereign branches of state governments (the legislature, executive, and judiciary) are absolutely immune under the doctrine. *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Costco Wholesale Corp. v. Maleng*, 514 F.3d 915 (9th Cir. 2008); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 442 (4th Cir. 2006) (“First, if that party is the ‘state itself’—i.e., the state legislature or the courts—its actions ipso facto are exempt from operation of the antitrust laws.”); *Jackson Hosp. Corp. v. W. Tenn. Hosp. Co.*, 414 F.3d 608 (6th Cir. 2005).

   b. Subordinate state actors and local governmental entities—The state-action exemption applies to the actions of subordinate state actors (e.g., state agencies and local governmental entities such as counties and municipalities) if their actions are clearly articulated by a sovereign branch of the state as state policy. The state need not also supervise their activities. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *Lafaro v. N.Y. Cardiotoracic Group, PLLC*, 570 F.3d 471, 476 (2d Cir. 2009); *Elec. Inspectors, Inc. v. Village of E. Hills*, 320 F.3d 110, 118 (2d Cir. 2003) (“Local governments are not sovereign and so their actions are not automatically immune under Parker.”); rather, “municipalities that wish to avail themselves of Parker immunity must show that their regulations were authorized by the state”).

   c. Private parties—The state-action exemption applies to the conduct of private parties if the challenged conduct meets two requirements: “First, [as in the case of subordinate state and municipal entities] the challenged restraint must be one ‘clearly articulated and affirmative expressed as state policy’; second the policy must be actively supervised by the state.” *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum Co.*, 445

(1) The “clearly articulated and affirmative expressed as state policy” requirement—To meet this requirement, the state need not mandate or require the conduct in question. Rather, in general, the state must intend to replace competition with regulation; the state must authorize the conduct in question; and the state must foresee or contemplate that anticompetitive effects might result from the conduct. City of Columbia; Town of Hallie; S. Motors Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985); Lafaro v. N.Y. Cardiothoracic Group, PLLC, 570 F.3d 471 (9th Cir. 2009).

(2) The “active state supervision requirement”—The purpose for the active-state-supervision requirement is to ensure that the private parties’ activities actually reflect and promote the state’s policy rather than merely their own economic interests. FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992). To sustain the requirement, the state must have and exercise the power to approve or disapprove the conduct in question. Patrick v. Burget, 486 U.S. 94 (1988); see also Ticor; Trigon Okla. City Energy Corp. v. Okla. Gas & Elec. Co., 244 F.3d 1220 (10th Cir. 2001).

(3) If the government entity’s conduct is exempt, then private-party conduct taken in conjunction with that conduct is usually also exempt. Otherwise, plaintiffs could thwart the state’s program by suing the private parties but not the state. E.g., N.Y. Cardiothoracic Group; Elec. Inspectors, Inc. v. Village of E. Hills, 320 F.3d 110 (2d Cir. 2003); Earles v. State Bd. of Certified Pub. Accountants, 139 F.3d 1033 (5th Cir. 1998).

5. Sherman Act preemption of anticompetitive state regulation—States cannot merely grant private parties permission to engage in conduct that violates the antitrust laws. Indeed, where a state program mandates that private parties engage in conduct that, in all circumstances, results in a per se violation of Section 1, the Sherman Act preempts the state regulation. Rice v. Norman Williams Co., 458 U.S. 654 (1982); see also Fisher v. City of Berkeley, 475 U.S. 260 (1986); Grand Rapids Enters. Six Nations, Ltd. v. Beebe, 574 F.3d 929, 936 (8th Cir. 2009); KT&G Corp. v. Attorney General, 535 F.3d 1114 (10th Cir. 2008); Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007) (“To be preempted by [the Sherman] Act, a state statute must be in ‘irreconcilable’ conflict with the federal antitrust regulatory scheme. . . . The only way such a conflict can exist, according to the Supreme Court, is if the state ‘mandates or authorizes conduct that necessarily constitutes a violation . . . in all cases, or if it places irresistible pressure on a private party’ to violate those laws.”).

6. Soliciting anticompetitive governmental action: the “Noerr-Pennington” exemption. Perhaps the broadest and most important of the antitrust exemptions is that provided to parties petitioning the government to take anticompetitive action, commonly called the Noerr-Pennington or Noerr exemption after the two seminal decisions establishing the exemption. E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965). The antitrust laws simply do not apply to this type of petitioning in most circumstances. See
generally Kaiser Found. Health Plan v. Abbott Labs., 552 F.3d 1033, 1044 (9th Cir. 2009) (“The Noerr-Pennington doctrine allows private citizens to exercise their First Amendment rights to petition the government without fear of antitrust liability.”); see also Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Tal v. Hogan, 453 F.3d 1244 (10th Cir. 2006); Andrx Pharms., Inc. v. Elan Corp., 421 F.3d 1227, 1233 (11th Cir. 2005) (“A defendant is immune from Sherman Act liability for concerted efforts to petition government to pass legislation which has the effect or restraining or monopolizing trade in favor of the defendant.”).

a. The doctrine rests on both First Amendment considerations protecting governmental petitioning activities and on statutory construction—that the antitrust laws were not intended to apply to political activity. Noerr; Sosa v. DIRECTV, Inc., 437 F.3d 923 (9th Cir. 2006); GF Gaming Corp. v. City of Blackhawk, 405 F.3d 876 (10th Cir. 2005); Armstrong Surgical Cir. v. Armstrong County Mem’l Hosp., 185 F.3d 154 (3d Cir. 1999).

b. Because of its First Amendment basis, most courts hold that the exemption applies to most types of federal and state claims, not just to federal antitrust claims. E.g., BE&K Constr. Co. v. NLRB, 536 U.S. 516 (2002) (applied in labor-law context); Campbell v. PMI Food Equip. Group, Inc., 509 F.3d 776 (6th Cir. 2007) (exemption applies to tortious-interference and federal civil-rights claims); Sanders v. Brown, 504 F.3d 903 (9th Cir. 2007) (exemption applies to state antitrust claims); Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119 (3d Cir. 1999) (exemption applies to state tortious-interference and unfair-competition claims).

c. The exemption applies to petitioning of all levels of local, state, and federal governments. BE&K Constr. Co.; Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Andrx Pharms., Inc.; A.D. Bedell Wholesale Co. v. Philip Morris, Inc., 263 F.3d 239 (3d Cir. 2001); Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056 (9th Cir. 1998). But a number of courts have held that misrepresentations by petitioners that are tolerated in the legislative process (we expect politicians to lie!) will not be tolerated in an adjudicatory context. Cal. Motor Transp.; Boone v. Redevelopment Agency, 841 F.2d 886 (9th Cir. 1988); In re Burlington N., Inc., 822 F.2d 518 (5th Cir. 1987).

d. The exemption applies whether the petitioning results from concerted activity among parties or from unilateral action.

e. The exemption applies regardless of the petitioners’ anticompetitive intent. City of Columbia, 499 U.S. at 377-78 (noting that the fact that a petitioner’s motives may be selfish is irrelevant); Sanders v. Brown, 504 F.3d 903, 912 (9th Cir. 2007) (“it is inappropriate to base liability on whether a petitioner has an anticompetitive motive, because that would unduly chill speech”); Tal v. Hogan, 453 F.3d 1244, 1259 (10th Cir. 2006) (“The actual intent of the parties petitioning the government or of the government agent involved is irrelevant.”).
f. In general, the exemption applies if the petitioners are genuinely seeking governmental action and the anticompetitive effect results from that governmental action. The exemption does not apply if the restraint results from the petitioning activity itself rather than from the governmental action sought. City of Columbia; In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187 (2d Cir. 2006); Sandy River Nursing Care v. Aetna Cas., 985 F.2d 1138 (1st Cir. 1993). But, petitioning activities that themselves harm competition but are only incidental to seeking governmental action are protected. Noerr; see also Allied Tube & Conduit; Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180 (9th Cir. 2005).


h. The major exception to Noerr-Pennington immunity is the so-called “sham exception.” The Supreme Court has explained that “sham” petitioning results where “persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon”; i.e., where the petitioners’ action is not genuinely intended to obtain favorable action but to harm their competitors directly by their petitioning activity. City of Columbia, 499 U.S. at 380; Kaiser Found. Health Plan v. Abbott Labs., Inc., 552 F.3d 1033 (9th Cir. 2009); Knology, Inc. v. Insight Commc’ns Co., 393 F.3d 656 (6th Cir. 2004). Precisely what activities constitute sham petitioning is not clear, but courts have condemned the following as sham:


3. Misrepresentations in the petitioning process. Whether misrepresentations constitute a sham destroying the exemption is particularly unclear. Some decisions hold that misrepresentations, at least in adjudicatory settings, constitute sham petitioning. E.g., A Fisherman’s Best, Inc. v. Recreational Fishing Alliance, 310 F.3d 183 (4th Cir. 2002); Litton Sys., Inc. v. Am. Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983); Potters Med. Ctr. v. City Hosp. Ass’n, 800 F.2d 568 (6th Cir. 1986); St. Joseph’s Hosp. v. Hosp. Corp. of Am., 795 F.2d 948 (11th Cir. 1986). Other decisions hold the opposite, at least where the petitioners’ actual intent was to obtain governmental action. Armstrong Surgical Ctr. Some courts, taking somewhat of a middle ground, hold that the answer depends on factors such as whether the misrepresentation is so serious that it deprived the adjudication of its legitimacy. Freeman v. Lasky, Hass & Cohler, 410 F.3d 1180 (9th Cir. 2005); Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119 (3d Cir. 1999); Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056 (9th Cir. 1998); Union Oil Co., 138 F.T.C. 1 (2004) (full discussion of the FTC’s view on the scope of the exemption).
(4) Enforcement of a patent that plaintiff knows is invalid because, for example, it was obtained by fraud on the patent office. Walker Process Equip. Co. v Food Mach. & Chem. Corp., 382 U.S. 172 (1965); Nobelpharma; In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 691 (2d Cir. 2009).

(5) Sham litigation—Filing suits, even if for an anticompetitive purpose, is usually protected by the exemption.

(a) There is, however, a narrow “sham litigation” exception. In Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 (1993), the Supreme Court established a two-part test for identifying sham litigation:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively baseless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals “an attempt to interfere directly with the business relationships of a competitor.”

See also Andrx Pharms., Inc. v. Elan Corp., 421 F.3d 1227 (11th Cir. 2005); Golan v. Pingel Enter., Inc., 310 F.3d 1360 (Fed. Cir. 2002); Bayou Fleet, Inc. v. Alexander, 234 F.3d 852 (5th Cir. 2000).

(b) Several courts have held that litigation cannot be a sham if the plaintiff in that litigation (or other forms of petitioning the government) prevailed. E.g., A Fisherman’s Best, Inc., 310 F.3d at 191 (noting that “[a] successful effort to influence governmental action ‘certainly cannot be characterized as a sham’”).

(c) Several courts have applied the Prof’l Real Estate Investors test to forms of petitioning other than the filing of litigation. E.g., Armstrong Surgical Ctr.; Bayou Fleet; Bath Petrol. Storage, Inc. v. Market Hub Ptrs., L.P., 229 F.3d 1135 (2d Cir. 2000) (per curiam unpublished opinion reprinted at 2000-2 Trade Cas. (CCH) ¶ 73,061).

7. Political or social petitioning of non-governmental parties subject to First Amendment protection—The antitrust laws do not apply to activities such as political or social boycotts, where the aim is to achieve political or social ends rather than economic ends. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (boycott of white merchants to effect social change); Mo. v. Nat’l Org. for Women, Inc., 620 F.2d 1301 (8th Cir. 1980); Nat’l Org. for Women, Inc. v. Scheidler, 765 F. Supp. 2d 937 (N.D. Ill. 1991), aff’d, 968 F.2d 612 (7th Cir. 1992), rev’d on other grounds, 510 U.S. 249 (1994).

8. Labor exemption.
a. Labor unions fix prices—i.e., the level of employee wages. Normally, this activity would constitute a per se violation of Section 1, and several early cases so held. E.g., Loewe v. Lawlor, 208 U.S. 274 (1908). As a technical matter, employers participating in the collective-bargaining process would constitute co-conspirators. Because, however, of the strong national policy favoring collective bargaining, Congress, as a result of decisions such as Loewe, enacted several statutes resulting in broad antitrust exemptions for labor-union activities and collective bargaining.

b. The labor exemption arises from Sections 6 and 20 of the Clayton Act, Sections 1, 4, 5, and 13 of the Norris-LaGuardia Act, and judicial decision making.

c. There is both a “statutory” labor exemption and a “non-statutory” labor exemption:

   (1) The statutory exemption applies only to agreements between labor unions and the employees they represent, and applies only to activities where the union acts in its own self-interest. H.A. Artists & Assocs., Inc. v. Actors’ Equity Ass’n, 451 U.S. 704 (1981); Connell Constr. Co. v. Plumbers & Steamfitters Local Union 100, 421 U.S. 616 (1975).

   (2) The statutory exemption does not apply to employers, and, by itself does not exempt collective-bargaining agreements between unions and employers. As a result, to accommodate the competing interests of the labor laws and antitrust laws, the courts created the non-statutory labor exemption, which exempts collective bargaining and collective-bargaining agreements between employers and unions from the antitrust laws. See generally Brown v. Pro Football, Inc., 518 U.S. 231 (1996); Connell Constr.; Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club, 419 F.3d 462 (6th Cir. 2005); Claret v. NFL, 369 F.3d 124 (2d Cir. 2004) (Sotomayor, J.).

   (a) The non-statutory labor exemption applies where (1) the effect on competition from the agreement is primarily on the parties to the agreement (i.e., unions and employers) and not third parties; (2) the agreement affects mandatory subjects of collective bargaining—wages, hours, and other terms and conditions of employment; and (3) the agreement results from bona fide, arms’ length negotiations between unions and employers. Claret v. NFL, 369 F.3d at 142-43 (also noting that the exemption “extends as far as necessary to ensure the successful operation of the collective bargaining process”); Sheet Metal, Roofing & Air Conditioning Contractors Ass’n, Inc. v. Local 38, Sheet Workers Int’l Ass’n, 208 F.3d 18 (2d Cir. 2000).

   (b) The exemption does not apply to agreements and schemes between unions and employers to competitively disadvantage competitors of the employers—where the primary effect on competition is in the market for employer output rather than in the market for employee services. United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. Local Union No.3, Int’l Bhd. of Elec. Workers, 325 U.S. 797 (1945); Am. Steel Erectors, Inc. v. Local Union No. 7, 536 F.3d 68 (1st Cir.)

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(c) The exemption protects multi-employer collective bargaining (i.e., agreements among employers in negotiating collectively with unions), as well as collective bargaining between unions and individual employers. Brown v. Pro Football; Clarett v. NFL.

(d) But for the exemption to apply, there must be an employer-employee relationship between the parties participating in the collectively bargaining. The exemption does not apply to collective bargaining between firms and independent contractors. Los Angeles Meat & Provision Drivers Union, Local 626 v. United States, 371 U.S. 94 (1962); Spence v. Se. Alaska Pilots Ass’n, 789 F. Supp. 1007 (D. Alas. 1990). So, for example, the exemption does not apply to collective bargaining by competing physician practices and health plans over rates the health plans will pay the physicians.

9. Business of insurance—There is a limited antitrust exemption for the “business of insurance,” embodied in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, which resulted from a 1944 Supreme Court decision holding that the antitrust laws apply to insurance and that an agreement among insurers as to their premiums constituted an unlawful price-fixing agreement. United States v. South-Eastern Underwriters Ass’n, 322 U.S. 533 (1944).

a. It is the “business of insurance,” not “insurance companies,” that is exempt. Hartford Fire Ins. Co. v. Cal., 509 U.S. 764 (1993); Arroyo-Melecio v. Puerto Rican Am. Ins. Co., 398 F.3d 56 (1st Cir. 2005). Accordingly, not all activities of insurance companies are exempt, and the exemption can apply to the activities of non-insurance companies to the extent their activities constitute the “business of insurance.”

b. For the exemption to apply:

(1) First, the conduct in question must constitute or be part of the “business of insurance.” Conduct constitutes the business of insurance if:

(a) It spreads or transfers risk;

(b) It is an integral part of the relationship between the insurer and its insureds; and

(c) It involves only firms within the insurance industry.


(2) Second, the business of insurance must be regulated by the state. See, e.g., FTC v. Travelers Health Ass’n, 362 U.S. 293 (1960). Even the most general state regulation of insurance seems sufficient, and it need not even be enforced. FTC v. Nat’l Cas. Co., 357 U.S. 560 (1958); Arroyo-Melecio; Ocean State Physicians Health Plan v. Blue Cross & Blue Shield, 883 F.2d 1101 (1st Cir. 1989).

(3) Third, the conduct must not constitute “any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.” 15 U.S.C. § 1013(b). For purposes of the McCarran Act, these terms mean a refusal to deal seeking “to ‘coerce the target of the boycott into acceding to certain demands by means of a refusal to deal with the target in collateral, unrelated transactions.’” Arroyo-Melecio, 398 F.3d at 70; see also Hartford Fire Ins.; Gilchrist, 390 F.3d at 1335 (explaining that the terms encompass a “refusal to deal in a collateral transaction as a means to coerce terms respecting a primary transaction”); Slagle v. ITT Hartford, 102 F.3d 494 (11th Cir. 1996).


a. “[L]ocal government” is defined broadly to include all general function and special-function governmental units established by state law. This includes cites; towns; counties; and water, sanitary, school, and hospital districts. 15 U.S.C. § 34(1).

b. In addition to the local governmental unit itself, the exemption from damages applies to individuals (whether or not employees of the local government) where the challenge is to conduct based on their official action directed by a local government. It also applies to any official or employee of the local government acting in his or her official capacity. Id. § 36(a). An individual’s actions are directed by the local government if they were authorized and supervised by that government. GF Gaming Corp. v. City of Black Hawk, 405 F.3d 876 (10th Cir. 2005); Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp. Sys., Inc., 853 F.2d 1139 (4th Cir. 1988) (Powell, J.). State authorization is unnecessary. Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2d Cir. 1986).

c. The defendants’ motives are immaterial. GF Gaming; Cohn v. Bond, 953 F.2d 154 (4th Cir. 1991).

11. Health Care Quality Improvement Act—In the health-care sector, another exemption from damages, but not liability, is the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §§ 11101-52, which applies primarily (but not solely) to the decisions of hospitals in peer-review proceedings affecting the staff privileges of physicians.
a. In the late 1970s and 1980s, a huge number of physicians filed antitrust actions against hospitals and their medical staffs when the hospital adversely affected the physician’s staff privileges, either by denying his or her application for privileges or by revoking, suspending, or terminating those privileges through the hospital/medical-staff peer-review credentialing process. See generally 2 John J. Miles, Health Care & Antitrust Law, Ch. 10 (Supp. 2009). In Patrick v. Burget, 486 U.S. 94 (1988), the Supreme Court held (at least in the circumstances there) that the state-action exemption did not provide the hospital and members of its medical staff engaging in peer review with any protection from suit or antitrust damages. As a result of this decision, Congress enacted HCQIA. See Liu v. Bd. of Trustees of the Univ. of Ala., 2009 WL 2233092 (11th Cir., Jul. 28, 2009) (unpublished opinion) (explaining the purpose for HCQIA). Although HCQIA is aimed at providing protection primarily in the context of hospital/medical-staff credentialing, it applies to physician exclusions from other relationships as well when the exclusion is based on the physician’s professional competence or conduct.

b. HCQIA’s exemption from damages applies to all types of federal and state cases, regardless of the type of claim or legal theory, except civil-rights cases and cases brought by the federal government or state attorneys general. 42 U.S.C. § 11111(a)(1).

c. The exemption from damages applies to the “professional review actions” of “professional review bodies” in the course of “professional review activities” taken with respect to “physicians,” as those terms are defined by HCQIA. See id. § 11151; Moore v. Williamsburg Reg’l Hosp., 560 F.3d 166 (4th Cir. 2009). The exemption applies to the professional review body, its staff, persons under contract with it, and persons assisting it in the professional review action.

d. The exemption applies if the professional review action was taken:

(1) with the reasonable belief that it would further quality health care;

(2) after a reasonable effort to obtain the relevant facts;

(3) after adequate notice and hearing procedures for the affected physician; and

(4) with the reasonable belief it was warranted by the known facts. Id. § 11112(a).

e. In determining whether the professional review action meets these requirements, the court applies a purely objective standard. See, e.g., Wahi v. Charleston Area Med.Ctr., 562 F.3d 599 (4th Cir. 2009). Accordingly, the reviewers’ motives, feelings toward the subject of the review, and biases are irrelevant. Poliner v. Tex. Health Sys., 537 F.3d 368, 379 (5th Cir. 2008) (plaintiff’s “urging of purported bad motives or evil intent or that some hospital officials did not like him provides no succor”); Lee v. Trinity Lutheran Hosp., 408 F.3d 1064 (8th Cir. 2005).
f. The reviewers’ conclusion about the affected physician’s professional competence or conduct need not be correct for the exemption to apply. *Poliner*, 537 F.3d at 378 (HCQIA “does [not] require that the conclusions reached by the reviewers were in fact correct”); *Brader v. Allegheny Gen. Hosp.*, 167 F.3d 840 (3d Cir. 1999).

g. HCQIA establishes a rebuttable presumption that the professional review action met the four requirements above. 42 U.S.C. § 11112(a). Accordingly, the adversely affected physician bears the burden to rebut the presumption by a preponderance of the evidence. *E.g.*, *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 202 (3d Cir. 2005) (“[t]he HCQIA places a high burden on physicians to demonstrate that a professional review action should not be afforded immunity.” creating “an unusual burden on summary judgment . . ., as the plaintiff bears the burden of proving that the professional review process was not reasonable and thus did not meet the standard for immunity”); see also *Johnson v. Christus Spohn*, 2009 WL 1766557 (10th Cir., June 30, 2009) (per curiam unpublished opinion); *Poliner; Myers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461 (6th Cir. 2003).

h. Most courts hold that the exemption’s applicability is a question of law for the court to decide, usually on summary judgment. *E.g.*, *Bryan v. James E. Holmes Reg’l Med. Ctr.*, 33 F.3d 1318 (11th Cir. 1994).

i. If the professional review action meets the standards listed above, if the defendants substantially prevailed in the adversely affected physician’s subsequent suit, and if the suit was “frivolous, unreasonable, without foundation, or in bad faith,” the court “shall” award defendants their attorneys fees and costs. 42 U.S.C. § 11113. But courts seem reluctant to award defendants their attorneys fees. *See Stratienko v. Chattanooga-Hamilton County Hosp. Auth.*, 2009 WL 2168717 (E.D. Tenn., Jul., 16, 2009); *Gordon v. Lewistown Hosp.*, 2006-2 Trade Cas. (CCH) ¶ 75,454 (M.D. Pa. 2006).


VII. PRIVATE ACTIONS FOR DAMAGES UNDER THE ANTITRUST LAWS.

embodies a number of requirements that plaintiffs must prove before they may recover damages.


**C. Liability versus Recovery of Damages**—Don’t confuse issues relating to liability under, e.g., Sections 1 and 2 of the Sherman Act, with issues relating to relief (e.g., recovery of damages under Section 4 of the Clayton Act).

**D. Elements of a Section 4 Claim for Damages.**

1. **Person**—Section 1 of the Sherman Act, 15 U.S.C. § 12 defines “persons” as including corporations and associations.

   a. The Supreme Court has held that states and municipalities are also “persons” for purposes of Section 4(a), and thus they may recover treble damages. *Ga. v. Pa. R.R. Co.*, 324 U.S. 439 (1945) (states); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (municipalities).

   b. The federal government is not a “person” for purposes of Section 4(a). *United States v. Cooper Corp.*, 312 U.S. 600 (1941). In reaction to the *Cooper Corp.* decision, Congress enacted Section 4A of the Clayton Act, 15 U.S.C. § 15a, which explicitly authorizes the federal government to sue for treble damages (but not attorneys fees).

   c. In *Pfizer v. Gov’t of India*, 434 U.S. 308 (1978), the Supreme Court held that foreign governments are “persons” for purposes of Section 4(a). As a result, Congress enacted Section 4(b) of the Clayton Act, 15 U.S.C. § 15(b), which permits recovery of damages by foreign governments, but limits them to single damages in most situations.

   d. In 1976, Congress enacted Section 4C of the Clayton Act, 15 U.S.C. § 15c, which authorizes state attorneys general to bring *parens patriae* suits for damages on behalf of their citizens injured by antitrust violations.

2. **Injury**—This simply means that the plaintiff experienced some loss. Typically, for example, a price-fixing agreement among a firm’s competitors in which it is not a participant will not injure it; indeed, the firm benefits from the violation because the supracompetitive price set by the cartel often permits non-participating competitors to raise their prices or increase their sales under the “umbrella” of the conspirators’ price increase. *E.g.*, *JTC Petrol. Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Arista Records LLC v. Lime Group, LLC*, 532 F. Supp. 2d 556 (S.D.N.Y. 2007). Likewise, if
the defendants’ conduct is unsuccessful in achieving anticompetitive effects, typically no plaintiff is injured even if defendant’s conduct is unlawful. E.g., Davric Maine Corp. v. Rancourt, 216 F.3d 143 (1st Cir. 2000).

3. “Business or property”—As Section 4(a) provides, plaintiff’s injury must be to its “business or property.” The Supreme Court has held that the phrase includes anything of material value. Reiter v. Sonotone Corp., 442 U.S. 330 (1979). It includes things such as money and employment, Int’l Bhd. of Teamsters, Local 734 Health & Welfare Fund v. Philip Morris, Inc., 196 F.3d 818 (7th Cir. 1999), but does not include personal injuries, Tal v. Hogan, 453 F.3d 1244, 1254 (10th Cir. 2006) (noting that the phrase “business or property” excludes personal injuries, derivative injuries such as loss in stock value or employment opportunities, injuries to reputation or dignity, and emotional damages).

4. Causation—The injury for which plaintiff seeks damages must have been caused by the antitrust violation. There must be some direct causal connection between the antitrust violation and plaintiff’s injury—causation is the bridge between the two. A plaintiff cannot recover where the unlawful conduct did not cause its injury. E.g., Heary Bros. Lightning Protection Co. v. Lightning Protection Inst., 262 Fed. App’x. 815 (9th Cir. 2008); In re Canadian Imp. Antitrust Litig., 470 F.3d 785 (8th Cir. 2006).

   a. The antitrust violation need only be a “material” cause of plaintiff’s injury, not the sole cause. E.g., J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 485 F.3d 880, 887 (6th Cir. 2007) (“The plaintiff ‘bears the burden of showing that the violation was a material cause of its injury, a substantial factor in the occurrence of damages or that the violation was the proximate cause of the damage.’ . . . [T]he defendant’s actions need not be the sole proximate cause of any alleged injuries, but ‘must be proved as a matter of fact with a fair degree of certainty.’”); El Aguila Food Prods., Inc. v. Gruma Corp., 131 Fed App’x. 450 (5th Cir. 2005); Rossi v. Standard Roofing Co., 156 F.3d 452 (3d Cir. 1998).

   b. To be a “material cause,” the violation must have been a “substantial contributing factor.” E.g., Read v. Med. X-Ray Ctr., 110 F.3d 543, 545 (8th Cir. 1997) (“A material cause is a ‘substantially contributing factor’”); Irvin Indus., Inc. v. Goodyear Aerospace Corp., 947 F.2d 241 (2d Cir. 1992) (explaining that the violation must be a “substantial or materially contributing factor”).


   d. Many courts hold that plaintiff must prove causation with a “fair degree of certainty.” J.B.D.L. Corp.; Taylor Pub’l g Co. v. Josten’s, Inc., 216 F.3d 465 (5th Cir. 2000).
5. Antitrust injury—Antitrust injury is one of the most important, and sometimes most confusing, concepts in antitrust law. It is a key essential element in every antitrust action for damages, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (the seminal decision), and for injunctive relief, *Cargill Corp. v. Montfort of Colo.*, 479 U.S. 104 (1986). Conduct constituting a violation may injure the plaintiff, but the plaintiff cannot recover damages for the injury unless the injury constitutes “antitrust injury.”

a. Antitrust injury is “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Brunswick Corp.*, 429 U.S. at 489.

b. The type of injury the antitrust laws were intended to prevent and what makes defendants’ acts unlawful are the violation’s anticompetitive effects. Thus, plaintiff’s injury must have resulted from the challenged conduct’s anticompetitive effects, not from some other cause.

(1) Therefore, for antitrust injury to result, there must be a violation of the antitrust laws (although if there is no antitrust violation, the antitrust-injury inquiry seems moot). And for a violation of the antitrust laws (and antitrust injury), there must be an injury to market-wide competition, not just to competitors. *Brunswick Corp.*, 429 U.S. at 488 (“[t]he antitrust laws . . . were enacted for ‘the protection of competition, not competitors’”) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis added); *CBC Cos. v. Equifax, Inc.*, 561 F.3d 569 (6th Cir. 2009) (explaining that “the key inquiry is whether competition—not necessarily a competitor—suffered as a result of the challenged business practice”; no antitrust injury results unless plaintiff’s injury arises from an anticompetitive aspect of the challenged conduct).

(2) So to constitute antitrust injury, “[t]he injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.” *Brunswick Corp.*, 429 U.S. at 489. In other words, antitrust injury is injury a plaintiff suffers from the competition-reducing effect of the violation. *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 344 (1990) (“The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant’s behavior.”); *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117 (2d Cir. 2007); *Harper v. Colo. State Bd. of Land Comm’rs*, 248 Fed. App’x. 4 (10th Cir. 2007).

(3) No antitrust injury results if the alleged conduct increases competition (or is competitively benign), even if it injures plaintiff and even if it is unlawful. *Theme Promotions, Inc. v. News Am. Mktg. Fsi*, 539 F.3d 1046, 1055 (9th Cir. 2008) (“If the injury flows from aspects of defendant’s conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant’s conduct is illegal.”); *James Cape & Sons v. PPC Constr. Co.*, 453 F.3d 396 (7th Cir. 2006); *Dial-A-Car, Inc. v. Transp., Inc.*, 82 F.3d 484 (D.C. Cir. 1996). Likewise, antitrust injury does not result.
from conduct permitting plaintiffs’ competitors to compete more effectively, even if it injures plaintiff. *Glen Holly Entm’t, Inc. v. Tiktronix, Inc.*, 352 F.3d 357 (9th Cir. 2003); *Midwest Gas Servs., Inc. v. Ind. Gas Co.*, 317 F.3d 703 (7th Cir. 2003); *Balaklaw v. Lovell*, 14 F.3d 793 (2d Cir. 1994).

(4) If plaintiff would have suffered the same injury from the challenged conduct, even had it been lawful, its injury is not antitrust injury. *Brunswick Corp; Valley Prods. Co. v. Landmark*, 128 F.3d 398 (6th Cir. 1997); *Anago, Inc. v. Technol Med. Prods., Inc.*, 976 F.2d 248 (5th Cir. 1992).

(5) To recover damages, plaintiff must prove antitrust injury even if the challenged conduct is per se unlawful and thus proof of liability requires no proof of any actual competition-reducing effect. *Atl. Richfield; Pace Elecs., Inc. v. Canon Computer Sys., Inc.*, 213 F.3d 118 (3d Cir. 2000).

6. *Antitrust standing*—To recover damages, plaintiff must show that it has “antitrust standing”—i.e., that it is a proper party to bring the case. See generally *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983) (the seminal decision). The antitrust-standing requirement significantly limits the universe of parties injured by the violation who may recover damages for the violation. *E.g., Del. Valley Surgical Supply, Inc. v. Johnson & Johnson*, 523 F.3d 1116 (9th Cir. 2008).

a. Antitrust standing is significantly narrower than constitutional standing under Article III of the Constitution. *Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006); *Gerlinger v. Amazon.com, Inc.*, 526 F.3d 1253 (9th Cir. 2008); *Ross v. Bank of Am., N.A.*, 524 F.3d 217 (2d Cir. 2008); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007) (en banc); *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302 (4th Cir. 2007). Article III standing requires only proof of an injury in fact that is actual or imminent and a likely favorable judicial response preventing or redressing the injury. *Summers v. Earth Inst.*, 129 S.Ct. 1142 (2009). *Antitrust standing* requires more.

b. Antitrust standing is a threshold question of law determined from the face of the complaint. E.g., *Del. Valley Surgical Supply; JES Props., Inc. v. USA Equestrian, Inc.*, 458 F.3d 1224 (11th Cir. 2006). Most courts hold that a defendant can challenge plaintiff’s antitrust standing at any stage of the case. *Glen Holly; Hyland v. Homeservs. of Am., Inc.*, 2007-2 Trade Cas. (CCH) ¶ 75,795 (W.D. Ky. 2007). But unlike constitutional standing, antitrust standing is not jurisdictional.

c. Courts examine and balance six factors in determining whether a plaintiff has antitrust standing. See *Associated General Contractors; Ross v. Bank of Am., N.A.*, 524 F.3d 217 (2d Cir. 2008); *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677 (2d Cir. 2009); *Novell, Inc. v. Microsoft Corp.; Paycom Billing Servs., Inc. v. MasterCard Int’l, Inc.*, 467 F.3d 283 (2d Cir. 2006):

(1) Degree of causal connection between the violation and plaintiff’s injury;
(2) Defendant’s intent and whether it intended to harm plaintiff;

(3) Nature of the injury, particularly whether plaintiff was a competitor or customer in the relevant market in which competition was adversely affected by the alleged violation;

(4) Directness of the injury, including whether other victims were injured more directly than the plaintiff and are likely to sue;

(5) The degree to which plaintiff’s damage claim is speculative; and

(6) Any risk of duplicative recoveries and problems in apportioning damages.

d. Many courts have synthesized these elements into two requirements: (1) that plaintiff suffered antitrust injury; and (2) that plaintiff is an efficient enforcer of the antitrust laws—meaning primarily that the plaintiff is the party most directly injured by the violation or the party most likely to sue to redress the violation. *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117 (2d Cir. 2007); *Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991).

e. Antitrust injury is always a necessary, but not sufficient, condition for antitrust standing. *NicSand, Inc. v. 3M Co.*, *In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785 (8th Cir. 2006); *Tal v. Hogan*; see also *Theme Promotions*, 539 F.3d at 1055 (“Several factors are relevant in considering whether a plaintiff has established antitrust standing. The most important is whether the plaintiff has established antitrust injury.”). Factor (3) above reflects the antitrust-injury requirement.

f. In most situations, a plaintiff must be a competitor or customer in the relevant market to have antitrust standing (or to suffer antitrust injury). *Jebaco, Inc. v. Harrah’s Operating Co.*, 587 F.3d 314, 320 (5th Cir. 2009); *Norris v. Hearst Trust*, 500 F.3d 454 (5th Cir. 2007); *Winstar Commc’ns, LLC v. Equity Office Props., Inc.*, 170 Fed. Appx. 740 (2d Cir. 2006); *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417 (5th Cir. 2001); *Amarel v. Connell*, 102 F.3d 1494 (9th Cir. 1996).

(1) The primary exception to this rule arises where plaintiff is not a customer or competitor in the relevant market but its injury is “inextricably intertwined” to the injury to competition in the relevant market in the sense that that the plaintiff was the direct target of the violation and injury to it was necessary to injure competition in the relevant market. *Blue Shield v. McCready*, 457 U.S. 465, 484 (1982); see also *Novell, Inc. v. Microsoft Corp.*, *Caruna v. Gen. Motors Corp.*, 204 Fed. App’x. 511 (6th Cir. 2006). There is fairly wide disparity, however, in the ways the courts interpret and apply the *McCready* principle.

g. There are several categories of plaintiffs who rarely have antitrust standing:
(1) Indirect purchasers suing for overcharges—An “indirect purchaser” is a purchaser from a seller (the “direct purchaser”) who itself was a purchaser from the parties engaging in the antitrust violation. Subject to several very narrow exceptions, indirect purchasers lack antitrust standing to recover damages from those engaging in the antitrust violation, even if the direct purchaser passed-on some of the overcharge it paid to the indirect purchaser, injuring it. See Ill. Brick Co. v. Ill., 431 U.S. 720 (1977); see also Kan. v. UtiliCorp. United, Inc., 497 U.S. 199 (1990); In re New Motor Vehicles Canadian Exp. Antitrust Litig., 533 F.3d 1 (1st Cir. 2008); Kendall v. VISA U.S.A., Inc., 523 F.3d 1116 (9th Cir. 2008). There are three very narrow exceptions to the no-antitrust-standing-for-indirect-purchasers principle:

(a) Where the contract between the direct purchaser and indirect purchaser is a pure cost-plus contract, so it is obvious that the entire overcharge paid by the direct purchaser was passed-on to the indirect purchaser, Kan. v. UtiliCorp United; Del. Valley Surgical Supply;

(b) Where the direct purchaser was a co-conspirator of the sellers in the unlawful scheme, Del. Valley Surgical Supply; Howard Hess Dental Labs., Inc. v. Dentsply Int’l, Inc., 424 F.3d 363 (3d Cir. 2005); and

(c) Situations in which the direct purchaser is effectively controlled by the co-conspirators, Del. Valley Surgical Supply; Howard Hess Dental Labs.; City of Moundridge v. Exxon Mobil Corp., 471 F. Supp. 2d 20 (D.D.C. 2007).

(d) In addition, many states have enacted state antitrust statutes specifically granting indirect purchasers antitrust standing to recover damages in cases brought under the state’s antitrust laws. The federal antitrust laws do not preempt these statutes. Cal. v. ARC Am. Corp., 490 U.S. 93 (1989).

(2) Typically, officers, directors, shareholders, employees, creditors, distributors, brokers, sales representatives, and suppliers of a business injured by an antitrust violation lack antitrust standing because their injuries are usually derivative of the injuries to the business. For citations to cases, see 1 John J. Miles, Health Care & Antitrust Law § 9:7 at 9-75 n.27 (Supp. 2008).

h. In determining whether potential entrants—i.e., firms planning to enter the market but which have not yet entered—have antitrust standing, courts examine (1) their background and experience in the prospective business, (2) their affirmative actions to engage in the proposed business, (3) their ability to finance entry, and (4) their consummation of contracts necessary for entry. E.g., Cyntegra, Inc. v. IDEXX Labs., Inc., 322 Fed. App’x. 569 (9th Cir. 2009) (per curiam).

7. Fact of damage—Plaintiff must prove “fact of damage”—i.e., that it suffered some damage from the antitrust violation—with “reasonable certainty.” E.g., Continental Airlines, Inc. v. United Airlines, Inc., 136 F. Supp. 2d 542 (E.D. Va. 2001), vacated on

8. Amount of damages—Plaintiff must then prove the amount of its damages. But once plaintiff proves fact of damage with reasonable certainty, its burden in proving amount of damages is lenient and relaxed. The Supreme Court and lower courts have explained that plaintiff need not prove its amount of damages with exactness but need only provide a reasonable estimate. The estimate, however, cannot be based on conjecture, guesswork, or speculation. Bigelow v. RKO Pictures, Inc., 327 U.S. 251 (1946); see also Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990); In re Scrap Metal Antitrust Litig., 527 F.3d 517 (6th Cir. 2008); El Aguila Food Prods., Inc. v. Gruma Corp., 131 Fed. App’x. 450 (5th Cir. 2005); Rossi v. Standard Roofing, Inc., 156 F.3d 452 (3d Cir. 1998).

   a. The basic task in calculating damages is to estimate plaintiff’s situation had the violation not occurred. The measure of damages might be lost profits, the value of plaintiff’s business, or the amount plaintiff was overcharged as a result of the violation, depending on the type of antitrust violation, the context in which it occurred, and its effect on plaintiff. Expert witnesses (economists and accountants) are almost always necessary, and damages can be estimated using various methodologies, depending on the situation. See generally ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues (1996).

   b. In many cases, plaintiff’s damages will result from both lawful and unlawful causes. A plaintiff, of course, can recover only damages resulting from unlawful conduct, see, e.g., El Aguila Food Prods., and, if possible, it must segregate or disaggregate its damages into those resulting from unlawful conduct and those resulting from lawful conduct. Id.; Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000); In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781 (7th Cir. 1999); In re Linerboard Antitrust Litig., 497 F. Supp. 2d 666 (E.D. Pa. 2007).

   c. In addition, plaintiff has a duty to mitigate its damages to the extent it reasonably can, although defendant bears the burden of showing that plaintiff failed to do so. E.g., Pierce v. Ramsay Winch Co., 753 F.2d 416 (5th Cir. 1985).

E. Statute of Limitations—The statute of limitations for recovery of damages in federal antitrust cases is four years. Section 4B of the Clayton Act, 15 U.S.C. § 15b.

1. As a general rule, the statute of limitations begins to run at the time of an unlawful act that injures plaintiff. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971); Travel Agent Comm’n Antitrust Litig., 583 F.3d 896, 902 (6th Cir. 2009) (stating general rule and explaining that the statute begins to run at the time of the cause of injury, not when plaintiff feels its effects); RX.com v. Medco Health Solutions, Inc., 322 Fed. App’x. 394 (5th Cir. 2009); Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204 (3d Cir. 2008); GO Computer, Inc. v. Microsoft Corp., 508 F.3d 170 (4th Cir. 2007). The statute of limitations is an affirmative defense; accordingly, the
defendant must plead it in its answer, and it bears the burden of persuasion to prove that it bars plaintiff’s action.

2. Several events, however, can extend, restart, or begin a new limitation period:

a. Continuing violations—Continuing violations result when a plaintiff is repeatedly injured by the violation over time after the initial violation, including, for example, new acts that are part of a “continuing conspiracy.” Each new injury resulting from the continuing violation starts a new limitations period as to damages from that act but not for previous acts. E.g. Hazeltine Research; Toledo Mack Sales & Serv.; Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073 (10th Cir. 2006). But to start a new limitations period, the later act must (1) be a new and independent act, not merely a reaffirmation of a previous act; and (2) inflict new and accumulating injury on plaintiff. Champagne Metals; Varner v. Peterson Farms, 371 F.3d 1011 (8th Cir. 2004); DXS, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462 (6th Cir. 1996); Kaw Valley Elec. Co-op Co. v. Kan. Elec. Power Co-op, Inc., 872 F.2d 931 (10th Cir. 1989). The circuits differ on what acts are sufficient to start a new limitations period.

b. Fraudulent concealment—If the defendants undertook affirmative conduct to conceal the violation that injured plaintiff, the statute of limitations does not begin to run until the time at which plaintiff knew, or should have known, about the violation. Fraudulent concealment, which Fed. R. Civ. P. 9(b) requires the plaintiff to allege with particularity, requires the plaintiff to prove (1) affirmative acts by the defendants to conceal their conduct; (2) that plaintiff did not discover the facts forming the basis of its claim during the limitations period; and (3) that plaintiff exercised due diligence in attempting to discover the facts and the violation. GO Computer, Inc. v. Microsoft Corp., 508 F.3d 170 (4th Cir. 2007); Hamilton County Bd. of Comm’rs v. NFL, 481 F.3d 310 (6th Cir. 2007); Morton’s Mkt., Inc. v. Gustafson’s Dairy, Inc., 198 F.3d 823 (11th Cir. 1999). The circuits differ about what constitutes the requisite affirmative acts to conceal and about what the plaintiff must show to prove its due diligence to discover the violation.

c. Speculative damages—The limitations period does not begin to run until plaintiff’s damages are reasonably ascertainable. Hazeltine Research; Midwestern Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265 (8th Cir. 2004). But mere uncertainty as to the extent or amount of damages, rather than the fact of damages, is insufficient to toll the statute. E.g., Kabealo v. Huntington Nat’l Bank, 17 F.3d 822 (6th Cir. 1994).

d. Federal government actions—Section 5(i) of the Clayton Act, 15 U.S.C. § 16(i), provides that the limitations period is tolled during a government enforcement action and for one year thereafter with regard to a subsequent private civil action for damages “based in whole or in part on any matter complained of” in the government’s suit. For discussions of this provision and how it applies, see Minn. Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965); Novell v. Microsoft Corp., 505 F.3d 302 (4th Cir. 2007); In re Evanston Nw. Healthcare Corp., 2008-1 Trade Cas. (CCH) ¶ 76,182 (N.D. Ill. 2008).
F. In Pari Delicto Defense—“In pari delicto” means “of equal fault,” i.e., the plaintiff itself was a participant in the unlawful conduct. Courts have rejected this, as a general matter, as a defense in antitrust cases. Perma Life Mufflers, Inc. v. Int’l Parts Corp., 392 U.S. 134 (1968); Tidmore Oil Co. v. BP Oil Co., 932 F.2d 1384 (11th Cir. 1991). Some courts have, however, applied a so-called “complete involvement” defense, under which the plaintiff is precluded from recovering damages where it bore at least equal responsibility for the violation. See, e.g., Howard Hess Dental Labs., Inc. v. Dentsply Int’l, Inc., 424 F.3d 363 (3d Cir. 2005) (not deciding issue because plaintiffs were not substantially responsible for the violation); Sullivan v. NFL, 34 F.3d 1091 (1st Cir. 1994); Blackburn v. Sweeney, 53 F.3d 825 (7th Cir. 1995); Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276 (9th Cir. 1976).

G. Indirect-Purchaser Defense—We saw above that indirect purchasers from those violating the antitrust laws lack antitrust standing because, in effect, the antitrust laws deem that the direct purchaser suffers all the injury from the violation, even if it passes-on some of the overcharge to its customers. That principle resulted from an earlier Supreme Court decision holding that antitrust violators cannot defend against a direct purchaser’s damage claim by arguing that it passed-on the entire amount of the overcharge resulting from the violation to its customers, the indirect purchasers. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968). So there is no “pass-on” defense to damage claims, and the effect of the indirect-purchaser doctrine on plaintiffs and defendants is symmetric.

H. Liability.

1. Joint and several liability—Defendants in civil antitrust cases are jointly and severally liable for any damages. Plaintiffs are not required to sue all participants in the violation and may recover all damages awarded from any of the defendants, regardless of that defendant’s degree of responsibility for causing plaintiff’s injury. E.g., Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Paper Sys., Inc. v. Nippon Paper Indus. Co., 281 F.3d 629 (7th Cir. 2002).


3. Contribution—There is no right of contribution among defendants in antitrust cases. Thus, where all defendants are found liable but plaintiff seeks to recover the entire amount of the damages from only one, that one cannot successfully sue the others to force them to pay any part of the judgment. Tex. Indus.
I. Effect of Prior Government Judgments—Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), provides that a *litigated* final judgment in a criminal or civil antitrust action by the United States finding that a defendant violated the antitrust laws is prima facie evidence of the violation in subsequent private civil suits in which the judgment would serve as an estoppel between the parties. *See Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558 (1951); *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024 (9th Cir. 2001). Section 5(a), however, does not apply to consent orders and decrees, or to *nolo contendere* pleas.

J. Injunctive Relief—Section 16 of the Clayton Act, 15 U.S.C. § 26, provides that plaintiffs may “sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust law . . ., and upon . . . a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.” *See In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008).

1. The Supreme Court explained the requirements for a permanent injunction in *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006), a non-antitrust case: “A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”

2. Although the requirements for preliminary injunctive relief vary to some extent from circuit to circuit (for the different requirements, *see* 1 John J. Miles, *Health Care & Antitrust Law* § 9:15 at 9-137 n.5 (Supp. 2008)), all require some combination of: (a) likelihood of success on the merits, (2) irreparable injury, (3) balance of hardships favoring the moving party, and (4) the public interest. *E.g.*, *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112 (2d Cir. 2005); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517 (4th Cir. 2003); *Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 325 F.3d 712 (6th Cir. 2003).

3. District courts have substantial discretion in determining whether to issue preliminary injunctions, *e.g.*, *Coastal Fuels, Inc. v. Caribbean Petrol. Corp.*, 990 F.2d 25 (1st Cir. 1993), and their decisions are reviewed under the abuse-of-discretion standard, *e.g.*, *Theme Promotions, Inc. v. News Am. Mktg. Fsi*, 539 F.3d 1046 (9th Cir. 2008); *Samuel v. Herrick Mem’l Hosp.*, 201 F.3d 830 (6th Cir. 2000).

**RECOMMENDED ANTITRUST AND ECONOMICS RESOURCES**


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