1 Defining antitrust violations in the United States

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§ 1.01 Introduction

Private lawsuits have played a critical role in the enforcement of U.S. antitrust laws ever since the Sherman Act was enacted in 1890. The Supreme Court and federal and state enforcement authorities have repeatedly recognized the role Congress envisioned for the private plaintiff when it provided private parties a treble-damage remedy. As the Supreme Court put it, “the purpose of giving private parties treble-damage and injunctive remedies

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Defining antitrust violations in the United States

was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.”

This central role is reflected in the number of private cases and their success. Between 1975 and 2010, private antitrust litigants filed more than 30,000 cases in federal courts, accounting for more than 75 percent of all federal antitrust cases filed during that period. Between 1990 and 2007, private plaintiffs recovered more than $18 billion in damages. As a result of its domination of federal antitrust dockets, private litigation has profoundly affected the substantive law of antitrust. Over the last four decades, the Supreme Court has decided 90 antitrust cases. Of these, more than two-thirds were initiated by private plaintiffs.

This chapter outlines the elements the private antitrust plaintiff must prove in litigating antitrust claims. While the focus is on federal law, state law will be discussed briefly, primarily where it diverges from federal law. The chapter is organized along two main themes: (1) joint conduct among two or more actors and (2) unilateral or single-firm conduct. This structure mimics the federal Sherman Act, which separately regulates concerted conduct (under § 1) and single-firm conduct (under § 2).

§ 1.02 Restraints of trade: Agreements that restrict competition

Under federal law, agreements that restrict competition are typically evaluated under § 1 of the Sherman Antitrust Act, which declares illegal “[e]very contract, combination in the

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2 Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130–31 (1969); see also Perma Life Mufflers Inc. v. Int’l Parts Corp., 392 U.S. 134, 139 (1968) (“[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.”). In criminal prosecutions brought by the Department of Justice’s Antitrust Division, the Division typically waives the Sentencing Guidelines requirement that the defendant pay restitution to victims because compensation is available through private litigation. See, e.g., Plea Agreement in United States v. Hsu, No. CR 11-0061 RS (N.D. Cal. Mar. 30, 2011) (“The United States and the defendant agree that, pursuant to U.S.S.G. Section 5E1.1(b), the defendant should not be ordered to pay restitution in light of the civil cases filed . . . which potentially provide for a recovery of a multiple of actual damages.”), available at http://www.justice.gov/atr/cases/f269400/269486.htm.

3 Sourcebook of Criminal Justice Statistics (2010), available at http://www.albany.edu/sourcebook/pdf/t5412010.pdf. According to the raw statistics, private cases account for more than 90 percent of all federal antitrust case filings during this period. These statistics, however, overstate the number of private actions because they individually count pre-consolidation class action filings that all challenge the same conduct. In 2010, for example, private plaintiffs filed 137 separate class actions in antitrust cases involving photochromic lens, potatoes, polyurethane foam, silver futures, and American Express. These 137 cases were ultimately consolidated into just five class actions. United States Judicial Panel on Multidistrict Litigation, available at (with log-in) https://ecf.jpml.uscourts.gov/cgi-bin/JPML_MDLCaseRpt.pl?48165531251463-L_570_0-1 (accessed June 10, 2011). Thus, the number of private antitrust cases filed in 2010 was 391, rather than the reported 523. These 391 cases accounted for just over 78 percent of all antitrust cases filed in federal courts.


5 This chapter will also briefly touch upon private challenges to mergers and acquisitions. These lawsuits comprise a very small proportion of private antitrust litigation in the United States and are rarely successful. See the discussion infra at § 1.02.5(d).
form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” To prevail on a § 1 claim, the government must prove three elements: (1) the existence of an agreement between two or more separate parties that (2) unreasonably restricts competition and (3) affects interstate or foreign commerce. A private plaintiff must additionally prove either that he has been “injured in his business or property” as a result of the unlawful agreement, or that such harm is imminent.

1.02.1 “Contract, combination, or conspiracy”

Section 1 is potentially applicable to all types of joint action between two or more persons or entities, including open agreements such as agreements among members of a joint venture, and secret agreements, such as price-fixing cartels. It applies to horizontal agreements (agreements among competitors) and to vertical agreements (agreements between participants in a supply chain, such as a manufacturer and its distributor). It also applies to coerced “agreements,” such as tying arrangements. Section 1 typically does not apply to agreements among members of a single corporate entity, such as an agreement between a parent corporation and its wholly-owned subsidiary, because the parent and subsidiary “have a complete unity of interest,” and so are incapable of conspiring under Section 1. However, the mere fact that legally distinct entities have organized themselves under a “single umbrella” or into a “structured joint venture” does not immunize them from scrutiny under § 1. Rather, the court must determine whether the agreement joins together “independent sources of decisionmaking.” If so, the entities are capable of conspiring together under § 1, and the finder of fact must determine whether the agreement unreasonably restrains trade.

A plaintiff may prove the existence of a contract, combination, or conspiracy through direct or circumstantial evidence. A secret agreement will nearly always need to be proven through circumstantial evidence. The agreement need not be in writing, and it need not even be express. But there must be sufficient evidence to prove that the parties acted

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7  Section 4 of the Clayton Act permits “any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws” to recover treble damages. 15 U.S.C. § 15(a).
8  Am. Needle, Inc. v. NFL, 560 U.S. __, 130 S. Ct. 2201, 2211–12 (2010). In “rare cases,” however, even agreements within a single firm “can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself.” Id. at 2215.
9  Am. Needle, 130 S. Ct. at 2212 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984)).
10  Id.
11  See, e.g., United States v. Wash., 586 F.2d 1147, 1153 (7th Cir. 1978) (“By its nature conspiracy is conceived and carried out clandestinely, and direct evidence of the crime is rarely available. Thus, circumstantial evidence from which the jury could reasonably infer the existence of an agreement is permissible.”).
12  United States v. General Motors Corp., 384 U.S. 127, 142–43 (1966) (“explicit agreement is not a necessary part of a Sherman Act conspiracy.”)
in concert. Specifically, the plaintiff “must present evidence that ‘tends to exclude the possibility’ that the alleged conspirators acted independently.”

It is not unlawful under the Sherman Act for businesses in a highly concentrated industry to engage in similar or even identical behavior, including pricing their products identically, so long as they have not agreed to do so. This conduct – “conscious parallelism” – can be found unlawful, however, if the plaintiff proves enough additional indicia of agreement – called “plus factors” – to enable the fact finder to infer an agreement. The following “plus factors” are often alleged, in addition to consciously parallel behavior, in support of a conspiracy allegation: (1) evidence that the defendants engaged in behavior that would have been against each defendant’s self-interest if it had acted alone, but in all defendants’ self-interest if they act together; (2) opportunities to conspire; (3) a motive to conspire, including poor economic performance prior to the conspiracy; (4) the exchange of price information; and (5) structural features that make collusion (that is, an agreement to fix prices, allocate markets, or otherwise restrain competition) more likely, such as a limited number of suppliers and a homogeneous product.

In its 2007 decision in *Bell Atlantic Corp. v. Twombly*, the Supreme Court clarified the standards for pleading a § 1 antitrust conspiracy claim in the context of conscious parallelism. The Court held that allegations of parallel conduct combined with a “bare assertion of conspiracy” were insufficient, even at the pleading stage, to sustain a complaint:

> [A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

In addition to allegations of parallel conduct, the complaint must include “plausible grounds to infer an agreement” or “enough factual matter (taken as true) to suggest that an agreement was made.” The Court concluded that the conspiracy alleged by the plaintiff was not plausible because each of the defendants had a rational economic incentive to engage unilaterally in each of the parallel acts alleged by plaintiff to be suggestive of conspiracy.

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16 *Twombly*, 550 U.S. at 556–57. In *Ashcroft v. Iqbal*, 552 U.S. 662 (2009), the Court made clear that the *Twombly* standard applies to all civil actions, and not just antitrust cases.

17 *Twombly*, 550 U.S. at 556. The Court “retired” the pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957), which had long held that in a notice pleading case, “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Twombly*, 550 U.S. at 561. For a discussion of Rule 12(b)(6) motions to dismiss pursuant to *Twombly*, see Chapter 6 of this Handbook.
In its subsequent decision in *Ashcroft v. Iqbal*, the Court explained that the plausibility standard it articulated in *Twombly* is “not akin to a probability requirement.”18 Lower court decisions interpreting *Twombly* and *Iqbal* have similarly made clear that motions to dismiss antitrust claims are still governed by the notice pleading standard of Rule 8 of the Federal Rules of Civil Procedure.19

### 1.02.2 Affecting interstate or foreign commerce

The requirement that the challenged agreement affect interstate or foreign commerce is easily satisfied. Even if an agreement is limited by its terms to conduct within a state, it will be found to affect interstate or foreign commerce if the parties or the commerce affected by the restraint have some relation to interstate or foreign commerce.20

### 1.02.3 Unreasonably restrains competition

As the Supreme Court has repeatedly recognized, § 1, if read literally, could apply to “every instance of cooperation between two people.”21 But that is not how the Court has interpreted the statute. Rather, the Sherman Act only prohibits those agreements that are “unreasonably restrictive of competitive conditions.”22 An agreement can unreasonably restrict competitive conditions if it has the effect of raising prices, restricting output, diminishing quality, limiting choice, or creating, maintaining, enhancing, or preserving an entity’s market power.

### 1.02.4 Rule of reason vs. per se analysis

In determining whether an agreement unreasonably restrains competition under § 1 of the Sherman Act, courts employ one of two standards of analysis. The “rule of reason” standard, which is used in most cases, analyzes the market and then weighs all of the harmful effects of the restraint against its benefits to determine whether the restraint “is one that promotes competition or one that suppresses competition.”23

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18 129 S. Ct. at 1949.
19 See, e.g., Aktieselskabet AF 21 Nov. 2001 v. Fame Jeans Inc., 525 F.3d 8, 15 (D.C. Cir. 2008) (“*Twombly* leaves the long-standing fundamentals of notice pleading intact”); Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663, 667 (7th Cir. 2007) (“*Twombly* did not signal a switch to fact-pleading”); Starr v. Sony BMG Music Entm’l, 592 F.3d 314, 323 (2d Cir. 2010) (“[P]laintiffs were not required to mention a specific time, place or person involved in each conspiracy allegation.”).
20 See, e.g., McLain v. Real Estate Bd., Inc., 444 U.S. 232 (1980) (local real estate brokers’ agreement to fix the price of sales commissions affected interstate commerce because the commission rates affected local residential real estate sales, which in turn affected interstate demand for financing and title insurance).
22 Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).
To prove a § 1 case under the rule of reason standard, the plaintiff must first define the relevant product and geographic markets affected by the challenged restraint, and demonstrate that the defendant or defendants have market power in those markets. Next, the plaintiff must prove that the challenged restraint has a substantial anticompetitive

The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint is imposed, the nature of the restraint, and its effect, actual or probable.

Definition of the relevant market has long been considered necessary to provide the context in which to assess the competitive effect of the restraint. Cont'l T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 53 n.21 (1977). Relevant market analysis is also employed under § 2 of the Sherman Act (monopolization), § 3 of the Clayton Act (certain tying and exclusive dealing agreements), § 7 of the Clayton Act (mergers and acquisitions), the Robinson-Patman Act (price discrimination), and § 5 of the FTC Act (unfair methods of competition). The standards for determining the relevant product and geographic markets are nearly identical under these statutes, and courts conducting a relevant market analysis rely on cases decided under each. While a thorough description of relevant market analysis is beyond the scope of this chapter, “[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). A similar test is used to determine the relevant geographic market, which the Supreme Court has described as “the ‘area of effective competition . . . in which the seller operates, and to which the purchaser can practically turn for supplies.’” United States v. Philadelphia Nat'l Bank & Trust, 374 U.S. 321, 359 (1963); Brown Shoe Co., 370 U.S. at 336–37 (“The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market . . . ”).

In recent years, the federal antitrust enforcement agencies have moved away from strict reliance on careful market definition and market share analysis in assessing competitive effects. The recently-issued Horizontal Merger Guidelines (August 19, 2010), for example, state that “[s]ome of analytical tools used by the Agencies to assess competitive effects do not rely on market definition. . . .” U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES at 7, available at http://www.ftc.gov/os/2010/08/100819hmg.pdf. Commentators have long criticized the market definition/market share framework of analysis, and one recent article concludes that the market definition process is “incoherent as a matter of basic economic principles and hence should be abandoned entirely.” Louis Kaplow, Why (Ever) Define Markets?, 124 HARV. L. REV. 437 (2010); see also id. at notes 78–80 (describing prior critiques).

Market power is “the ability to raise prices above those that would be charged in a competitive market.” Nat’l Collegiate Athletic Ass’n v. Board of Regents, 468 U.S. 85, 109 n.38 (1984) (NCAA). Market power can be proven by evidence of a high market share and barriers to new entry. What constitutes a sufficiently high market share to raise competitive concerns has never been definitively answered by the Supreme Court, and varies according to the type of restraint under review. For horizontal restraints, the courts and the enforcement agencies (the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ)) typically require that the competitors whose conduct is being challenged have a combined market share of at least 20 percent. For vertical restraints like tying arrangements and exclusive dealing, the threshold is at least 30 percent. For monopolization claims the threshold is generally considered to be 70 percent. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 230–32 (5th ed. 2002).

Where the plaintiff can prove that the restraint caused “actual detrimental effects, such as a reduction of output,” no inquiry into market power is required, because the market power inquiry is merely “a surrogate for detrimental effect.” FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 460–61 (1986) (citation omitted).
Private enforcement of antitrust law in the United States

If the plaintiff demonstrates that the agreement has a substantially harmful effect on competition (and not just individual competitors), and in addition demonstrates injury or imminent threat of injury to its business or property, it has established a prima facie case under § 1. The burden then shifts to the defendant to proffer a “procompetitive justification.” In other words, the defendant must show that the restraint benefits competition by, for example, promoting interbrand competition, enhancing efficiency, increasing output, or making available a product or products that would not otherwise be available. If the defendant successfully proffers a non-pretextual procompetitive justification for the restraint, the burden shifts back to the plaintiff to show either that the defendant can advance the proffered procompetitive justification through less restrictive means, or that the anticompetitive harm of the conduct outweighs the procompetitive benefits.

A few categories of agreements are deemed so harmful to competition that they are per se unlawful without analysis either of market conditions or their actual competitive effects. Price-fixing, bid-rigging, and market and customer allocation agreements among horizontal competitors are per se unlawful. In addition, some restraints can be analyzed either under a rule of reason or a modified per se standard of illegality.

The modified per se standard, also referred to as the “quick look” rule of reason standard, is more rigorous than the per se standard but less rigorous than a full blown rule of reason analysis. Under a “quick look,” an analysis of market power is not required because the restraint at issue—typically one that increases price or reduces output—is

26 United States v. Topco Assocs., Inc., 405 U.S. 596, 606 (1972) (practices that “in some insignificant degree” restrain competition are not unlawful). The plaintiff must also show that the restraint has a substantially adverse impact on the competitive process, as opposed to a competitor or a group of competitors. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

27 Cal. Dental Ass’n v. FTC, 526 U.S. 756 (1999). In California Dental, the Court instructed courts applying a rule of reason analysis to use a “sliding scale” at each step of the burden-shifting test, so that the degree of proof required depends on the nature of the conduct considered and the degree of proof offered at the previous step. The Court stated that sometimes the analysis can be conducted in “the twinkling of an eye” and that the analysis can be truncated if at any point the outcome is clear. Cal. Dental Ass’n, 526 U.S. at 780, 781 n.15. In United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), a § 2 monopolization case, the Court of Appeals for the D.C. Circuit described a rule of reason analysis that is more structured and sequential than the analysis often employed by courts under § 1. Under this approach, after the plaintiff has established that the defendant’s conduct has caused anticompetitive effects, the burden shifts to the defendant to proffer a procompetitive justification for its conduct. If it succeeds in showing a procompetitive justification, the burden shifts back to the plaintiff to show that the defendant can advance its procompetitive justification through less restrictive means. If plaintiff can meet this burden, it will prevail. If not, plaintiff must then demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefits. Microsoft, 253 F.3d at 58–59.

28 A practice that “appears to be one that would always or almost always tend to restrict competition and decrease output” rather than “increase economic efficiency and render markets more, rather than less, competitive,” is subject to the per se rule and is deemed illegal without any inquiry into the purported business justifications or the competitive injury. Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979) (citation omitted).

Defining antitrust violations in the United States

obviously harmful to competition. On the other hand, the agreement may have some procompetitive benefits, making application of the per se standard inappropriate. For example, the Supreme Court held that a National Collegiate Athletic Association (NCAA) rule limiting the number of football games its member schools could televise was a naked restriction on output that had “significant potential for anticompetitive effect . . . .”  

But because the rule was imposed in an industry “in which horizontal restraints on competition are essential if the product is to be available at all,” application of the per se rule was inappropriate.

Determining which standard of analysis applies has profound implications for private litigation. A full-blown rule of reason analysis requires extensive economic analysis of the relevant product and geographic markets, market power, and the competitive impact of the challenged agreement. This analysis is costly and increases significantly the length and uncertainty of litigation. Thus, a private plaintiff will always attempt to fit its claims within one of the categories of claims that are subject to per se analysis. And the defendant, in turn, will virtually always contend that the case must be analyzed under the rule of reason.

1.02.5 Horizontal restraints

Horizontal restraints are agreements among actual or potential competitors. Vertical restraints, in contrast, are agreements between parties who stand at different levels in a chain of distribution, such as an agreement between a manufacturer and its distributor. Because vertical restraints are almost never analyzed under a per se standard of illegality, the distinction is critical. Several types of horizontal agreements that may be illegal are discussed below.

1.02.5(A) Cartels

Organizations of horizontal competitors that conspire to fix prices, restrict output, rig bids, or allocate customers or territorial or product markets have long been considered the “supreme evil of antitrust.” In the United States, the only criminal enforcement of antitrust laws is targeted against cartels. Cartel members who fix prices, agree on output restrictions, allocate customers or markets, or rig bids are all subject to felony prosecution and criminal fines. The DOJ’s Antitrust Division makes cartel prosecution a top priority, and its criminal prosecution of cartel members has resulted in sharply increased fines.


31 NCAA, 468 U.S. at 100–06.

32 As discussed below, some tying arrangements, which consist of a vertical agreement between a supplier and a customer, and hub-and-spoke conspiracies, which consist of both vertical and horizontal agreements, are analyzed under a per se or modified per se standard.


and jail time in recent years. In the period 2000–2010, the Antitrust Division obtained over $4.5 billion in criminal fines, with more than a dozen individual corporate fines of more than $100 million. Over that same period, the percentage of defendants serving jail time has steadily trended upward, from 38 percent in 2000 to 78 percent in 2010. In 2010, the average jail sentence for an antitrust violator was 30 months. Each of the offenses targeted for criminal prosecution is analyzed under a per se standard of illegality.

Cartels also give rise to a significant percentage of private antitrust litigation in the United States. When a criminal investigation becomes public, private individuals and businesses that have been harmed by the cartel’s conduct will often file private actions—including class actions—to recover their damages. In some instances, private litigation precedes the government investigation.


Scott D. Hammond, Deputy Asst. Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks at the 24th Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades (Feb. 25, 2010), available at http://www.usdoj.gov/atr/public/speeches/255515.htm; U.S. DEP’T OF JUSTICE, ANTITRUST DIV., CRIMINAL ENFORCEMENT: FINE AND JAIL CHARTS 2000–2010, available at www.justice.gov/atr/public/criminal/264101.html. The Antitrust Division’s leniency program, begun in 1978 and modified in 1993 and 1994, enables corporations and individuals to avoid criminal convictions, fines and jail time by being the first to confess participation in a criminal antitrust violation. The leniency applicant must admit participation in a criminal violation of the antitrust laws before receiving a conditional leniency letter, and must demonstrate that it has satisfied its obligation to pay restitution before it will be granted final leniency. The program has been highly successful in encouraging companies and individuals to come forward and report cartel behavior. The Antitrust Division describes the Corporate Leniency Program as the Division’s “most effective investigative tool” and states that cooperation from leniency applicants “has cracked more cartels than all other tools at our disposal combined.” Scott D. Hammond, Presentation to the OECD Competition Committee: Cracking Cartels With Leniency Programs at 2 (Oct. 18, 2005), available at http://www.usdoj.gov/atr/public/speeches/212269.pdf (emphasis in original).

The leniency program impacts private litigation not only by exposing more cartels; it also sometimes facilitates cooperation with private plaintiffs. A leniency applicant may qualify for detrebling of damages if the applicant cooperates with plaintiffs in their civil action, while the applicant’s former co-conspirators will remain liable for treble damages on a joint and several basis. Scott D. Hammond & Belinda A. Barrett, Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters (Nov. 19, 2008), available at http://www.justice.gov/atr/public/criminal/239583.htm.

The victim of a price-fixing cartel is the customer that paid an inflated price. Because there are many victims, and because individual damages may be relatively modest, many victims pursue recovery through the class action device. Private litigation often begins within weeks or even days of a public announcement of a federal investigation into suspected cartel activity. While the Antitrust Division does not usually announce the inception of a criminal antitrust investigation, pre-dawn raids of targeted companies, often coordinated with antitrust authorities in other countries, are often reported in the press. Such investigations also become public because federal securities laws require publicly held companies to disclose such investigations in their quarterly filings. For further discussion of pre-complaint investigation, see Chapter 2 of this Handbook.

The claim most commonly alleged in private cartel litigation is price-fixing. Because price-fixing agreements are often accompanied by or implemented through agreements to restrict output as well as agreements to allocate customers or territorial markets, these claims are also common in private litigation. Least common among per se offenses is private litigation challenging bid-rigging. While the DOJ frequently prosecutes businesses and individuals for bid-rigging, the effects are often localized, making nationwide class actions less likely. The episodic nature of bid-rigging may render class certification difficult as well.

1.02.5(B) Joint Ventures

Joint ventures are collaborative undertakings among competitors in which otherwise independent firms seek to achieve a specific business objective (or objectives) through partial integration of their resources or risks. Joint ventures are “more integrated than cartels but less integrated than mergers.” Private parties injured by the formation of a joint venture or by subsequent agreements among venture participants can sue the participants or the joint venture itself under § 1 or § 2 of the Sherman Act, or under § 7 of the Clayton Act. They can also assert state law claims under parallel statutory and common law rules. Most cases are brought under § 1.

The first step in evaluating the legality of a joint venture agreement under § 1 is to determine whether the venture participants engage in the requisite concerted conduct or instead operate as a single entity immune from scrutiny under § 1. In American Needle, Inc. v. NFL, the Supreme Court, in a unanimous opinion, reversed a ruling by the Seventh Circuit that had held that § 1 did not apply to the NFL teams’ joint agreements to develop and market their intellectual property. The teams formed National Football League Properties (NFLP) to develop and market their intellectual property, and agreed to share revenues equally or give the proceeds to charity. In 2000, the teams voted to allow NFLP to grant exclusive licenses, and NFLP granted Reebok an exclusive 10-year license to produce and sell trademarked hats and other headwear for all 32 teams. American Needle, a former licensee, sued the NFL, the 32 member teams, NFLP, and Reebok, alleging a violation of § 1. The district court granted summary judgment for the defendants, holding that the teams had sufficiently integrated their licensing operations so as to constitute a single entity immune from § 1 scrutiny. The Seventh Circuit affirmed, finding that because the NFL teams shared an economic interest in promoting NFL football over other forms of entertainment, “only one source of economic power controls the

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41 130 S.Ct. 2201 (2010).
promotion of NFL football.” Thus, according to the Seventh Circuit, the NFL acted as a single entity in the context of licensing its member teams’ intellectual property.43

Rejecting the Seventh Circuit’s conclusion, the Supreme Court emphasized that the determination whether an entity is capable of conspiring under § 1 requires a substantive inquiry into whether the challenged agreement “joins together ‘independent centers of decisionmaking.’ If it does, the entities are capable of conspiring under Section 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one.”44 The Court found that the NFL teams did “not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action.”45 Rather, each of the teams was “a substantial, independently owned, and independently managed business.”46 With respect to the licensing of their intellectual property, the Court also found that the teams compete in that market.47 Nor did the fact that the NFL and its member teams formed a legally separate entity that centralized the management of their intellectual property immunize their conduct from § 1: “An ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label.”48 Though it was a closer question, the Court held that decisions by NFLP could also constitute concerted activity covered by § 1, because such decisions were made by the 32 teams—potential competitors of one another in the intellectual property market—each of which owned its share of the jointly managed assets.49

If the joint venture is subject to § 1, it can be analyzed under a per se standard, a “quick look” rule of reason standard, or a full-blown rule of reason standard.50 Merely labeling

43 Am. Needle, Inc. v. NFL, 538 F.3d 736, 744 (7th Cir. 2008).
45 Id. at 2212.
46 Id.
47 Id.
48 Id. at 2213.
49 Id. at 2215.
50 See, e.g., Broadcast Music Inc. v. CBS, Inc., 441 U.S. 1 (1979) (agreement by thousands of authors and composers to grant a joint venture a blanket license to all their musical compositions analyzed under a rule of reason standard because the agreement reflected integration of sales, addressed a free-rider problem, and created a product that would otherwise not have been available); Nat’l Collegiate Athletic Ass’n v. Board of Regents, 468 U.S. 85, 100–01 (1984) (NCAA rule limiting member universities’ football game telecasts analyzed under quick look rule of reason rather than a per se standard because the “case involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all”). Most recently, in Texaco, Inc. v. Dagher, 547 U.S. 1, 8 (2006), the Court held that a pricing arrangement that Shell and Texaco entered into after they consolidated their operations in the Western United States did not “fall within the narrow category of activity that is per se unlawful” because the joint venture (already reviewed by the antitrust authorities) had already eliminated all relevant competition between the parties. They had “agreed to pool their resources and share the risks of and profits from . . . [the joint venture’s] activities,” and shared those profits in their role as investors, not competitors. Dagher, 547 U.S. at 4, 8.

The FTC and DOJ’s jointly issued Antitrust Guidelines for Collaboration Among Competitors similarly treat joint ventures differently depending on whether the parties integrate their economic resources and the nature and extent of any efficiencies created by the joint venture. Fed. TRADE COMM’N & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG

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a collaboration among competitors a joint venture, however, will not protect it from per se illegality under the Sherman Act if it involves joint price-setting or restrictions on output.51

As with any other conduct analyzed under the rule of reason, an evaluation of the legality of a joint venture agreement requires a fact-specific analysis. If the agreement has obvious anticompetitive effects or the plaintiff can show that it has already caused anticompetitive harm, the court may apply a “quick look” rule of reason standard, dispensing with any detailed market analysis.52 Otherwise, the plaintiff must first define the relevant market (along both product and geographic dimensions) and then demonstrate that the joint venture has (or will have) market power in that market.53 If the joint venture meets the threshold market power requirement, the court will then examine the nature of the agreement to determine whether it is likely to cause substantial anticompetitive harm. If yes, then the court will consider any procompetitive benefits proffered by the defendant, and determine whether those benefits can be achieved by a less restrictive alternative.54

The Competitor Collaboration Guidelines, issued jointly by the FTC and DOJ in 2000, set out the standards of review the enforcement agencies rely upon in evaluating the legality of concerted conduct. While the Guidelines are not binding on the courts, they have been cited in some published decisions (though not yet by the United States Supreme Court) and provide a useful framework for analysis because they are based on existing law. The Guidelines explain that the Agencies will challenge agreements “of a type that always or almost always tends to raise price or reduce output,” such as price-fixing, bid-rigging, and market-allocation agreements, under a per se standard of illegality, “without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects.”55 On the other hand, the Agencies will not challenge an


51 Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). See also Arizona v. Maricopa County Med. Soc’y, 457 U.S. 332 (1982) (agreement among medical doctors to set a maximum fee schedule constituted per se illegal price fixing); but see Dagher, 571 U.S. 1 (legality of joint venture between two previously competing companies that set a single price for jointly-produced product subject to rule of reason, not per se analysis, because the companies participated in the relevant market jointly through investment in joint venture and shared in profits as investors).

52 See Am. Needle, 130 S. Ct. at 2216–17 (remanding determination of legality of league’s joint licensing of intellectual property under § 1, the Supreme Court suggested applicability of “quick look” standard but also noted that the NFL’s interest in maintaining a competitive balance among member teams might save the restraint): Ind. Fed’n of Dentists, 476 U.S. at 460–61 (analysis of market power not necessary where there is proof of actual anticompetitive effect); Cal. Dental Ass’n, 526 U.S. at 770 (court of appeals erred in applying quick look analysis where joint venture’s advertising restrictions did not have obvious anticompetitive effects).

53 If the combined market share of the joint venture and its members exceeds 20 percent, that is sufficient to continue the analysis. ABA SECTION OF ANTITRUST LAW, JOINT VENTURES: ANTITRUST ANALYSIS OF COLLABORATIONS AMONG COMPETITORS 47 (2006).

54 See, e.g., Sullivan v. Nat’l Football League, 34 F.3d 1091, 1103 (1st Cir. 1994) (“[A] given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative . . . exists.”); see also Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998).

55 Competitor Collaboration Guidelines at 8.
agreement “that is reasonably related” to an “efficiency-enhancing integration of economic activity” and “reasonably necessary” to achieve its procompetitive benefits under a flexible rule of reason standard.56

Under the Guidelines’ flexible rule of reason standard, the Agencies begin their analysis by examining the business purpose of the challenged agreement and inquiring whether the agreement has caused anticompetitive harm. If the nature of the agreement and the absence of market power demonstrate the absence of anticompetitive harm, the Agencies will not challenge the agreement. If the agreement has already caused anticompetitive harm, or if the “likelihood of anticompetitive harm is evident from the nature of the agreement,” the Agencies will challenge the agreement without a detailed market analysis.58 If the agreement raises competitive concerns but cannot be analyzed without a detailed market analysis, the Agencies will define relevant markets, calculate market shares and concentration levels, inquire whether the venture and its participants have the “ability and incentive to compete independently,” evaluate the likelihood and impact of competitive entry, and “assess any other market circumstances that may foster or impede anticompetitive harms.”59 If this analysis indicates no potential for anticompetitive harm, the Agencies will discontinue the investigation. Otherwise, the Agencies will “examine whether the relevant agreement is reasonably necessary to achieve procompetitive benefits that likely would offset anticompetitive harms.”60

Two federal statutes – the National Cooperative Research and Production Act (NCRPA)61 and the Standards Development Organization Advancement Act (SDOA)62 – provide limited antitrust safe harbors for certain kinds of joint ventures. The NCRPA provides limited antitrust immunity to research and development and production joint ventures that meet its criteria and that register with the DOJ and FTC. A joint venture that meets the NCRPA criteria and files the requisite notice is not subject to the per se standard. If it is adjudged to be in violation of the antitrust laws under a rule of reason standard, it is liable for only actual damages, rather than treble damages. Further, if a private plaintiff unsuccessfully challenges the legality of a qualified NCRPA joint venture, the defendant may recover its attorneys’ fees and costs.63 The SDOA extends the protections of the NCRPA to qualifying standard setting organizations.64

56 Id.
57 In this initial inquiry, the Agencies may be able to determine that there is no market power without defining a relevant market. For example, if there are no barriers to entry, or there is no plausible market power no matter how the market is defined, the Agencies may discontinue the inquiry without further analysis. Id. at 10 n.26.
58 This analysis is similar to the Supreme Court’s “quick look” rule of reason analysis. Id. at 10.
59 Id. at 11.
60 Id. at 11–12.
63 15 U.S.C. §§ 4301–4305. Normally, the antitrust defendant must pay its own attorneys’ fees and costs, even if it prevails. (The Clayton Act’s exception to the “American Rule” entitles prevailing plaintiffs, not defendants, to attorneys’ fees and costs. 15 U.S.C. § 15.)
1.02.5(C) **CONCERTED REFUSALS TO DEAL**

Concerted refusals to deal, also known as group boycotts, are agreements among horizontal competitors not to do business with certain other firms or individuals, or to do so only under specified terms. For many years group boycotts were considered illegal per se.\(^{65}\) Under current law, however, they may be evaluated under either the per se or rule of reason standard, depending on the market power of the defendants, and the purpose and effect of the boycott: “the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor . . . .”\(^{66}\) A per se approach will also be applied to group boycotts that constitute or enforce a price-fixing agreement or other agreement that is illegal per se.\(^{67}\)

1.02.5(D) **MERGERS AND ACQUISITIONS**

While regulation of mergers and acquisitions is mostly left to federal and state antitrust authorities,\(^{68}\) private litigants may also challenge them under federal and state law. Private plaintiffs may seek injunctive relief preventing or undoing the merger, and may seek damages.\(^{69}\) The principal statute governing mergers and acquisitions is § 7 of the Clayton Act, which prohibits any merger or acquisition where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”\(^{70}\) Private plaintiffs can also challenge a merger or acquisition as an unreasonable restraint of trade, monopolization, or attempted monopolization under §§ 1 or 2 of the Sherman Act,\(^{71}\) and seek damages and injunctive relief under the Clayton Act.\(^{72}\)

A plaintiff challenging a merger or acquisition must define a relevant market along product and geographic dimensions,\(^{73}\) identify the market participants, and show that the merger is likely to substantially lessen competition in the relevant markets.\(^{74}\) If the

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\(^{65}\) See, e.g., Klor’s, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (group boycotts “have long been held to be in the forbidden category” of restraints as to which courts need not inquire into anticompetitive effects).

\(^{66}\) *Ind. Fed’n of Dentists*, 476 U.S. at 458 (“quick look” rule of reason analysis applied to agreement among a group of dentists not to forward x-rays to insurers).

\(^{67}\) FTC v. Superior Ct. Trial Lawyers Ass’n, 493 U.S. 411, 436 n.19 (1990) (agreement among lawyers to stop representing indigent clients unless government increased fees illegal per se).

\(^{68}\) The FTC, DOJ, and state attorneys general may seek injunctive relief preventing or undoing a merger or acquisition under § 16 of the Clayton Act, and may seek damages under § 4 of the Clayton Act. 15 U.S.C. §§ 26, 15.


\(^{70}\) 15 U.S.C. § 18. Section 7 applies broadly to transactions involving acquisitions of stock, assets or partnership interests, including those transactions which resemble mergers, and those in which only some assets or interests are acquired. *Id.*

\(^{71}\) The government can challenge a merger under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 43.


defendant proff ers evidence that the merger will create efficiencies and other procompetitive benefits, the plaintiff must show that the anticompetitive effects of the merger would outweigh any procompetitive benefits.\textsuperscript{75}

The DOJ and FTC’s recently-issued Horizontal Merger Guidelines (August 19, 2010) set forth the agencies’ enforcement policy with respect to mergers and acquisitions involving actual or potential competitors.\textsuperscript{76} The Horizontal Merger Guidelines, together with the agencies’ 2006 Commentary on the earlier Guidelines, provide a useful framework for analysis.\textsuperscript{77} The Guidelines describe the kinds and sources of evidence the agencies review in analyzing a merger,\textsuperscript{78} the consideration to be given to the existence of price discrimination,\textsuperscript{79} the methods the agencies use to define the relevant markets and assess market concentration,\textsuperscript{80} how they assess unilateral and coordinated effects,\textsuperscript{81} and the tools they use to analyze ease of entry.\textsuperscript{82}

In addition to proving all of the elements that a government plaintiff must prove, the private plaintiff challenging a merger or acquisition faces the additional challenge of showing that it has standing. Just as in any other private antitrust action, the plaintiff must show that it has suffered or is likely to suffer antitrust injury as a result of the challenged merger or acquisition.\textsuperscript{83} Because of this additional hurdle, competitor challenges to mergers and acquisitions have rarely succeeded since the mid-1980s.\textsuperscript{84}

that mergers resulting in an entity with a market share comprising more than 30 percent of the relevant market and increasing concentration by more than 33 percent were presumptively illegal (see, e.g., United States v. Philadelphia Nat’l Bank, 374 U.S. 321 (1963)), the Court retreated from that position in 1974 (see United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974)), and in recent decades courts have permitted mergers in markets far more concentrated initially, and in which the merger resulted in far greater concentration. See, e.g., United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990) (no § 7 violation where post-acquisition market share exceeded 75 percent). The new Horizontal Merger Guidelines reflect the courts’ and enforcement agencies’ shift away from a focus on market shares and market concentrations to a broader, more fact-specific analysis of the competitive circumstances surrounding the proposed merger. See Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, 49 ANTITRUST L.J. 77 (2010).

The Horizontal Merger Guidelines and Merger Commentary make clear that the agencies will consider the nature and extent of any efficiencies created by a merger in analyzing its competitive effects, and will avoid “unnecessary interference with mergers that are either competitively beneficial or neutral.” U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES, supra note 24, at 1; COMMENTARY ON HORIZONTAL MERGER GUIDELINES 49–59 (2006), available at http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

\textsuperscript{75} The Horizontal Merger Guidelines and Merger Commentary make clear that the agencies will consider the nature and extent of any efficiencies created by a merger in analyzing its competitive effects, and will avoid “unnecessary interference with mergers that are either competitively beneficial or neutral.” U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES, supra note 24, at 1; COMMENTARY ON HORIZONTAL MERGER GUIDELINES 49–59 (2006), available at http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

\textsuperscript{76} Id. at 1 n.1 (the Commentary remains a “valuable supplement”).

\textsuperscript{77} Id. §§ 1, 2.

\textsuperscript{78} Id. § 3.

\textsuperscript{79} Id. §§ 4, 5.

\textsuperscript{80} Id. §§ 6, 7.

\textsuperscript{81} Id. § 9.

\textsuperscript{82} Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (where acquisition of a competing but failing bowling alley harmed plaintiff by eliminating its opportunity for additional profits, but benefited competition, plaintiff has not shown antitrust injury and has no standing under the antitrust laws); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986) (where post-merger conduct did not threaten antitrust injury, rival that challenged merger not entitled to injunctive relief under Clayton Act).

\textsuperscript{83} In its 1986 decision in Cargill, Inc., 479 U.S. 104, the Supreme Court denied injunctive relief
1.02.6  Vertical agreements

Vertical restraints are agreements among firms standing at different levels in the chain of distribution. They may be challenged under § 1 (unreasonable restraint of trade) or § 2 (monopolization or attempted monopolization) of the Sherman Act. As discussed below, § 2 challenges are always assessed under the fact-intensive rule of reason standard of illegality. Until recently, vertical restraints involving concerted conduct and restraints on output or price could be assessed under a per se standard of illegality. Since the Supreme Court’s decision in Leegin,85 however, most vertical restraints are now challenged under a rule of reason standard. Several types of vertical agreements that may be illegal are discussed below.

1.02.6(A)  Hub-and-Spoke price-fixing agreements

The only vertical price restraint that continues to be evaluated under a pure per se standard of illegality is the so-called “hub-and-spoke” conspiracy. A hub-and-spoke conspiracy is a price-fixing or market allocation cartel involving both vertical and horizontal agreements. At the center, or “hub”, of the conspiracy is a dominant supplier or distributor, which enters into a series of vertical agreements with its distributors or suppliers (the “spokes”). Without more, these vertical restraints – even if they dictate prices – are not actionable under § 1.86 If, however, the “spokes” enter into horizontal agreements with one another to adhere to the vertical restraint (the “rim” of the conspiracy), the series of agreements are per se unlawful.87

1.02.6(B)  Resale price maintenance

One of the most commonly challenged vertical price restraints is resale price maintenance, in which a manufacturer and its distributor agree on minimum or maximum prices to be charged for the manufacturer’s products.88 Maximum resale price maintenance to a plaintiff rival challenging a proposed merger, holding that the plaintiff had not shown that the merged entity’s conduct was likely to cause it antitrust injury, even though both lower courts had found that the merger was illegal under § 7 of the Clayton Act. (Section 7 prohibits a merger where the effect “may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18.) The competitor-plaintiff’s threatened injury of reduced profits (caused by the merged entity’s ability to lower prices) did not constitute antitrust injury. Cargill, Inc., 479 U.S. at 114–15.

86  United States v. Colgate & Co., 250 U.S. 300 (1919) (manufacturers may announce pricing policies to their distributors and terminate any distributor that fails to follow the policy without liability under § 1, unless the distributor manifests agreement).
87  Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Toys “R” Us, Inc v. FTC, 221 F.3d 928 (7th Cir. 2000) (where major toy retailer negotiated series of agreements with leading toy manufacturers that they would not sell to discount warehouse club stores, and there was evidence that seven of those manufacturers accepted the restriction on the condition that their competitors would do the same, agreements were illegal per se).
88  An agreement is an essential element of a claim under § 1. Thus, if a manufacturer unilaterally announces a minimum or maximum price for its products, and then terminates distributors that do not comply with the pricing policy, there is no agreement, and hence no liability under § 1. Colgate & Co., 250 U.S. 300. (There may, however, be liability under § 2 of the Sherman Act.). If, however, the manufacturer demands assent, and receives it, there is an agreement that can be
Private enforcement of antitrust law in the United States

agreements are analyzed under a rule of reason analysis. Until recently, minimum resale price maintenance agreements were considered so harmful to consumers that they were analyzed under a per se standard of illegality. In Leegin, however, the Supreme Court reversed 96 years of precedent, holding that minimum resale price maintenance agreements are now subject to the rule of reason. In addition to noting that it has in recent decades reduced the number of practices that are subject to a per se standard of antitrust illegality, the Court reasoned that resale price maintenance policies often have procompetitive benefits, such as promoting interbrand competition by eliminating intrabrand competition.

The Leegin decision was controversial when written and continues to be met with opposition at both the federal and state levels. As the dissent noted, requiring courts to apply a rule of reason analysis forces the parties to engage in “one of the most costly procedures in antitrust practice,” and has the effect of making a plaintiff’s victory unlikely. Leegin was followed by three failed attempts to pass federal legislation repealing the decision and reinstating the per se rule for minimum resale price maintenance. A fourth attempt is currently before the Senate Committee on the Judiciary. Some state courts have held that their own state laws governing resale price maintenance are not subject to a rule of reason analysis, and the appropriate standard of review remains an open question in many other jurisdictions. Despite this uncertainty, and the fact that Leegin does not immunize minimum resale price maintenance agreements from liability, the number of manufacturers setting minimum retail prices has reportedly increased since 2007.

1.02.6(c) Non-price Vertical Agreements

Vertical agreements that do not constrain price are typically assessed under a rule of reason standard of illegality, because of their “real potential to stimulate interbrand

challenged under § 1 of the Sherman Act. See, e.g., Leegin, 551 U.S. 877 (manufacturer adopted a “Colgate policy,” that is, a policy stating it would sell its products only to retailers that followed its suggested retail prices, but then took the additional step of demanding a “pledge” of compliance, which Leegin gave, then broke). State Oil Co. v. Khan & Assoc., Inc., 522 U.S. 3 (1997) (overturning nearly 30 years of precedent, Court held that maximum resale price maintenance agreements were subject to rule of reason, rather than per se, analysis).

Leegin, 551 U.S. 877.
Id.
Id. at 889–91.
Id. at 915–17 (Breyer J., dissenting).

Albert A. Foer, President, American Antitrust Institute, Testimony Before the Maryland Senate Judiciary Committee on Senate Bill 239 (Feb. 25, 2009), available at http://www.antitrustinstitute.org/node/11041 (follow “Read the testimony” hyperlink).
S. 75, 112th Cong. § 3 (2011). For further discussion of Leegin-related legislation and other reform proposals, see Chapter 15 of this Handbook.

For a survey of current resale price maintenance statutes and case law in each of the 50 states and the District of Columbia, see Michael A. Lindsay, Overview of State RPM, Antitrust Source (Apr. 2011), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/april11-lindsaychart_4-20f.authcheckdam.pdf.
Defining antitrust violations in the United States

31

competition."99 The most commonly challenged non-price vertical restraints are agreements among manufacturers and their distributors not to permit other entities to distribute the manufacturer’s goods (exclusive distributorships) and agreements among manufacturers and their distributors limiting each distributor’s customers or geographic sales territory (territorial and customer restrictions).

In determining whether an exclusive distributorship constitutes an unreasonable restraint of trade under the rule of reason, courts will consider the nature and extent of interbrand competition, the duration of the agreement, and the geographic scope covered by the exclusive distributorship.100 In assessing the legality of territorial and customer restraints, courts have examined the purpose of the restrictions (for example, a restriction that promotes a legitimate business reason such as improving efficiency, reducing free riding, or promoting consumer safety is more likely to be upheld), the effect of the restriction in limiting competition in the relevant market, the market power of the supplier, and the impact on competition.101

1.02.6(d) Tying arrangements

A tying arrangement is a vertical “agreement” between seller and buyer in which the seller agrees to sell a product to the buyer “only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.”102 The buyer’s agreement, though coerced, is sufficient to satisfy § 1’s requirement of joint action. In order to prove a tying claim, a plaintiff must show (1) a tie between two separate products or services; (2) that the defendant has appreciable market power in the tying product market; and (3) that the tie has a “not insubstantial” effect on commerce in the tied product market.103 Implicit in the first element is the requirement that the buyer was coerced into buying a product he or she did not want, or would have preferred to buy on other terms.

Tying arrangements are usually evaluated under a modified per se standard of illegality. Unlike the standard applied to a horizontal price-fixing agreement, a plaintiff in a tying case must show that the defendant has sufficient market power in the tying product market “to force a purchaser to do something he would not do in a competitive market.”104

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100 United States v. Chicago Tribune-N.Y. News Syndicate, Inc., 309 F. Supp. 1301, 1307–08 (S.D.N.Y. 1970) (whether territorial scope of agreement was “arbitrary and unreasonably broad” was fact question); Paddock Publ’ns v. Chicago Tribune Co., 103 F.3d 42, 47 (7th Cir. 1996) (enduring exclusive distribution contracts characterize markets that are recognized as competitive); Murphy v. Bus. Cards Tomorrow Inc., 854 F.2d 1202, 1205 (9th Cir. 1988) (restraint not unreasonable where substantial interbrand competition existed and there were low entry barriers).
101 Murphy, 854 F.2d at 1205 (so long as there is sufficient interbrand competition, negative impact on intrabrand competition irrelevant); Clairiol, Inc. v. Boston Disc. Ctr. of Berkley, 608 F.2d 1114, 1125 (6th Cir. 1979) (customer restrictions that promoted consumer safety and customer goodwill not unreasonably restrictive); Bi-Rite Oil Co. v. Ind. Farm Bureau Coop. Ass’n, 908 F.2d 200, 204 (7th Cir. 1990) (no violation where supplier lacked market power).
102 Hyde, 466 U.S. at 13–14 (internal citation omitted). Market power can be demonstrated by a large market share or proof that the defendant offers a unique product that competitors cannot
the plaintiff must show appreciable market power in the tying product market, however, there is no requirement (in contrast to a rule of reason case) to demonstrate the anticompetitive effects of the tie. Moreover if the defendant does not have market power in the tying product, the plaintiff can still assert a rule of reason claim.\footnote{Id. at 21.}

Tying law has evolved from a state in which courts assumed that “[t]ying arrangements serve hardly any purpose beyond the suppression of competition,”\footnote{Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 498–99 (1969).} to one in which the potential procompetitive benefits of tying arrangements are widely recognized.\footnote{Ill. Tool Works v. Indep. Ink, Inc., 547 U.S. 28, 37 (2006) (tracing the history of the Court’s treatment of tying arrangements and noting that “[t]he assumption that ‘[t]ying arrangements serve hardly any purpose beyond the suppression of competition’” has not been endorsed by the Supreme Court since 1969 (internal citation omitted)).} However, courts have not adopted the recommendation of some commentators to abandon entirely the modified per se standard in favor of a pure rule of reason analysis.\footnote{The Antitrust Modernization Commission, established by Congress in 2002 to review federal antitrust law, recommended in 2007 that all tying cases be analyzed under a rule of reason standard. Antitrust Modernization Comm’n, Report and Recommendations 105 (2007). The AAI, in contrast, urges retention of the current modified per se rule for tying, with certain caveats. The Next Antitrust Agenda 81 (Albert A. Foer ed., 2008), available at http://www.antitrustinstitute.org/node/11001.}

\section{Single firm conduct}

\subsection{Elements of a § 2 monopolization claim}

Section 2 of the Sherman Act\footnote{15 U.S.C. § 2.} makes it illegal to “monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize.” A monopoly is illegal only if it was “willfully” acquired or maintained. “Willfully” refers to improper conduct that excludes or drives rivals from the market on some basis other than competition on the merits.\footnote{Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985).}

In order to make out a monopolization claim, the government or a private plaintiff must prove that the defendant (1) possesses monopoly power in a relevant market; and (2) willfully acquired or maintained that power, instead of acquiring monopoly power through “growth or development as a consequence of a superior product, business acumen, or historic accident.”\footnote{United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).} The private plaintiff must also prove that it was injured by reason of defendant’s monopolization conduct, or that such harm is imminent.\footnote{As in any antitrust case, the plaintiff must also prove that the challenged conduct has an “anticompetitive effect” or causes “antitrust injury,” that is, it harms not merely other competitors, but the competitive process itself. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) (the Sherman Act is not directed at “conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.”); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487–88 (1977) (plaintiff must show that the injury caused by defendant’s challenged conduct is of “the type that the statute was intended to forestall”).}
1.03.1(A) MONOPOLY POWER IN A RELEVANT MARKET

The first step in determining whether a firm possesses monopoly power requires defining the “relevant market” along both product and geographic dimensions. The relevant market must include all products “reasonably interchangeable by consumers for the same purposes.” Products in another market may also be included in the relevant market definition if the producer of those products can quickly and cheaply shift to production of the defendant’s product (or a reasonably interchangeable substitute).

After it has defined a proper relevant market along both product and geographic dimensions, the plaintiff must prove that the defendant possesses “monopoly power” in that market. The Supreme Court has defined monopoly power as “the power to control prices or exclude competition.” In some cases the plaintiff will be able to rely on direct evidence to prove that the defendant has the power to control prices or exclude competition. Usually, however, monopoly power is inferred from a firm’s possession of a dominant share of a market characterized by barriers to entry. A firm that controls 70 percent or more of a relevant market protected by entry barriers likely has monopoly power.

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113 Definition of the relevant market is often a critical dispute in monopoly cases. See Jonathan B. Baker, Market Definition: An Analytical Overview, 74 ANTITRUST L.J. 129 (2007) (the outcome of more cases has surely turned on market definition than on any other substantial issues); Pamela J. Harbour & Tara I. Koslov, Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets, 76 ANTITRUST L.J. 769, 772 (“In any industry, product market definition is capable of determining the outcome of an antitrust inquiry or enforcement action.”). In United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), the court defined the relevant market as the licensing of all Intel-compatible PC operating systems worldwide, a market in which Microsoft possessed a 95 percent market share. The court rejected Microsoft’s argument that other products, specifically non-Intel compatible operating systems such as Apple’s Macintosh operating system, operating systems for non-PC devices, and middleware, should be included in the market. Microsoft, 253 F.3d at 53–54. If the Court had accepted Microsoft’s proposed market definition, Microsoft would have prevailed. Cf. United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1158–61 (N.D. Cal. 2004) (holding that plaintiff did not meet its burden of proof in establishing relevant market).

114 See Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995) (explaining “supply-side substitutability”).

115 Courts have used the terms “monopoly power” and “market power” interchangeably, although they arguably carry different burdens of proof. See, e.g., Grinnell Corp., 384 U.S. at 570 (Section 2 violation requires proof of “monopoly power”); Hyde, 466 U.S. at 16–17 (tying arrangement is illegal only if seller has “market power” in the tying product); NCAA, 468 U.S. at 109 n.38 (in § 1 case, Court defined market power as “the ability to raise prices above those that would be charged in a competitive market”); E.I. Du Pont de Nemours & Co., 351 U.S. at 391 (in § 2 case, Court defined monopoly power as “the power to control prices or exclude competition”).


117 See, e.g., FTC v. Mylan Labs., 62 F. Supp. 2d 25, 55 (D.D.C. 1999) (allegations that defendant successfully raised prices above competitive level and constricted supply of two drugs by denying competitor access to essential ingredient sufficient to allege monopoly power), modified on other grounds, 99 F. Supp. 2d 1 (D.D.C. 1999); Rebel Oil Co., 51 F.3d at 1434; Ind. Fed’n of Dentists, 476 U.S. at 460–61 (in a § 1 rule of reason case, Court held that “the finding of actual, sustained adverse effects on competition . . . is largely sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.”).

118 Grinnell, 384 U.S. at 571 (“existence of [monopoly] power ordinarily may be inferred from the predominant share of the market”).
Private enforcement of antitrust law in the United States

power. Entry barriers include large initial capital outlays, regulatory barriers, control by the incumbent of a necessary input or intellectual property rights necessary to produce the product, or network effects that discourage new entry.

1.03.1(B) ACQUIRED, ENHANCED, OR MAINTAINED THROUGH EXCLUSIONARY CONDUCT

A determination that the defendant possesses monopoly power in a relevant market does not, however, end the inquiry. As the Supreme Court has emphasized, the mere possession of monopoly power is not unlawful:

Simply possessing monopoly power and charging monopoly prices does not violate § 2; rather the statute targets “the willful acquisition or maintenance of that power . . . .”

Rather, the plaintiff must prove that the defendant acquired, enhanced, or maintained its monopoly power through exclusionary conduct. There is no “general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.” Because “the means of illicit exclusion . . . are myriad,” a plaintiff is not limited in identifying the types of anticompetitive conduct that can satisfy the “willfulness” element of § 2.

1.03.2 Examples of potentially exclusionary conduct

Case law has, however, identified certain practices that can constitute exclusionary conduct. Predatory pricing, refusal to deal, product disparagement or displacement, anti-

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120 E.I. Du Pont, 351 U.S. at 404; Grinnell Corp., 384 U.S. 563 (87 percent); Eastman Kodak Co., 504 U.S. 451 (80 percent); Int’l Audiotext Network v. AT&T, 893 F. Supp. 1207 (S.D.N.Y. 1994), aff’d, 62 F.3d 69 (2d Cir. 1995) (“As a general proposition, a market share of 70 percent should be an adequate (if barely adequate) basis, at the pleading stage for an inference of power in a relevant market.”). The concept of domination in the European context may be established at considerably lower market shares. See Einer Elhauge & Damien Geradin, Global Antitrust Law and Economics 270 (2007).

121 See, e.g., Microsoft, 253 F.3d at 55 (“applications barrier to entry” protected Microsoft’s monopoly position in the operating system market).


123 Microsoft, 253 F.3d at 58.

124 Microsoft, 253 F.3d at 58.

125 See, e.g., Aspen Skiing Co., 472 U.S. 585 (Aspen ski resort that operated three of the four area ski resorts violated § 2 when it terminated a long-standing joint marketing arrangement with its smaller competitor; and the jury found no business justification for its conduct); Eastman Kodak Co., 504 U.S. 451 (a monopolist’s refusal to sell parts to independent service organizations that competed against it in servicing copiers could be a violation of § 2); but see Trinko, 540 U.S. 398 (Verizon’s failure to comply with the mandate of the Telecommunications Act of 1996 to share its network with competitors on a non-discriminatory basis did not violate § 2).

126 See, e.g., Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 783–88 (6th Cir. 2002) (distribution of misleading information about competing products, displacement of competitors’ advertising, and other conduct violated § 2); Am. Prof’l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof’l Publ’n, 108 F.3d 1147, 1151–53 (9th Cir. 1997) (distribution of disparaging leaflets about competitor). The Sixth Circuit noted in Conwood that these kinds of tortious acts will
Defining antitrust violations in the United States

competitive litigation, denial of access to an essential facility, enforcement of a fraudulently obtained patent, vertical agreements that foreclose competition, tying, and monopoly leveraging have all been held to constitute exclusionary conduct that can support a monopoly claim under § 2.

In some cases, there are relatively precise rules for determining whether a defendant has acquired or maintained a monopoly through anticompetitive conduct. For example, a plaintiff alleging predatory pricing under § 2 must meet the exacting standard set by the Supreme Court in Brooke Group in 1993. In addition to establishing all of the other elements of a monopoly claim, the plaintiff must prove both that the defendant has set its prices so low that they are below “an appropriate measure of its . . . costs,” and that there is a “dangerous probability” that the defendant will recoup the losses it incurs through low pricing by driving out rivals, thereby enabling it to charge monopoly prices.

Though courts, commentators and federal enforcement officials have at times advocated the adoption of a single, all-purpose test to determine whether conduct is exclusionary under § 2, no single standard has been adopted. Courts and the antitrust enforcement agencies have sometimes used a balancing test derived from the § 1 “rule of reason” standard. In one case, the Supreme Court used, with the support of several commentators, a violate § 2 “only in ‘rare gross cases.’” Conwood, 290 F.3d 783–84 (quoting 3A Areeda & Turner, Antitrust Law 782(a), at 272 (2002)). See Maurice E. Stucke, When a Monopolist Deceives, 76 Antitrust L.J. 823, 823–46 (2010) (criticizing the presumption in some circuits and the Areeda Treatise that the competitive harm from deception is generally de minimus).

127 Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (claim for conspiracy to monopolize could be based on concerted action by defendants to file federal and state actions seeking to preclude plaintiff from market).

128 MCI Commc’ns Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983) (Section 2 violation where a monopolist controlled an essential facility but refused to permit access to competitor).


130 Microsoft, 253 F.3d 34 (licensing agreements between Microsoft and original equipment manufacturers that contained terms making use of rival browser software difficult or impossible were anticompetitive and violated § 2).

131 Hyde, 466 U.S. at 9 (tying may violate § 2).

132 LePage’s, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (bundled discounts violated § 2).

133 Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1208–13 (9th Cir. 1997); but see In re Independent Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1327 (Fed. Cir. 2000) (rejecting monopoly leveraging theory in the absence of below-cost pricing); Schor v. Abbott Labs., 457 F.3d 608, 613–14 (7th Cir. 2006) (same); Trinko, 540 U.S. at 415 n. 4 (monopoly leveraging theory inapplicable where no proof of “dangerous probability of success” in monopolizing second market).

134 Brooke Group, 509 U.S. at 222–23 (an “appropriate measure” of cost has been held to be either the defendant’s average variable cost, or its marginal cost).

135 Id.

136 Microsoft, 253 F.3d at 58–59. As in a § 1 rule of reason case, this balancing approach employs shifting burdens. After the plaintiff has demonstrated that the monopolist’s conduct has caused anticompetitive effects in the relevant market, the burden shifts to the monopolist to proffer a “procompetitive justification” for its conduct, for example, “a non-pretextual claim that its conduct is indeed a form of competition on the merits,” because, for example, it enhances efficiency or consumer appeal. If the defendant successfully proffers a non-pretextual procompetitive justification, the burden shifts back to the plaintiff to show that the monopolist can advance the proffered procompetitive justification through less restrictive means. If the plaintiff successfully rebuts
Private enforcement of antitrust law in the United States

“profit sacrifice” test, which asks whether the defendant is willing to “sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.”\(^{137}\) The DOJ under a previous administration advocated a “disproportionality” test, which treats single-firm conduct as exclusionary only if its anticompetitive effects “substantially outweigh” any procompetitive benefits.\(^{138}\) This standard was repudiated by the succeeding Assistant Attorney General for the DOJ’s Antitrust Division, who did not propose a single test for evaluating all conduct under § 2, but advocated “balanced analyses” like the one applied in the Microsoft case.\(^{139}\)

### 1.03.3 Elements of a § 2 attempted monopolization claim

A plaintiff in an attempted monopolization case (just like in a monopolization case) must prove that the defendant “has engaged in predatory or anticompetitive conduct.”\(^{140}\) The plaintiff must also prove that the defendant acted with “a specific intent to monopolize,” and that there was a “dangerous probability” that the defendant would achieve monopoly power.\(^{141}\)

In evaluating whether the defendant possessed the requisite intent, evidence that the defendant displayed an intent “to compete vigorously” is insufficient.\(^{142}\) Instead, the plaintiff must show a “specific intent to destroy competition or build monopoly.”\(^{143}\) Intent may be proven by direct or circumstantial evidence, and must be supported by evidence of conduct corroborating the alleged intent.\(^{144}\)

The principal factor in assessing whether a defendant had a “dangerous probability of success” is market share. A market share of 50 percent or more, together with barriers to entry, is often a starting point for this finding. A market share of between 30 and 50

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percent will rarely suffice, and a market share of less than 30 percent is always insufficient to support a finding of “dangerous probability of success.”

1.03.4 Price discrimination

The Robinson-Patman Act is the principal federal statute regulating price discrimination. Criticized by many as inimical to the goals of modern competition policy because it protects competitors and can lead to increased prices to consumers, antitrust law’s “illegitimate child” is still on the books, despite numerous calls for its repeal. Although the FTC and the DOJ both have enforcement authority, the FTC (which is the only federal agency that has enforced the Act since the 1960s) has sharply reduced its enforcement activity under the Act in recent years, bringing only one case since 1992. Hence, it is enforced primarily through private litigation.

The Robinson-Patman Act prohibits a seller from offering different prices to different buyers for commodities of “like grade and quality,” where the effect of such price discrimination may be to injure competition. Different prices are allowed only if (1) the lower price is available to all buyers; (2) a lower price is justified by lower costs of selling to a particular buyer; (3) a lower price is offered in a good faith attempt to meet competition; or (4) a lower price is justified by a change in market conditions, such as impending bankruptcy or perishability of goods.

There are two kinds of price discrimination claims: primary-line discrimination (involving competition at the seller’s level) and secondary-line discrimination (involving competition at the buyer’s level). In a primary-line price discrimination claim, a competing seller challenges its rival’s pricing policies; in a secondary-line claim, a disfavored buyer (or its customer) challenges the seller’s discriminatory pricing.

In sharp contrast to other federal antitrust claims, a secondary-line buyer challenging price discrimination may prove the requisite injury to competition simply by showing its own injury: the statute prohibits price discrimination if its effect “may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure.
Private enforcement of antitrust law in the United States

destroy, or prevent competition with any person . . . .”155 Thus, a plaintiff can prevail if it can show that a single competitor lost sales as a result of the discriminatory pricing, and need not show injury to competition.156

In order to recover damages, a secondary-line plaintiff must show that it lost sales or profits as a result of the price discrimination. Merely showing that it paid a higher price than its competitor is insufficient.157

The plaintiff alleging primary-line price discrimination must prove, in addition to the four elements required of secondary-line claims (price differential applied to commodities of like grade and quality that are sold in interstate commerce and which differential causes injury), that the differential pricing is predatory. That is, the plaintiff must prove “that the prices complained of are below an appropriate measure of its rival’s costs” and that the competitor has a “reasonable prospect . . . of recouping its investment in below-cost prices . . . .”158 This standard, nearly identical to the requirements imposed on a plaintiff alleging predatory pricing under § 2 of the Sherman Act,159 has sharply curtailed these cases and “has largely eliminated calls for further reform regarding primary-line claims.”160

§ 1.04 State law

All states have their own antitrust laws. Many state antitrust statutes are similar or identical to federal antitrust statutes, and are interpreted by their courts to be consistent with federal law. There are, however, notable distinctions. Many states do not, for example, have monopolization statutes analogous to § 2 of the Sherman Act.161 In at least some of those states, however, monopolies may be challenged under state common law, or under

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155 Id. (emphasis added).
156 Morton Salt Co., 334 U.S. at 49; Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006); see also, e.g., J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1535 (3d Cir. 1990) (“evidence of injury to a competitor may satisfy the component of competitive injury necessary to show a violation of the Robinson-Patman Act”). Cf. Brunswick Corp., 429 U.S. at 488 (the purpose of the antitrust laws is to protect overall competition, not individual competitors). Even if the defendant can show that competition was not harmed, a plaintiff can prevail so long as there was injury to individual buyers. Chroma Lighting v. GTE Prods., 111 F.3d 653, 658 (9th Cir. 1977). In addition, injury can be inferred from proof that a “favored competitor received a significant price reduction over a substantial period of time.” Volvo Trucks, 546 U.S. at 224.
157 XIV Herbert Hovenkamp, Antitrust Law ¶2331 79–93 (2006) (“The statute does not prohibit a price discrimination that merely ‘injures or destroys’ the disfavored purchasing. Rather, the discrimination must injure or destroy the disfavored purchaser’s ability to compete with the favored purchaser.”) (emphasis in original). See J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981) (to recover damages under § 4 of the Clayton Act, plaintiff “must make some showing of actual injury attributable to something the antitrust laws were designed to prevent”).
158 Brooke Group, 509 U.S. at 222, 224.
159 A plaintiff in a § 2 predatory pricing case must also prove below-cost pricing and probable recoupment via supracompetitive pricing. Unlike the Robinson-Patman Act plaintiff, however, the § 2 plaintiff must show a “dangerous probability” of recoupment, instead of a merely “reasonable prospect.” Id.
160 Antitrust Modernization Comm’n, Report and Recommendations 315.
161 California, for example, has no § 2 analog. See XIV Herbert Hovenkamp, Antitrust Law, ¶2414a 351–52 (2006); Bondi v. Jewels by Edwar, Ltd., 267 Cal. App. 2d 672 (1968) (Cartwright Act requires “combination”).

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state antitrust statutes that regulate concerted conduct. Another significant difference is in state-law treatment of resale price maintenance. In some states minimum resale price maintenance remains per se illegal even after the Supreme Court’s *Leegin* decision; in others, state legislatures are considering or have already enacted statutes directly rejecting *Leegin*’s rule-of-reason standard. Another significant difference is state law treatment of price discrimination. Some states’ laws are more aggressively protective of individual competitors. In some states, for example, a primary-line price discrimination plaintiff (claim by a rival seller) need only prove that the defendant sold its goods at a discounted price that was below its fully-allocated cost, as opposed to its marginal or average variable cost (as required under the Robinson-Patman Act). This is a far easier burden for plaintiffs to satisfy. Another significant difference is the treatment of parties who are indirectly injured by antitrust violations. Under federal law, indirect purchasers are barred from recovering their damages under the Clayton Act (though they may still seek injunctive relief). A number of states have explicitly rejected the federal bar to indirect purchaser recovery, adopting “Illinois Brick repealers” or interpreting their statutes in a manner contrary to federal law.

§ 1.05 Exempt industries

Despite broad agreement that the goal of antitrust law is to protect competition rather than competitors, there are currently more than 30 statutory and judge-made exemptions to the federal antitrust laws. Insurance, agriculture, charitable giving, exports, fishing,
health care, labor, local governments, college financial aid, medical resident matching programs, small businesses, soft drink distributors, railroads, shippers, professional baseball teams, and local governments all enjoy some measure of protection from federal antitrust liability.

One important statutory exemption is the Capper-Volstead Act of 1922, which immunizes an agricultural co-operative or association from antitrust liability unless it “monopolizes or restrains trade to such an extent that the price of any agricultural product is unduly enhanced.” The coverage of the Act is broad. It applies to “[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut, or fruit growers,” and it allows them collectively to process, prepare for market, handle, and market agricultural products in interstate and foreign commerce. Enacted in 1922 – when demand for agricultural products was down from its war-time peak – the purpose of the Act was to permit agricultural co-operatives to join together to increase their bargaining strength against large corporate buyers. While antitrust advocates generally view exemptions as contrary to the goals of United States competition policy, there has been little movement to repeal or substantially modify the Act.

More controversially, the McCarran-Ferguson Act exempts a wide swath of insurer conduct from antitrust scrutiny. The Act provides that the Sherman, Clayton, and FTC Acts “shall be applicable to the business of insurance,” only to the extent that such business is not regulated by State law. With extensive state regulation of insurance,
Defining antitrust violations in the United States

the exception is broad. The Act does have a limiting provision, however: the Sherman Act still applies “to any agreement to boycott, coerce, or intimidate.”172 Furthermore, because the Act only exempts “the business of insurance,” conduct by insurers that does not have the effect of spreading risk, is not integral to the policy relationship between the insurer and the insured, or includes entities outside the insurance industry, may not be exempt.173 Numerous attempts to repeal or reduce the scope of the insurance exemption have not succeeded.

Another important exemption is organized labor. Federal statutes provide that labor unions are not combinations or conspiracies in restraint of trade and exempt specific union acts, including picketing and boycotts, from the antitrust laws.174 The exemption does not extend to combinations among unions and non-labor groups. In addition to the statutory exemptions, courts have held that labor unions and employer groups have limited immunity from federal antitrust laws for conduct that is necessary to make the collective bargaining process work.175

Export activities also enjoy limited immunity from antitrust scrutiny under two related statutes, the Foreign Trade Antitrust Improvement Act (FTAIA)176 and the Export Trading Company Act (ETCA).177 Under the ETCA, a company engaged in export activities can obtain immunity from federal and state enforcement actions by obtaining a Certificate of Review from the Department of Commerce (which the Department of Commerce issues only with the concurrence of the DOJ). If subsequently sued by a private entity, a company that has obtained a Certificate of Review is entitled to a rebuttable presumption that it has complied with the statute, a shorter statute of limitations for antitrust claims, and a prohibition against treble damages.178

The FTAIA makes the Sherman and FTC Acts inapplicable to exporting activities unless those activities have a “direct, substantial, and reasonably foreseeable effect” on domestic commerce or a domestic firm competing for foreign trade.179

174 See 15 U.S.C. § 17 (the labor of a human being is not a commodity or article of commerce and cannot be construed as an illegal combination or conspiracy in restraint of trade); 29 U.S.C. § 104 (no court shall have jurisdiction to issue a restraining order or permanent injunction in any case arising out of or involving a labor dispute); 29 U.S.C. § 105 (court does not have jurisdiction to issue restraining order or permanent injunction upon the grounds of a labor dispute that constitutes an unlawful combination or conspiracy).
178 Id.
§ 1.06 Conclusion

Private enforcement of antitrust laws remains robust and effective in the United States. While judicial decisions have in recent years imposed stricter pleading standards, eliminated categories of conduct from the less stringent per se standard of review, and imposed heavier evidentiary burdens on plaintiffs seeking to certify a class, private plaintiffs continue to play an important role in enforcing the antitrust laws and deterring anticompetitive conduct.