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Antitrust Analysis Synthesis

for Sherman Act §1 & §2 theories

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This handout is intended to give you a unified to-do list for approaching antitrust problems under §1 or §2 of the Sherman Act. It also applies, of course, to cases brought by the FTC using Sherman Act theories – cases that are technically brought under §5 of the FTC Act.

Important notes regarding how this document relates to our course: First, note that **this handout does not cover all the legal doctrine in the course**. For example, it does not cover the enforceability of non-compete agreements under state law (topic 7) or merger review (topic 33). Second, this document is not meant to be a source for helping you to understand the law. Rather, it is meant to be a road map for approaching problems in order to apply what you've learned. Third, do not try to make inferences about what will be on the exam from this handout. The amount of words devoted to a topic in this handout reflects my judgment in the amount of detail necessary to give you a comprehensible scheme for applying what you've learned. The amount of words devoted to topics in this document is not intended to correspond to the amount of time devoted to the topic in class or to correspond to the amount of emphasis a topic will receive on the exam. Thus, a topic might receive detailed coverage in this document but little emphasis on the exam.[1] The semester's "Exam Prospectus" document will be your source for exam coverage information.

[1] In a couple of places I couldn't help myself, and I added a footnote to memorialize the fact that in 2021 we did not spend much time on something. But I have not sought to make such notations systematically throughout this document.

General approach

Think about multiple restraints. The to-do lists below tend to speak in the singular about "a" restraint. But in any given fact pattern, there may be multiple restraints giving rise to multiple theories of a §1 or §2 violation.

Think about multiple causes of action. Often the same restraint can be challenged under §1 and §2.

Avoid copy-and-paste. In an essay context, when dealing with multiple restraints, monopolization theories, multiple claims, multiple parties, etc., avoid using the copy-and-paste function to duplicate text. Where appropriate, reference your prior analysis, and then note any differences.

Think about the cases you've read. Federal antitrust law under the Sherman Act is essentially a common-law endeavor; therefore be mindful of the power of reasoning by analogy from the cases. Thus, while this document sets out an analytical structure for approaching problems, do not view it as a rigid algorithm. Instead, think of it as a way to organize your common-law reasoning. Insofar as that goes, keep in mind that knowing the facts of the cases we read will help you to see which ones might be valuable for reasoning analogically.

Creating a structure for common-law-type analysis always involves judgment calls and subjectivity. The scheme I've laid out below is just one way to do it. There are other good approaches. The structure I suggest below for §1 is based very loosely on *U.S. v. Brown University,* 5 F.3d 658 (3d Cir. 1993). Another resource for §1 analysis synthesis is pp. 160-162 of *United States Antitrust Law and Economics,* 3rd Edition, by Einer Elhauge. While Elhauge's analytical steps for §1 are somewhat different from what I've set out below, there is a large amount of overlap, and I think it is helpful to read Elhauge's explanation alongside the approach outlined here.

What counts as "procompetitive" and "anticompetitive"?

Much of §1 and §2 analysis comes down to considering "procompetitive" justifications and "anticompetitive" effects. There's no hard-and-fast rule about what counts as either. But here is some guidance:

Procompetitive justifications are ultimately delineated by the examples provided in the cases, but in general: Increasing consumer choice is procompetitive.[2] Allowing market options to better conform to consumer choice is procompetitive.[3] Increasing consumer information should count as procompetitive where it aids consumer choice. Importantly, increasing the incentives to develop a business can be procompetitive—even where that's accomplished through a non-compete agreement that makes the business more transferrable.[4] And while "efficient" is not synonymous with "procompetitive" in an economic sense, efficiencies are very often counted as procompetitive.[5]

But "procompetitive" is not synonymous with "good."[6] Social welfare justifications are liable to be ignored as not being procompetitive. Recall that *National Society of Professional Engineers* rejected safety as a justification for an agreement to prohibit competitive bidding. But bona fide pursuit of safety, where unaffected by financial self-interest, can sometimes be shoe-horned into the "procompetitive" category.[7]

Anitcompetitive effects are also ultimately delineated by the examples provided in the cases. But in general, anticompetitive effects include harming the competitive process and thus decreasing the capacity for consumer choice to guide market outcomes. It is blackletter law that merely harming a competitor is not an anticompetitive effect. But as *LePage's Inc. v. 3M* said, "When a monopolist's actions

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[2] *See* U.S. v. Brown Univ., 5 F.3d 658, 675 ***[Elhauge 3d ed., p. 169]*** (3d Cir. 1993) ("Enhancement of consumer choice is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit.").

[3] **Elhauge 3d ed., p. 136:** "Agreements that improve a market option can thus be procompetitive even though they reduce the number of market options, as long as the improved market option itself is itself subject to a competitive process because it competes with other firms for the business of buyers in a way that leaves those buyers better off according to their own market judgments."

[4] *See* Nat'l Soc. of Pro. Engineers v. United States, 435 U.S. 679, 688–89 ***[Elhauge 3d ed., p. 130]*** (1978) ("*Mitchel* involved the enforceability of a promise by the seller of a bakery that he would not compete with the purchaser of his business. The covenant was for a limited time and applied only to the area in which the bakery had operated. ... The long-run benefit of enhancing the marketability of the business itself—and thereby providing incentives to develop such an enterprise—outweighed the temporary and limited loss of competition.").

[5] *See* F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 ***[Elhauge 3d ed., p. 138]*** (1986) (listing as an example of a "procompetitive virtue" the "creation of efficiencies in the operation of a market or the provision of goods and services").

[6] *See* Nat'l Soc. of Pro. Engineers v. United States, 435 U.S. 679, 691 ***[Elhauge 3d ed., p. 131]*** (1978) ("[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.").

[7] See ***Elhauge 3d ed., p. 142*** discussing *Allied Tube* (U.S. 1988).

are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary, *i.e.* predatory, conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general."

§1 violation

A violation of §1 of the Sherman Act requires the plaintiff to prove that (1) The defendant was part of an agreement or concerted action that (2) has unreasonably restrained trade (3) with an effect on interstate commerce.

Element (1) is: The defendant was part of an agreement or concerted action.

Analyze:

Was there an agreement or concerted action?

Often this is an easy question. Sometimes, however, it is a difficult issue; if so apply the appropriate analysis.

Are the defendants, purported to have agreed with one another, separate entities?

- Consider whether there is a wholly-owned subsidiary relationship that excludes a §1 agreement.
- Apply *American Needle*'s test as appropriate concerning whether there are "independent centers of decisionmaking."

Is there direct evidence of an agreement?

- Note that in some cases, such as *Fashion Originators Guild*, *Northwest Stationers*, and *NCAA v. OU*, there are out-in-the-open associations with bylaws and so on, making this part easy. In some cases, the parties to the agreement may try to keep the agreement secret, but wiretaps or subpoenaed documents may provide direct evidence.

If there is no direct evidence, can an agreement be inferred?

- Apply the teachings of *Bell Atlantic v. Twombly*.
- Apply the economic sense test. Consider plus factors.

Element (2) is: The action constitutes an unreasonable restraint of trade. For a restraint to be "unreasonable," it is either per-se illegal, condemned under "quick look" analysis, or is found unreasonable via rule-of-reason analysis. There are many structures one could use to facilitate a complete analysis of this element. But the following structure/order-of-doing-things should help you to bring all of the relevant law to bear.

Can the challenged restraint be characterized as per-se illegal?

With per-se treatment, it's all about categorization. Once the restraint (a/k/a action or agreement) has been categorized as per-se unlawful, then:

- there's no need to determine whether the defendant has market power
- there's no need for empirical[8] evidence of anticompetitive effect

To determine whether the restraint can be characterized as per-se illegal, ask these questions (in blue) and subquestions (in green):

Is there a restraint that falls under one of these per-se categories?

Note: Your analysis may benefit from analogizing to one or more particular cases we read.

- **horizontal price fixing**
  - Recall that *Palmer v. BRG* used a purpose-and-effect test: "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing … price … is illegal per se."[9]
- **horizontal output restriction**
- **horizontal market division**

→ ***if NO,*** then go down to the next blue question, about group boycotts.

→ ***if YES,*** then that's not the end of the story, go on to analyze:

Is the restraint reasonably necessary to advance procompetitive purposes of a productive business collaboration?

Again, your analysis may benefit from analogizing to one or more particular cases we read.

→ ***if YES,*** then you are headed to quick-look or rule-of-reason analysis. But before you go there, it may nonetheless make sense to consider the next questions …

→ ***if NO,*** then go on to ask …

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[8] When the word "empirical" is used in this context, it means *real-world, observed,* or *shown via experience*. Empirical does not necessarily mean sophisticated statistical treatment – such as academic economists might bring to bear. Empirical evidence of anticompetitive effects could be the observation that after a competitor was eliminated, prices went up. In this way, empirical evidence is distinguished from theoretical reasoning – making judgments about what is likely on the basis of economic reasoning.

[9] Palmer v. BRG, 498 U.S. 46, 48 ***[Elhauge 3d ed., p. 102]*** (1990) (quoting *Socony-Vacuum*).

Will the defendants get a break from per-se treatment because of who they are?

Once again, analogizing to cases we read is key. We know that professionals can sometimes get rule-of-reason treatment (e.g., *California Dental*), but not always (e.g., *Maricopa*). And we know universities can sometimes be given rule-of-reason treatment even with what looks like output caps or price fixing (*NCAA v. OU*; *Brown University*).

→ ***if NO,*** then the restraint is per-se illegal. The plaintiff has proved Element 2 (unreasonable restraint) and can go on to Element 3 (effect on commerce).

→ ***if PROBABLY NO, BUT ARGUABLE,*** then you may wish to engage in some quick-look or rule-of-reason-type analysis, looking at procompetitive and anticompetitive effects as the facts support.

→ ***if YES,*** then you are headed to quick-look or rule-of-reason-type analysis, looking at procompetitive and anticompetitive effects as the facts support.

Is there a restraint that qualifies as a group boycott (concerted refusal to deal)?

If so, whether the restraint gets per-se treatment or rule-of-reason treatment varies. Consider:

Is there a plausible procompetitive justification?

The whole point of per-se rules is that procompetitive justifications are inadmissible. Nevertheless, as we've seen time and time again, courts look at these. So, you should too. In *Klor's* the defendant went down in flames seemingly in large measure because it had no procompetitive justifications to offer. And in *Fashion Originators Guild* the defendant offered procompetitive justifications, and the court took these seriously, even while ultimately rejecting them.

Is the situation similar to cases that have applied per-se treatment?

Recall that *Klor's* and *Fashion Originators Guild* applied per-se treatment. *Associated Press* has language suggesting per-se treatment but analysis suggesting rule-of-reason treatment.

The court in *Indiana Dentists* synthesized precedent this way: "[For] the category of restraints classed as group boycotts … 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[.]"[10]

[10] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458 ***[Elhauge 3d ed., p. 137]*** (1986).

→ ***if YES,*** then you can predict this restraint is per-se illegal. The plaintiff has proved Element 2 (unreasonable restraint) and can go on to Element 3 (effect on commerce). ***BUT NOTE THAT YOU STILL MAY WANT TO DISCUSS*** proffered procompetitive justifications and any empirical evidence of anticompetitive effects if these are offered in the facts. Courts often discuss these even in the course of disposing of a case on a per-se basis, so you might consider the usefulness of doing so as well.

→ ***if PROBABLY YES, BUT ARGUABLE,*** then you may wish to engage in some quick-look or rule-of-reason-type analysis, looking at procompetitive and anticompetitive effects as the facts support.

→ ***if NO,*** then go on to ask …

Is the situation similar to cases that have refused to apply per-se treatment?

Recall that *Northwest Stationers* applied rule-of-reason treatment and *Associated Press* used analysis that looked a lot like rule-of-reason treatment.

→ ***if YES,*** then you can predict this restraint will not be considered per-se illegal. For this thread of analysis you will be going to quick-look or rule-of-reason analysis.

Is the restraint tying?

→ ***if YES,*** then tying gets its own analysis. Apply the analysis for tying, which was covered under the vertical-restraints portion of the course and is found later in this document under §2 monopolization analysis.

Is the restraint plausibly justified as fairly within the reward provided by an intellectual property entitlement?

→ ***if YES,*** then analyze in accordance with *General Electric, New Wrinkle, Actavis, In Re Humira,* and *Microsoft*.

Note that *General Electric* appears to create a rule of almost per se legality for patent license restrictions — and this holds at least in facts similar to that case. But *New Wrinkle* shows there's a limit — you can't use weak patents as an excuse to fix prices. And *Actavis* says that buying off patent challengers with reverse-payment settlements is subject to rule-of-reason scrutiny, and that case signaled that rule-of-reason scrutiny need not be as full-on as a patent holder might wish. But *In Re Humira*, albeit currently on appeal, shows potential limits to the application of *Actavis*. Recall that *Microsoft* rejected copyright as a blanket rationale for avoiding antitrust scrutiny, but the case did find that the copyright entitlement provided some cover for allegedly anticompetitive conduct at the extremes.

Might quick-look rule-of-reason apply?

To vet this, you might ask:

Does the agreement facially restrain competition such that the court would be justified in only considering the theoretical procompetitive justifications and anticompetitive effects without needing to see empirical evidence?

The idea of quick-look is that there are some restraints that aren't among the restricted set of per-se unlawful restraints but that also aren't among those restraints regarded as generally being on the up-and-up, like bona-fide joint ventures.

Think of it this way:

- Per-se treatment is efficient for courts and provides predictability for firms, which is good. But per-se treatment inhibits courts from considering procompetitive rationales, which could be bad if taken too far. So we reserve per-se treatment for categories of restraints so obnoxious we're sure we'll have no regrets about having banned them from our economy.
- Rule-of-reason treatment is incredibly laborious for courts, which is bad. And rule-of-reason litigation is time- and money-intensive for plaintiffs. And that's not good either. What's more, even if a plaintiff goes through all the trouble of bringing a rule-of-reason case, winning is against long odds. All of this means it's really hard for plaintiffs to win rule-of-reason cases. Add this up, and plaintiffs will often see rule-of-reason litigation as too much work for too little reward. That means restraints that get rule-of-reason scrutiny under the law may get no antitrust scrutiny at all in practice.
- Thus the courts have made room for an intermediate category — the quick look. These are restraints that *might* be economically beneficial, so the courts don't want to foreclose their possibility, yet they are so economically suspect that the courts don't want plaintiffs to be discouraged from bringing suit.
- This rationale for why we need a quick-look category, when stated this way, articulates an informal test: Quick-look rule-of-reason treatment is appropriate for restraints that, while not per-se unlawful, are so on-their-face troublesome that we want to cut plaintiffs a break.

Is the restraint a group boycott that doesn't qualify for per-se treatment?

Group boycotts that aren't handled on a per-se-illegal basis tend to be looked at in a quick-look-type manner (whether the court calls it that or not) — for instance *Associated Press* and *Northwest Stationers*.

Can the restraint at issue be fairly analogized to a restraint given quick-look treatment in the past?

In *National Society of Professional Engineers,* the court didn't need empirical evidence to decide that a professional association's elimination of

competitive bidding for engineering work was an unreasonable restraint of trade. In *Indiana Dentists,* the court didn't need empirical evidence to decide that dentists' refusal to send x-rays to insurers was an unreasonable restraint of trade. And *NCAA v. OU* can also be considered to be a quick-look case.

→ *IF QUICK-LOOK APPEARS APPROPRIATE, then …*

Engage in quick-look rule-of-reason analysis.

How do you do that? Here's the thing: Quick-look rule-of-reason is not really different from rule-of-reason. It's all on a spectrum. The main idea with quick-look is that it's truncated. If you think of full-on rule-of-reason analysis as consisting of five steps (as shown below in the five numbered questions in blue), then quick-look rule-of-reason can be thought of as just the first two questions ((1) theoretical anticompetitive effect and (2) theoretical procompetitive justification).

But keep in mind that even in quick-look cases, the courts often mention market power when that evidence is readily available. And they often mention intent evidence when that evidence presents itself. Remember: "[There's] always something of a sliding scale in appraising reasonableness." (*Actavis,* quoting others.)

NOTE: The category of "quick-look" rule of reason is also sometimes called "abbreviated" rule of reason. And it's often called nothing at all — various cases truncate their analysis because restraints are highly suspect, yet the words "quick look" or "abbreviated" are never incanted.

Engage in rule-of-reason analysis.

The default is rule-of-reason analysis. Historically, rule-of-reason analysis preceded the development of the doctrines of per-se illegality and quick-look. Today, rule-of-reason continues to be the presumed analytical mode for determining whether a restraint is unreasonable within the meaning of §1.

It is because rule-of-reason is the default that I recommend you start, above, by eliminating the applicability of the other modes of analysis. Once you've done that, you know that rule-of-reason analysis is appropriate.

The basic idea of rule-of-reason analysis is to determine whether the restraint is anticompetitive. The way to do this is to consider procompetitive justifications, to consider anticompetitive effects, and to analogize to prior cases.

To proceed methodically, the rule-of-reason process can be broken down in a way that is attentive to orders and burdens of production and proof, as follows:

(1) Can the plaintiff allege an agreement that has theoretical anticompetitive potential?

This means some agreement between two entities that has the effect of ordering economic production and consumption in some way other than would be the outcome as a matter of a free market driven by the self-interested choices of market participants.

For example, suppose dentists ban together and decide not to advertise on the basis of quality or affordability of dental services, enforcing that decision on each other (à la *California Dental*). That theoretically could lead to different offers of dental services, different consumption of dental services, and different transactions among dentists and dental patients than otherwise would have occurred among dentists and dental patients acting purely according to their own preferences.

(2) Can the defendant articulate a theoretically plausible procompetitive justification?

Consider whether the restraint contributes to overall economic efficiency — that is, in a way that's more efficient for society, not for the defendant's shareholders — through the creation of new choices and transactional opportunities for consumers. The set of possible theoretical procompetitive justifications is essentially infinite, but cases we've read give you a strong set of examples to work from.

In thinking about this question, also consider the existence of less restrictive alternatives. Even if a defendant can articulate a way in which a restraint does something procompetitive, if that same something could be achieved with a less restrictive alternative — providing a smaller or less extensive restraint on the market — then that suggests the particular restraint at issue isn't really procompetitively justified.

(3) Can the plaintiff provide empirical evidence of anticompetitive effect?

Consider that:

- direct evidence of anticompetitive effect will suffice[11]
- an empirical showing of market power can, in the right circumstances, allow an inference of anticompetitive effect
- anticompetitive intent is not necessary, but if shown, anticompetitive intent evidence can count as evidence of anticompetitive effect

(4) Can the defendant produce empirical evidence of procompetitive effect?

Confronted with empirical evidence of anticompetitive effect, the burden is on the defendant to take its theoretical arguments about procompetitive virtues and back them up with empirical evidence — showing that the procompetitive effects are real.

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[11] Note that where there's anticompetitive effect, this obviates the need to look into market power. *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61 ***[Elhauge 3d ed., pp. 138-139]*** (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.' P. Areeda, Antitrust Law ¶ 1511, p. 429 (1986)")).

(5) Which outweighs the other — evidence of anticompetitive effect or evidence of procompetitive effect?

Not many cases make it this far, but if there are theoretical justifications on both sides and those are borne out by empirical evidence, then the court has to weigh the procompetitive against the anticompetitive. On balance, is the challenged restraint more helpful or harmful for economic efficiency and consumer protection?

IMPORTANT NOTE ABOUT THE ABOVE STRUCTURE FOR ANALYSIS:

What's good about the above structure is that it may help you carefully unpack a §1 case and help you bring to bear on it all you have learned in class and in the reading, ***BUT*** the above structure presents a potential danger of making §1 analysis seem more regimented and inflexible than it really is.

I urge you to keep in mind this quote from *California Dental*:

> "The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear. We have recognized, for example, that there is often no bright line separating per se from Rule of Reason analysis, since considerable inquiry into market conditions may be required before the application of any so-called 'per se' condemnation is justified. Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same – whether or not the challenged restraint enhances competition. There is always something of a sliding scale in appraising reasonableness[.] … As the circumstances here demonstrate, there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry [appropriate] for the case, looking to the circumstances, details, and logic of a restraint. [Regarding whether quick-look is justified,] [t]he object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one."

California Dental Assn. v. FTC, 526 U.S. 756, 779-781 (1999) (internal cites, quotes, ellipses, and brackets omitted).

Element (3) is: There has been an effect on interstate commerce.

This often will be so clear it can be easily dispatched with a single sentence. Sometimes, however, this element can present more of a live issue and will require some level of nuance to the analysis.

- Consider whether there is an effect on "commerce," as opposed to being purely non-commercial activity.
- Consider whether the commerce is interstate (an incredibly low bar).
- Consider whether commerce in the United States is affected, as opposed to only outside the country.

Other issues that could affect liability might include:

- Jurisdiction issues
- Remedies
- Injury, standing, and limitations on actions
- Exemptions and immunities

Consult your notes as appropriate.

§2 monopolization

A §2 monopolization claim requires the plaintiff to show "(1) the possession of monopoly power in [a] relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *U.S. v. Grinnell Corp* (U.S. 1966).

Element (1) is: The defendant has monopoly power in a relevant market.

Analyze:

MARKET DEFINITION: What is a relevant market?

Note for market definition: There could be lots of potential markets, but the plaintiff only has to show monopoly power in "a" relevant market. That means, for the purpose of analyzing the defendant's potential liability, you should be looking for the worst-case scenario for the defendant: Is there a plausible product market definition and geographic market definition that portrays the defendant as having monopoly power?

A market consists of both a product market and a geographic market. So ask:

What is a relevant product market?

To unpack the issue of a relevant product market, ask:

What products are reasonably interchangeable by consumers?

If products are reasonably interchangeable by consumers, then they are part of the same product market. For example: If consumers would reasonably substitute steel tent spikes for aluminum tent spikes, then they are part of the same product market. If consumers would reasonably substitute Maine lowbush blueberries for Michigan highbush blueberries, then they are part of the same product market. If not, then not.

Consider cross-price elasticity of demand.

You may or may not have information from the facts relevant to cross-price elasticity of demand (a/k/a "cross-elasticity of demand"). But if you do, you should consider the implications for market definition.

Recall that cross-price elasticity of demand looks at the effect of a price increase on one good on the demand for the other good.

Cross-elasticity of demand can allow various inferences:

- You can conclude from low cross-price elasticities of demand that there are separate markets for the two goods. (This holds whether current prices are at competitive levels or not.)
- You can conclude from a high cross-price elasticity of demand at competitive price levels that there's a single market encompassing the two goods. (That is, if raising prices on one good causes consumers to flee to the other good, then the two goods appear to be reasonably interchangeable by consumers and thus may be considered to be part of the same product market.)
    - But be aware that buyer-substitution rates for a competitive market aren't observable in the real world if the real-world market is non-competitive — i.e., market power is already being brought to bear.
- You cannot conclude from high cross-price elasticity of demand at monopoly price levels that there's a single market encompassing two goods.
    - **To reason otherwise is to fall into the Cellophane Trap!** If raising prices by the would-be monopolist causes buyers to flee to substitutes, that doesn't mean the would-be monopolist isn't a monopolist. It might be that we have a monopolist who is already producing at the profit-maximizing output level so as to fetch the profit-maximizing supracompetitive price.

Consider the Hypothetical Monopolist Test.

The Hypothetical Monopolist Test comes from the 2010 Horizontal Merger Guidelines. You may or may not have information from the facts that allows you to do the Hypothetical Monopolist Test. But if you do have the information, the Hypothetical Monopolist Test can help with market definition.

Under the Hypothetical Monopolist Test, a "relevant product market" is one where, if one firm were the only seller of a product (that firm being the hypothetical monopolist), the firm would be able to impose a small but significant and non-transitory increase in price (SSNIP). For these purposes, "small but significant" is quantified as at least 5%.

What is a relevant geographic market?

A geographical market is the geographical area in which customers are willing to travel outward to find substitutes in response to an increase in price or in which suppliers are willing to travel inward in response to an increase in price.

The substance of the analysis for geography is the same as for products, above.

Once you have a relevant market, then you should proceed to …

MONOPOLY POWER: Given the market as defined, does the defendant have monopoly power?

Monopoly power is the power to control prices and exclude competition. Essentially, monopoly power is more market power than mere "market power."

Determining monopoly power is mostly about market share, but also relevant are barriers to entry, capacity constraints, changing consumer demand, and demand elasticity.

So start here:

Look at the market share in the relevant market.

Assuming you have a percentage to work with, compare it to signposts or flags that have been planted by prior cases:[12]

- 90% is enough for monopoly power (L. Hand, in Alcoa)
- 87% "leaves no doubt" that monopoly power exists
- 80-95% is enough for the plaintiff to survive summary judgment on the monopoly power issue
- 75% means monopoly power "may be assumed"
- min. 70-80% is what lower courts "generally require" (DOJ '08 report that was withdrawn in '09)
- >66% might be monopoly power
- 50% is the bare minimum for monopoly power for many lower courts
- 30% is insufficient even for §1 market power

Consider barriers to entry.

Barriers to entry are things that stop market entrants. If there are no barriers to entry, then it is easy for competitors to spring up. Even if a firm has 100% market share, there will be no monopoly power if there are no barriers to entry.

Examples of barriers to entry include:

- huge fixed costs, start-up costs
- government regulations
- patents or other IP rights
- lack of access to needed inputs or essential resources
- network effects

[12] This list comes from Elhague (3d ed.) at p. 226.

Consider whether future capacity constraints, changing consumer demand, or demand elasticity might indicate a lack of monopoly power.

Future capacity constraints: If an alleged monopolist won't be able to produce in the future, then it may have no monopoly power even though it has overwhelming market share. An example would be a coal company that already has sales commitments covering all of its coal reserves.

Changing consumer demand: If consumers no longer want the alleged monopolist's product going forward, then past dominant market share may not be probative.

Demand elasticity: Even with overwhelming market share, if consumers can very easily do without the product, then an alleged monopolist may not have monopoly power.

Element (2) is: Anticompetitive conduct.

Note that monopolization claims proceed under a rule-of-reason sort of analysis, but courts tend not to use the label "rule of reason" for §2 claims like they do for §1 claims.

There is general language about what constitutes anticompetitive conduct, such as *Grinnell*'s phrasing ("the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident") or *Microsoft's* five principles. But these standards provide little guidance that is useful in analyzing particularized sets of facts. Far more important are specific standards developed in connection with specific patterns of conduct (e.g., predatory pricing, refusals to deal, exclusive dealing, tying). Also of great value is reasoning by analogy from cases we've read.

Thus, to approach the anticompetitive conduct element systematically, consider:

Is there predatory pricing that qualifies as anticompetitive?

Keep in mind that the bar for a predatory pricing case under §2 is high, and a plaintiff will have to overcome the stringent standards set out in *Brooke Group* to succeed. Reason from, as appropriate, *Brooke Group*.

Is there a refusal to deal that qualifies as anticompetitive?

Reason from, as appropriate, *Aspen Skiing*, *Lorain Journal*, and *Verizon v. Trinko*.

Is there exclusive dealing that qualifies as anticompetitive?

Use the specific analysis for exclusive dealing. In particular, you should consider:

What are the procompetitive justifications for the arrangement?

For instance: lowering risk to allow for market entry, making efficient customer-specific investments, etc.

What are the anticompetitive effects of the arrangement?

For instance: eliminating competition either by splitting monopoly profits with vertical partners or taking advantage of collective action problems.[13]

Consider the substantiality of the market share foreclosure effected by the exclusive dealing arrangement.

Short of eliminating competitors, the key anticompetitive effect for exclusive dealing arrangements is foreclosing market share for rivals (*Microsoft*).

To gauge the substantiality of market share foreclosure:

Apply the qualitative analysis of *Tampa Electric*.

"[W]eigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." (*Tampa Electric*)

Consider the size of the market share foreclosed.

Assuming you have a percentage to work with, compare it to signposts or flags that have been planted by prior cases:

- in general, a minimum of roughly 30-40% of the market must be foreclosed according to some lower courts
- foreclosure 24% was unlawful in one case
- foreclosure of 38% was lawful in one case
- foreclosure of 40% was lawful in one case

Consider that courts typically require less foreclosure for §2 than for §1.

- foreclosure of roughly 40-50% is usually needed for §1.
- foreclosure of less is needed for §2.

Consider the duration of the exclusive dealing arrangement.

Recall that lower courts have held that exclusive-dealing contracts terminable in less than a year are presumptively lawful.

Is there tying that qualifies as anticompetitive?

Tying, to qualify as anticompetitive conduct for monopolization under §2 or as an unreasonable vertical restraint for §1, has its own analytical structure.

[13] In 2021 we did not spend a lot of time on this, but we talked about it a little bit in the abstract and in relation to *G Nova*.

Does the tying arrangement qualify as per se illegal?[14]

Keep in mind that "per se illegal" for tying is distinct from the regular per-se doctrine from §1 for price fixing, output caps, etc.

For per-se illegal tying, four elements must be met:

There are separate tying and tied products.

This is determined by consumer demand.

The sale of the tying product is conditioned upon the sale of the tied product or the buyer is otherwise coerced to purchase the tied product with the tying product.

Coercion includes terms that make it economically infeasible not to purchase the tied product.

There is sufficient economic/market power.

Relevant is the market power the defendant has in the tying product. Alternatively, courts may focus on the defendant's power to force upon the buyer a choice the buyer wouldn't make in a competitive market.

A substantial amount of commerce is affected.

This generally requires only more than a de minimis amount. Just $60,800 was found not insubstantial in one case.

Even if the tying arrangement qualifies as per se illegal, is there a business justification that forms a defense?

For instance, ensuring quality for a new product launch.

Also consider that *Microsoft* held that the per-se rule shouldn't apply to platform software because of the novel/innovative nature of the industry.

If the tying arrangement does not qualify as per-se illegal, does it qualify as unreasonable under rule-of-reason treatment?

There's always the ability to challenge a tying arrangement under rule-of-reason analysis – even if the defendant escapes per-se illegality.

Is there other conduct that plausibly qualifies as willfully acquiring or maintaining a monopoly?

Keep in mind there's no exclusive list of specific kinds of anticompetitive conduct. That is to say, conduct can still be anticompetitive if it doesn't fall into one of the above categories.

[14] In 2021 we did not spend much time on per-se tying analysis—mostly it was in covered cursorily in the slides.

Thus, consider:

- *Grinnell*'s phrasing ("the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident")
- *Microsoft's* five principles
- Myriad examples from *United Shoe*
- Bundling discounts and rebates, as in *LePage's v. 3M*
- Reasoning by analogy from cases we've read or went over

§2 attempted monopolization

A claim of attempted monopolization under §2 requires the plaintiff to show:

(1) Defendant has engaged in predatory or anticompetitive conduct with

(2) a specific intent to monopolize and

(3) a dangerous probability of achieving monopoly power.

Element (1) is: The defendant has engaged in predatory or anticompetitive conduct.

Here you can use the same analysis as for anticompetitive conduct under a §2 monopolization claim.

Element (2) is: A specific intent to monopolize.

With monopolization, intent requires only a deliberate and purposeful act – something that's not an accident. Attempted monopolization requires more, "specific intent," but it still can be inferred from conduct.

Element (3) is: A dangerous probability of achieving monopoly power.

Relevant to this element is the monopoly power analysis used under a §2 monopolization claim; that is, there needs to be some analysis of market definition, market share, barriers to entry, etc., that suggests the defendant could pull off the attainment of a monopoly if the anticompetitive conduct is successful. You can analogize to *Lorain Journal*. Note that even though "a dangerous probability of success" is required, it is not a defense that the plan would have been impossible to execute (*American Airlines*).