Antitrust Law

Trademark & Unfair Competition
Eric E. Johnson
ericejohnson.com

Hypo – new dentist

You are a newly graduated dentist. Eager to start practicing, you agree to buy an existing dental practice from Dr. Flossy, a dentist who has practiced for 40 years and is eager to take a step back. The agreement is to buy the office and equipment, the trademark, customer lists and files, and the "goodwill" of the business. You worry that after the sale Dr. Flossy could open a new office under a new trademark and take all his old patients back, leaving you without all those customers and income. So you require as part of the deal that Dr. Flossy agree not to compete with you – specifically, that he won't practice dentistry within 20 miles of you for the next two years.

Hypo – new dentist

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No worries! ☺

This is beyond fine. Antitrust enforcers couldn't care less about this ...
unless they need dental work! Do you take FEDVIP dental insurance?

Hypo – telecom merger

You represent wireless telecom company G-Mobile, which would like to merge with Dash telecom. In terms of market share, your two companies are well back in third and fourth place behind giants OT&T and Zerivon. Privately, your clients expect that they will be able to raise prices and get more customers after the merger, although doing so may cause OT&T and Zerivon to lower their prices somewhat. You know that G-Mobile may be able to roll out the next generation of wireless technology to rural customers faster if the merger goes forward.

Hypo – telecom merger

You represent wirele… which
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Hmm. I'm not sure. Well, okay. I guess it's okay.

Antitrust enforcers may hem and haw about this. They might request information before allowing the merger to go unchallenged. But they may well decide to just let it go – and yet live to regret that years later. But no one's gonna get sued by the government or anything. Worst case, it'll be talked about as a live-and-learn thing.

Hypo – house flippers

You and your friend both have side hustles where you flip houses. You buy a house at a foreclosure auction, you fix it up, and then you sell it at a profit to a family who plans to live in it. Your friend does the same thing. Since you often show up at the same foreclosure auctions and bid against one another, you've sometimes driven up the price on one another. So you make an oral agreement that before going out for a day of auctions, you'll divide up the list of properties according to a professional-sports-style draft system. That way you won't be bidding against each other.

Hypo – house flippers

Y... friend both have side hustles where you flip h... at a foreclosure auction, you fix i... t a profit to a family who plans ...es the same thing. Since you ...e foreclosure... p... before going out for a... list of properties accord... draft system. That way y... against each other.

You're going to JAIL

This is a clear violation of the Sherman Act – the kind the FBI likes to investigate and DOJ criminally prosecutes.

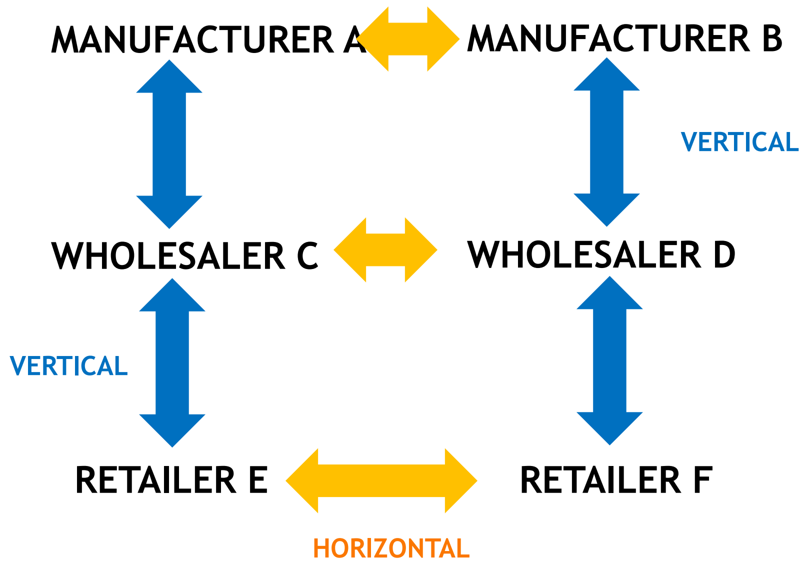
Sherman Act §1 (15 U.S.C. §1)

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

Sherman Act – overall

- The Sherman Act is essentially a federal common law. (And it's understood that that's what Congress intended in passing it in 1890.)
- The Sherman Act is understood to have one uniting theoretical concept, one singular goal: *competition is good*.
- In essence, if some business deal or activity inhibits or gets in the way of the competitive process, it is prohibited by antitrust law.
- If it's good for competition, antitrust law is okay with it.

Antitrust law is much more suspicious of horizontal deals than vertical deals.



Per se and rule of reason

Certain things are "per se" illegal under § 1:
- Horizontal price fixing
- Horizontal output caps
  - because of economics (supply and demand), fixing output generally has same effect as fixing price
- Horizontal market division
  - allows mini-monopolies such that participants can set price or output at profit maximizing level
- Bid rigging is considered a form of price fixing / market division

Essentially every other combination or agreement is considered under "rule of reason" analysis as to whether it is illegal under § 1
- This comes down to balancing the procompetitive justifications against the anticompetitive effects

Bid rigging as per-se illegal under § 1

- Bid rigging is a form of per-se illegal price fixing, where price is determined by competitive bidding.
- Bid rigging can be on the seller side (e.g., construction companies taking turns on who will submit the winning bid for construction contracts, essentially market division)
- Bid rigging can also be on the buyer side, esp. in auctions.
- Bid rigging is a frequent focus for federal prosecutions.
- Bid rigging by real-estate speculators at foreclosure auctions in CA, GA, NC, & AL has resulted in more than 130 prosecutions since 2010 through a joint DOJ-Antitrust-Division/FBI task force.
- Aubrey McClendon (co-founder and former CEO of Chesapeake) was indicted in 2016 for a bid rigging conspiracy to buy oil and gas leases. (He died the next day in a single-vehicle collision.)

Sherman Act §2 (15 U.S.C. §2)

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

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§1 only reached conduct involving at least two parties. §2 is importantly different in that it is capable of reaching unilateral conduct (although it doesn't have to be unilateral)

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We have three offenses under §2:
(1) monopolization
(2) attempted monopolization
(3) conspiracy to monopolize

FTC Act §5

"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

Everything that violates §2 for monopolization will also violate FTC Act §5.

But §5 is broader, reaching unilateral anticompetitive conduct even where there's not monopoly power.

Yet, as we know, only the FTC can enforce FTC Act §5. Also, the remedies are limited to prospective relief.

Monopolization elements

(1) monopoly power in a relevant market

(2) anticompetitive conduct

Mode of analysis

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.

Monopolization elements

"The offense of monopol[ization] under §2 of the Sherman Act has two elements: (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."

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)

Monopolization elements

(1) monopoly power in a relevant market

(2) anticompetitive conduct

a/k/a "monopoly conduct," "predatory conduct," "exclusionary conduct" (some sources may draw distinctions among various terms, but they are often used interchangeably)

Monopolization elements

(1) monopoly power in a relevant market

1. What's a relevant market?
   a) product market
   b) geographic market
2. What constitutes monopoly power in that market?

(2) anticompetitive conduct

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Product market definition

"In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal."

U.S. v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395 ("The Cellophane Case") (1956)

Monopolization elements

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Geographic market

A geographical market is the geographical area in which customers are willing to go to find substitutes in response to an increase in price and where suppliers are willing to come in response to an increase in price.

Geographic market

Consider:

- Every gas station within a three block radius of the law school raises prices by 5% over rivals outside that zone.
- Every gas station in Norman raises prices by 5% over rivals outside the city.
- Every gas station in Oklahoma raises prices by 5% over rivals outside the state.

Geographic market

Consider:

- All carpet cleaning services in Norman raise their prices by 5% over rivals outside the city.
- All carpet cleaning services in the Oklahoma City metro area raise their prices by 5% over rivals outside the metro.
- All carpet cleaning services in Oklahoma raise their prices by 5% over rivals outside the state.

Monopolization elements

(1) monopoly power in a relevant market

1. What's a relevant market?

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Monopoly power

Monopoly power is "the power to control prices or exclude competition."

United States v. E. I. du Pont De Nemours & Co., 351 U.S. 377, 391 ("The Cellophane Case") (1956)

Monopoly power

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- Theoretically, monopoly power can be proved by direct evidence.
  - But this is rarely available, so ...
- Generally, courts look to market share.

Monopoly-level market share

The law doesn't say exactly what market share constitutes monopoly power (MP), but some flags have been planted by various courts:

- 90% is enough for MP (L. Hand, J., in Alcoa)
- 87% "leaves no doubt" that MP exists
- 80-95% is enough for Π to survive sum. j'ment on MP
- 75% means MP "may be assumed"
- min. 70-80% is what lower courts "generally require"
- >66% might be MP
- 60-64% is doubtful for MP (L. Hand, J., in Alcoa)
- 50% is the bare minimum for MP for many lower courts
- 30% is insufficient even for §1 market power

(from p.21 of DOJ '08 report; p. 226 of Elhauge, 3d ed.)

Monopoly power

It's mostly about market share ...

But also relevant are:

- barriers to entry
- future capacity constraints
- changing consumer demand
- demand elasticity

Barriers to entry

Key point: Even if a firm has 100% market share, there will be no monopoly power if there are no barriers to entry - meaning it is very easy for competitors to jump into the market.

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.

Examples of barriers to entry:

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

Monopolization analysis to-do list

(1) monopoly power in a relevant market

1. figure out a relevant product market
2. figure out a relevant geographical market
3. look at the market share
4. consider barriers to entry
5. consider whether future capacity constraints, changing consumer demand, or demand elasticity might let an alleged monopolist off the hook

(2) anticompetitive conduct

[covered next ...]

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ANTICOMPETITIVE CONDUCT

What counts as anticompetitive conduct?

- Must look to economic realities of the situation.
- Must be injury to competition. Injury to competitors is not enough.
- Note: Charging monopoly prices is not anticompetitive conduct! (In fact, it's often the opposite.)

ANTICOMPETITIVE CONDUCT

Some specific examples of anticompetitive conduct (1/3)

- Predatory pricing (Brooke Group)
- Refusals to deal with competitors (Aspen Skiing)
- Refusals to deal with those who deal with competitors (Lorain Journal)
- Denial of access to an essential facility (Otter Tail)

ANTICOMPETITIVE CONDUCT

Some specific examples of anticompetitive conduct (2/3)

- Coercing a competitor's suppliers/partners (Standard Oil, Microsoft)
- Acquisition and retirement of assets (American Tobacco)
- Acquisitions of competitors (Standard Oil)

ANTICOMPETITIVE CONDUCT

Some specific examples of anticompetitive conduct (3/3)

- Preventing formation of second-hand market (United Shoe)
- Tying arrangements (United Shoe, Microsoft)
- Setting and controlling standards (Microsoft)
- Raising competitor's costs
- Loyalty discounts
- Bundled loyalty discounts

Merger analysis

Initial observations

- There's surprisingly little case law on mergers.
- What's interesting mostly has to do with what mergers the government agencies (i.e., DOJ or FTC) decide to challenge.
- And if there's a challenge, resolving it will mostly be about applying DOJ/FTC's own guidelines. It's not about statutory text. It's not really about case law either.
- The analysis comes down to considering anticompetitive effects, procompetitive virtues, and redeeming efficiencies.
    - (And from a law-student perspective, those concepts can be learned from the case law in non-merger Sherman Act §1 & §2 cases.)

Kinds of mergers

- Horizontal mergers
- Vertical mergers
- Conglomerate mergers

Potential benefits of mergers

- All kinds of efficiencies
- Economies of scale
- Preserving firms that would fail
- The list is endless …

Potential problems with mergers

- Unilateral effects – market/monopoly power of the merged firm
- Oligopoly effects – concentration of a market that can cause prices to increase, either through:
  - purely self-interested/independent decision-making of firms, or
  - oligopolistic coordination (e.g., legal “conscious parallelism”)
- According to research, five significant firms in a market tends to be enough to prevent oligopolistic coordination

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5 is a magic number …

Potential problems with mergers

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- Oligopoly of a market that can either through:
  - purel
  legal
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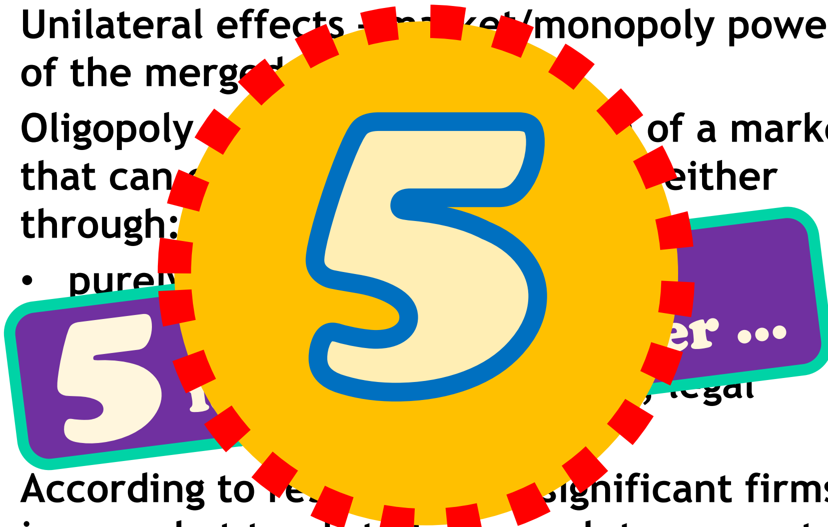

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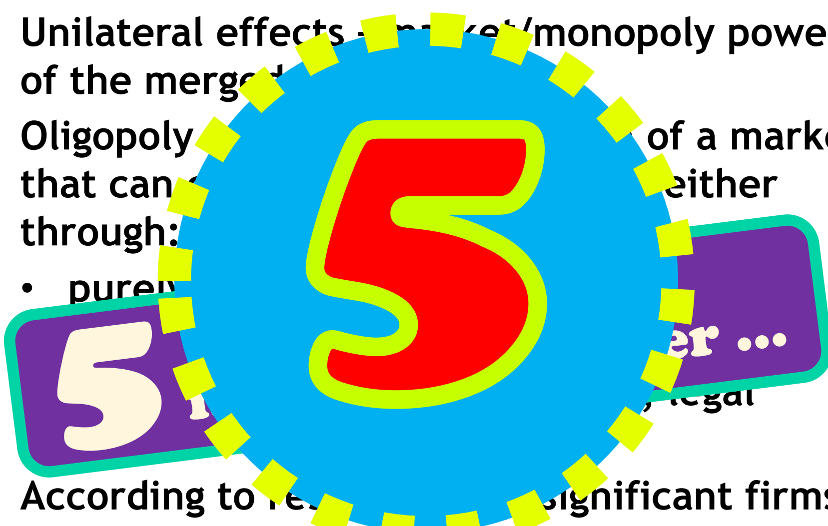
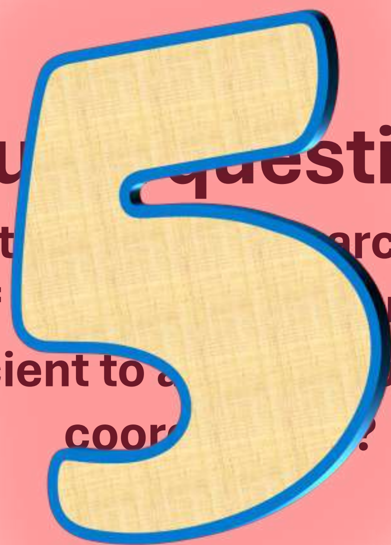


Quick question:

According to market research, how many sellers of significant size are generally sufficient to avoid oligopolistic coordination?

Qu question:

According t rch, how many sellers of re generally sufficient to a polistic coor ?



Qu… question:

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Legal Structure for Merger Review

Applicable law

- Mergers and acquisitions can be challenged under Sherman Act §1 or §2, or FTC Act §5, but generally they are challenged under the Clayton Act §7.
- Clayton Act §7 allows the blocking of mergers and acquisitions where "the effect of such ... may be to substantially lessen competition, or tend to create a monopoly."

Hart-Scott-Rodino Act

15 USC §18a

Per-merger filing with DOJ/FTC is required where:

- the stock acquisition value exceeds $50M <u>and</u> the acquirer and target have assets or annual sales in excess of $10M for one and $100M for the other (either way), <u>OR</u>
- the stock acquisition value exceeds $200M

Amounts are in 2004 dollars.

There's a passive investor exception.

DOJ/FTC challenge

- DOJ and FTC split up merger reviews between them.
- After the HSR filing, the agency has 30 days in which to make a “second request” for additional information (15 days for cash tender offers).
  - This happens about 5% of the time.
- The agency then engages in a detailed analysis.
  - Third parties can weigh in.
- To avoid adverse effects on competition, the merging firms can offer to divest themselves of certain assets or bind themselves to certain conduct.
- Often a merger dies if the agency opposes the merger.
- If the agency is opposed and the merging parties want to forge ahead, the dispute goes to court.
- Courts tend to evaluate mergers largely by the DOJ/FTC guidelines(!).