

# Antitrust

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## Notes about answering the The Last Mile in the Plum Isles practice exam

This document contains a response, with notes, to the practice exam, “The Last Mile in the Plum Isles.” It is based mostly on written responses sent in by e-mail as well as analysis done as an in-class review exercise. The bracketed insertions in blue font – *[Like this ...]* – are mine.

Note that there was a lot of good material that I received in the e-mailed responses that I chose to leave out of this document. What I’ve aimed for here is something along the lines of a very-well-thought-out response that leverages the analytical product of many students. I did not, however, attempt to provide an idealized or exhaustive response; thus, I did not try to put in every bit of plausible, worthwhile analysis.

This implies a couple of things: (1) Don’t assume you are off on the wrong track if you read the text below and think, “Gee, that’s not how I would have done that,” or “Gee, there’s other things I would have added into the analysis.” (2) Don’t view the answer below as a standard you need to meet. What appears below was cobbled together from the work of many students and includes the fruits of all of us working together in class. So, in that sense, it represents work product that may be unrealistically good for what a single student could do in the space of two hours.

One other admonition: Don’t view the text below as a rigid guide to exam-answering style. What is good about the response below, in terms of its writing, is that it concentrates on providing legal analysis – the mixing of facts and law together to make conclusions. That’s what everyone needs to do, and the response below is a model in that sense. On the other hand, the material below is probably needlessly wordy in many areas. More concise phrasing could be just as effective, if not more so. Also, on the real exam, you should feel free to use abbreviations. I eschewed abbreviations here to standardize the text and make it more readable.

For the corresponding practice exam booklet with the hypothetical facts and questions, go to my Exam Archive at ericejohnson.com. Here is the direct URL: [http://www.ericejohnson.com/exam\\_archive/Antitrust\\_Spring\\_2019\\_practice\\_exam\\_Part\\_2\\_essay.pdf](http://www.ericejohnson.com/exam_archive/Antitrust_Spring_2019_practice_exam_Part_2_essay.pdf)

## QUESTION 1

The first element of a §1 claim is indisputably met as there are a multitude of agreements between CycleCircle, WhipperWheel, and ZigZoom in their creation of a joint venture, PlumPedal. But if CycleCircle, WhipperWheel, and ZigZoom constitute a single entity, then they would not be able to form an agreement for §1 purposes. The test is whether they have independent centers for decision making. It appears that they do have separate decision-making centers. Each one (CycleCircle, WhipperWheel, and ZigZoom) operates on a separate island and is in charge of their own advertising so it seems they take action independent of the others, besides the things they've agreed upon (i.e. same app, parking center, price).

The third element is met as the actions taken have impacted the money spent by tourists on the islands, which is more than enough for the requirement of an impact on the interstate economy.

The second element—unreasonable restraint on trade—requires much more analysis.

Let's first take the price-fixing. It is horizontal because they're competitors. The JV itself shows explicit horizontal price fixing. CycleCircle, WhipperWheel, and ZigZoom have all set their prices at the same amount and clearly agreed on the pricing. As horizontal price-fixing, this is per-se illegal unless there's something to remove it from that categorization. What would get CycleCircle, WhipperWheel, and ZigZoom out of per se liability would be that if their collaboration is constitutes a legitimate joint venture. While they did pool their capital in order to create PlumPedal, they do not share in the profits: No matter what app is used to rent the bike, the only company that gets money from the bike rental is the owner of that bike. As such, this joint venture does not pass the *Texaco* test and so will not serve to defend the companies from liability for per-se price fixing.

*[An additional possible area for analysis: Is this like BMI?]*

*[Another additional possible area for analysis: Does the extra \$700,000 that would have to be spent to create an app with variable pricing serve as a defense? Consider: Was the uniform pricing reasonably necessary, or was there a less restrictive alternative?]*

Enforcers are also likely to argue that the companies have agreed to a horizontal market division that is per-se illegal. Under PlumPedal, the markets have been divided such that each company is on one island by itself. An agreement between competitors to halt competition in a geographic market of prior competition is a per-se violation of §1. Like in *Palmer v. BRG*, where before the JV agreement was put in place, the companies were competing, here the sharebike companies operated on all three islands competing with each other. After the agreement, there's no competition on any of the three islands. This appears to be per-se illegal conduct.

*[An additional possible area for analysis: Can any more light be shed on this by comparing and contrasting it to Palmer v. BRG?]*

Another issue is the existence of horizontal output restrictions, which is another category of per-se illegality. There are 80 bikes on each island, compared to about 350

before the JV. But the facts do not indicate that the companies agreed to have just 80 bikes per island. The explanation for the fact that all companies reduced the number of bikes—other than explicit agreement—is that reduced output is the natural consequence of an increased price. But there's still a possibility that the courts will find an agreement on the issue of output caps. The fact that all three islands have 80 bikes, followed by the explicit coordination among the firms, may allow for an inference of an agreement on output. Thus, this is an additional avenue for per-se illegality. But it's almost superfluous after the explicit price fixing and market division, discussed above, for which there is a strong case of per-se illegality.

Despite the foregoing, we might consider whether a court would nevertheless apply rule-of-reason analysis here because this is a new technology-based industry, one that the courts have little or no experience in dealing with. *[As we discussed in class, this comes under the heading of whether the companies get a break because of who they are—thus getting rule-of-reason analysis instead of per-se condemnation. While the bikeshare firms aren't professionals or universities, there is potentially an analogy to be drawn to Microsoft.]*

Another possible rationale for declining to apply per-se rules is that the JV constitutes an allowable means of exploiting patents. Here, because the 888 patent and the 404 patent lost on the preliminary injunction level, there is a high probability that their validity could be challenged and revoked by a different plaintiff. *[Continue this thread by analyzing by analogy to New Wrinkle and Actavis.]*

All in all, I would expect the PlumPedal arrangement to be condemned as per-se illegal. But since there are a couple of plausible reasons a court might analyze this with rule of reason analysis, let's look at how that might proceed.

In terms of theoretical anticompetitive effects, the market division limits the business available to each firm; it divides sales based on a geographic area and essentially assigns certain customers to each seller. This is extremely anticompetitive—terminating the competitive process on any given island.

The main theoretical procompetitive justification is that interisland competition is enhanced. A particular justification has to do with the Share Stations—if bikes were parked at any given Share Station, no single company would have the incentive to care for that Share Station, but with individualized Share Stations, each company is incentivized to keep their own stations tidy so as to enhance their interisland competitiveness. Part of the potential plausibility of interisland competition is wrapped up with the idea that the firms will invest in advertising to promote their island versus the others. Another justification, as far as tourists and residents are concerned, is that ShareStations eliminated “bike ditching pollution”—the clutter of people abandoning their bikes anywhere and everywhere. But by itself—without being tied into the interisland competition theory—this is just a social welfare justification that courts say they won't take into account.

In terms of empirical effects, the prices before the JV were much lower at \$1.00 to unlock and \$0.10 per minute. They are now raised to \$6.00 to unlock and \$0.50 per minute. This is powerful evidence of anticompetitive effect. It also strongly suggests an inference of PlumPedal's market power. *[Another issue that we can put under the*

*heading of empirical effects: What can be said about the \$7,000 ad-spend? What does that mean for whether interisland competitiveness is “for real” or just an excuse for a scheme to eliminate competition?]*

In sum, even though PlumPedal can argue procompetitive justifications for the market division and uniform pricing, this is mostly likely going to be found as an unlawful restraint on trade under rule-of-reason analysis. When weighed together, the procompetitive justifications seem weak and pretextual, while the anticompetitive effects are clear.

## QUESTION 2

The first element of a monopolization claim is monopoly power in a relevant market.

The geographic market here is not broader than the Plum Isles, encompassing all three islands. Customers may be willing to travel between the three islands to find transportation, but they would not be willing to go outside the Plum Isles because at that point the bike transportation is no longer necessary. *[Now go on to analyze whether each individual island constitutes its own market ... ]*

To determine if bikeshare bikes, daily-rented bikes, and privately-owned bikes are part of the same product market, it must be asked if these products are reasonably interchangeable by the consumers. It can be argued that these products are reasonably interchangeable because the traditional daily-rented bikes or a privately-owned bike can reasonably be substituted for the bikeshare bikes if a consumer finds the bikeshare bikes priced too high. But one must also consider that the majority of customers are merely on vacation and therefore less likely to purchase a bike, which means privately owned bikes likely need not be included within the market definition. At any rate, regardless of how we define the relevant market, PlumPedal has monopoly power in the Plum Isles based on its market shares, which are 100%, 90%, or 81%, respectively, for bikeshare-bike miles, rented-bike miles, and all-bike miles. These are all market-share percentages that definitely fall within the range in which courts find monopoly power to exist. And if each island is a separate geographical market, the percentages are the same for each of the individual firms of CycleCircle, WhipperWheel, and ZigZoom, such that each has monopoly power on its own island.

After FlytterFrolic comes into the picture, the percentages go down, but the biggest impact would be to lower CycleCircle’s percentage from 81% to 74% for CycleCircle’s market share on Empress Isle for all bikes including privately owned bikes. This might dip into the zone where courts could find monopoly power debatable. But one must also consider that the majority of customers are merely on vacation and therefore unlikely to purchase a privately owned bike, meaning those aren’t reasonably interchangeable, and the market should be either sharebikes or rented bikes, in which case there is plenty of market share for monopoly power.

Even though monopoly power is mostly focused on market share, courts also take into consideration factors such as barriers to entry, capacity constraints, changing consumer demand, and demand elasticity.

*[Regarding barriers to entry, here are two good alternative analyses based on responses sent in:]*

*[Alternative one:]* The facts in this problem do not show the barriers to entry as being very high, particularly under the Chicago School of thought. PlumPedal can say it has been successful to this point because it has been the only player in the market until the arrival of FlytterFrolic. FlytterFrolic may argue that there is a barrier to entry due to high start-up costs given the cost of the apps and other costs. But, given the Chicago School's influence in the courts, this argument may do little to persuade.

*[Alternative two:]* There appear to be high barriers to entry in the market. It would be difficult to get the capital together to set up one's own bike rentals, app, and get the manpower to manage all of this, never mind the difficulty of cutting into the territory of the well-established bike rental companies.

*[Also, as we discussed in class, perhaps the best evidence of high barriers to entry is that FlytterFrolic has been unable to get more than a 9% market share on Empress Island despite pricing their product at close to zero.]*

The facts do not indicate whether there are any capacity constraints or changing consumer demand that might indicate a lack of monopoly power. And as far as demand elasticity goes, while consumers could in theory choose to do without the bikeshare bikes and instead walk or rent traditionally, the bikeshare bikes are so ubiquitous that it would likely take a conscious effort to find someone who would rent traditionally, and walking is so much slower than biking that it would seriously limit people's mobility if they had to walk everywhere; people just can't easily do without PlumPedal and its bikeshare bikes. And, as discussed, privately owned bikes aren't interchangeable for tourists. Thus, a court will likely find that the relevant market is the bike-share market and hold that PlumPedal has monopoly power in the bikeshare market.

The second element of a monopolization claim is exclusionary conduct.

*[The exclusionary conduct theory that looks fruitful is the non-unilateral conduct, in which CycleCircle, WhipperWheel, and ZigZoom combined to eliminate competition among themselves and form a monopoly on each island. That doesn't add to the scope of liability beyond §1, but it is worth noting.]*

As far as unilateral conduct on the part of PlumPedal directed against their new rival FlytterFrolic, there seems to be nothing actionable. The only plausible exclusionary conduct I see vis-à-vis FlytterFrolic is predatory pricing. One problem with this, however, is that the defendant's prices must be below an appropriate measure of defendant's costs. The companies are making a good profit from their per-use-fee charges to tourists, so that can't be predatory pricing because it is above cost. The resident pricing may be below marginal cost, however. Residents may purchase a \$12.00 per month unlimited plan. Each sharebike ride costs each company an average of \$2.50. *[As we discussed in class, one problem with this is that it is a measure of average total cost. This is as opposed to average variable cost, which can be considered an appropriate measure of cost.]* The only way predatory pricing could thus exist is if residents are using the sharebike system many times per month and there are virtually no pay-per-

use customers. Even then, the conduct must discipline or eliminate a competitor. If the target is FlytterFrolic, it does not seem they are being disciplined by PlumPedal's resident pricing, since FlytterFrolic's total price structure for both tourists and residents has been far lower, something they seem to be doing to build market share as a new entrant.

Section 2 also allows a cause of action for attempted monopolization. But an attempted monopolization claim adds nothing to the picture of liability beyond the monopolization analysis. Attempted monopolization requires, as its first element, exclusionary conduct, which follows the same exclusionary conduct analysis as under a §2 monopolization claim. Thus, an attempted monopolization claim based on PlumPedal's unilateral conduct would fail for the same reason as the monopolization claim.

### QUESTION 3

For a § 2 claim of monopolization, you need monopoly power, and no matter how you identify the market, FlytterFrolic does not have monopoly power as it only has 9% of the total bikeshare miles ridden on Empress Island.

There can be no attempted monopolization claim because FlytterFrolic never had a dangerous probability of success in achieving a monopoly. Far from it: Even as it virtually gives away its product it is struggling to be a viable competitor to CycleCircle/PlumPedal.

For a § 1 claim, the first element is an agreement. The only agreement FlytterFrolic has is with the with Promenade's ownership for exclusive licensing for cycling there. Although this is subject to rule-of-reason scrutiny as exclusive dealing, courts tend to find exclusive dealing not to be unreasonable under §1 unless around 40-50% of the market share is foreclosed by the arrangement. Here, FlytterFrolic's 9% market share is not coming anywhere close to foreclosing an appreciable part of the market. Thus, FlytterFrolic will likely not face antitrust liability for its exclusive dealing arrangement. So, there appears to be no § 1 liability. *[One could also look at this as a group-boycott situation. But since there's no market power, analogizing to a per-se group-boycott case would be key. You could ask whether this seems to be similar to Klor's, for instance.]* The third element of §1 would be satisfied—there's more than enough of an effect on commerce to meet the low threshold.