# 5 Overview of Antitrust Law for the Corporate Practitioner

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## I. [5.1] INTRODUCTION

The United States Supreme Court has characterized the antitrust laws as "the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.,* 405 U.S. 596, 31 L.Ed.2d 515, 92 S.Ct. 1126, 1135 (1972).

The ultimate purpose of the antitrust laws is to benefit consumers through the preservation of competition in the marketplace. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 74 L.Ed.2d 723, 103 S.Ct. 897, 908 (1983) ("the Sherman Act was enacted to assure customers the benefits of price competition"); *Knevelbaard Dairies v. Kraft Foods, Inc.,* 232 F.3d 979, 988 (9th Cir. 2000) ("It is competition . . . that these [antitrust] statutes recognize as vital to the public interest."). Thus, the Supreme Court has stated, in an oft-quoted maxim, that "[i]t is competition, not competitors, which the [antitrust laws] protects." *Brown Shoe Co. v. United States,* 370 U.S. 294, 8 L.Ed.2d 510, 82 S.Ct. 1502, 1534 (1962). Of course, the protection of competition sometimes requires the protection of competitors, and the courts have developed concepts such as "antitrust injury" and "antitrust standing," applicable to both consumers and competitors, as bases for determining who is entitled to bring suit for violation of the antitrust laws. The antitrust injury doctrine was created to filter out complaints by those "who may be hurt by productive efficiencies, higher output, and lower prices, all of which the antitrust laws are designed to encourage." *United States Gypsum Co. v. Indiana Gas Co.,* 350 F.3d 623, 627 (7th Cir. 2003). *See also Race Tires America, Inc. v. Hoosier Racing Tire Corp.,* 614 F.3d 57, 76 (3d Cir. 2010) (observing that antitrust injury requires harm of type antitrust laws were intended to prevent and injury to plaintiff that flows from such harm). The antitrust standing doctrine requires consideration of a series of offense-specific factors — such as the directness between the injury and the market restraint — so as to assure that the claimed injuries reflect the anticompetitive effect of the violation. *Midwest Gas Services, Inc. v. Indiana Gas Co.,* 317 F.3d 703, 710 (7th Cir. 2003). *See also In re DDAVP Direct Purchaser Antitrust Litigation,* 585 F.3d 677, 688 (2d Cir. 2009) (analyzing antitrust standing involves "a two-part test," *i.e.,* antitrust injury and "four 'efficient enforcer' factors," which include directness and speculativeness of injury); *Gulf States Reorganization Group, Inc. v. Nucor Corp.,* 466 F.3d 961, 966 – 967 (11th Cir. 2006) (discussing antitrust injury).

Antitrust legislation exists at both the federal and state levels. At the federal level, the principal legislation includes the Sherman Anti-Trust Act (Sherman Act), ch. 647, 26 Stat. 209 (1890), codified at 15 U.S.C. §1, *et seq.,* the Clayton Act, ch. 323, 38 Stat. 730 (1914), codified at 15 U.S.C. §12, *et seq.,* the Robinson-Patman Anti-Discrimination Act, ch. 592, §2, *et seq.,* 49 Stat. 1526 (1936), codified at 15 U.S.C. §§13 – 13b, 21a, and the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914), codified at 15 U.S.C. §41, *et seq.* State antitrust legislation is primarily embodied in the Illinois Antitrust Act, 740 ILCS 10/1, *et seq.,* although in Illinois, as in all other states, the state has been content to follow the federal lead. See 740 ILCS 10/11 (state courts are to "use the construction of the federal [antitrust] law by the federal courts as a guide in construing" state Act). A statutory four-year limitation period applies at both the federal and state levels. 15 U.S.C. §15b; 740 ILCS 10/7(2). *See Xechem, Inc. v. Bristol-Myers Squibb Co.,* 372 F.3d 899, 902 (7th Cir. 2004) (discussing four-year limitations period but noting that "[e]ach

discrete act with fresh adverse consequences starts its own period of limitations”). At both federal and state levels, however, the courts have a heightened role in giving shape to the broad mandates of the legislation because of the recognized need to “adapt[] to changed circumstances and the lessons of accumulated experience.” *State Oil Co. v. Khan,* 522 U.S. 3, 139 L.Ed.2d 199, 118 S.Ct. 275, 284 (1997).

Antitrust is thus a complex area of the law. The subject is considered in this chapter at a rudimentary level, intended only to introduce the general corporate practitioner to its basic concepts by identifying the main types of injuries that the caselaw has sought to address. Subject matters not addressed in this chapter include criminal aspects, state action immunity to the antitrust laws and the immunity applicable to petitioning government entities; exceptions to the antitrust laws for various entities, such as those applicable to the business of insurance and to labor; application of the antitrust laws to regulated industries; the indirect-purchaser doctrine; the availability of damages and other remedies for violation; and the interaction and jurisdiction of the antitrust enforcement agencies. For more detailed treatment of the antitrust offenses discussed in this chapter and consideration of antitrust topics that space limitations have not permitted the author to cover, the reader is encouraged to consult antitrust treatises such as Julian O. Von Kalinowski, et al., ANTITRUST LAWS AND TRADE REGULATION (2d ed. 2005); Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (3d ed. 2010); Theodore L. Banks, DISTRIBUTION LAW: ANTITRUST PRINCIPLES AND PRACTICE (2d ed. 1998, Supp. 2010); Irving Scher, ANTITRUST ADVISER (5th ed. 2015); ANTITRUST LAW DEVELOPMENTS (American Bar Association, 8th ed. 2017).

## II. [5.2] PER SE ILLEGAL OFFENSES

As a starting point, it is probably helpful to understand the difference between §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2. Section 1 is directed at coordinated conduct, or collusive behavior, and therefore requires two or more actors. Section 2 is directed at regulating monopolies and monopolistic behavior, and, as implied by the “mono,” such action can be carried out unilaterally. A perhaps somewhat counterintuitive mnemonic device for remembering the distinction between the two sections is that §1 requires two or more actors, whereas §2 only requires one.

### A. [5.3] Per Se Offenses vs. Rule of Reason

“[C]ollusion” is “the supreme evil of antitrust.” *Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, L.L.P.,* 540 U.S. 398, 157 L.Ed.2d 823, 124 S.Ct. 872, 879 (2003). Not surprisingly, most per se illegal offenses (*e.g.,* horizontal price-fixing, market allocation, bid-rigging) are collusive activities which arise under §1 of the Sherman Act. Section 1 declares illegal any “contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.” 15 U.S.C. §1. Of course, every contract is by its nature a “restraint”; therefore, to avoid unreasonable or absurd results based on a literal interpretation of §1, courts test much of the alleged conduct under the rule of reason, as discussed in §§5.10 – 5.15 below. Certain agreements or practices, however, are so “plainly anticompetitive” and so often “lack . . . any redeeming

virtue" that they are conclusively presumed illegal without application of the rule of reason. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 60 L.Ed.2d 1, 99 S.Ct. 1551, 1556 (1979), quoting *National Society of Professional Engineers v. United States,* 435 U.S. 679, 55 L.Ed.2d 637, 98 S.Ct. 1355, 1365 (1978), and *Northern Pacific Ry. v. United States,* 356 U.S. 1, 2 L.Ed.2d 545, 78 S.Ct. 514, 518 (1958). These "naked" restraints on trade are thus condemned as per se violations of the Sherman Act. The per se rule avoids "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable." *Broadcast Music, supra,* 99 S.Ct. at 1556 n.11, quoting *Northern Pacific, supra,* 78 S.Ct. at 518. *See also Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717, 99 L.Ed.2d 808, 108 S.Ct. 1515 (1988).

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 168 L.Ed.2d 623, 127 S.Ct. 2705, 2713 (2007), the Supreme Court summarized the nature and bases of restraints of trade considered to be per se illegal, noting that they consist of restraints "that would always or almost always tend to restrict competition and decrease output" (*Business Electronics,* 108 S.Ct. at 1519), that they have " 'manifestly anticompetitive' effects" (*Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 53 L.Ed. 2d 568, 97 S.Ct. 2549, 2557 (1977)), and that the per se illegal treatment of such restraints "eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." In short, "per se illegal" means unlawful, regardless of any procompetitive business justifications that might otherwise be advanced.

The classic examples of per se offenses are naked, horizontal restraints pertaining to prices, horizontal market allocations, and bid rigging. *In re Cardizem CD Antitrust Litigation,* 332 F.3d 896, 907 (6th Cir. 2003), citing *National College Athletic Ass'n v. Board of Regents of University of Oklahoma,* 468 U.S. 85, 82 L.Ed.2d 70, 104 S.Ct. 2948, 2959 – 2960 (1984); *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 91 L.Ed.2d 628, 104 S.Ct. 2731, 2740 (1984); *United States v. Topco Associates, Inc.,* 405 U.S. 596, 31 L.Ed.2d 515, 92 S.Ct. 1126, 1133 – 1134 (1972). In some instances, tying arrangements and group boycotts are also treated as per se offenses, provided that certain elements are met. *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of Rhode Island,* 373 F.3d 57, 61 (1st Cir. 2004). Tying is treated in §5.15 below under the rule of reason, however, because of the market analysis typically required for a violation.

When the per se rule is not applicable, courts employ the more lenient rule of reason analysis. "Under the rule of reason, the '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.' " *Retina Associates, P.A. v. Southern Baptist Hospital of Florida, Inc.,* 105 F.3d 1376, 1383 (11th Cir. 1997), quoting *Board of Trade of City of Chicago v. United States,* 246 U.S. 231, 62 L.Ed. 683, 38 S.Ct. 242, 244 (1918). "Therefore, the rule of reason requires a plaintiff to prove the anticompetitive effect of the challenged conduct on the relevant market, and that the conduct has no procompetitive benefit or justification." *Terazosin Hydrochloride Antitrust Litigation,* 352 F.Supp.2d 1279, 1312 (S.D.Fla. 2005), citing *Levine v. Central Florida Medical Affiliates, Inc.,* 72 F.3d 1538, 1551 (11th Cir.1996); *United States v. Topco Associates, Inc.,* 405 U.S. 596, 31 L.Ed.2d 515, 92 S.Ct. 1126, 1133 (1972) (rule of reason involves complex

investigation into "the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption" to determine whether challenged contract unreasonably restrains competition).

Because rule of reason cases typically involve intensive and costly market evaluations along with other complexities, plaintiffs naturally prefer to cast their claims as per se when possible. *See, e.g., In re Sulferic Acid Antitrust Litigation,* 703 F.3d 1004, 1007 – 1008 (7th Cir. 2012) (class action price-fixing/ancillary restraints allegations, entailing nine-year saga in which the district court believed the case was a Rule of Reason case, and the plaintiffs declined to go to trial unless they had the advantage of the per se rule.) On the other hand, Judge Posner did not see the distinction between a rule of reason case and a per se challenge to be as formidable, observing that an "the abiding puzzle of the plaintiffs' appeal" was that although "the trial would have been governed by the rule of reason, probably all that this would have meant in a case such as this is that the defendants would have had greater latitude for offering justifications for what the plaintiffs claim is a price-fixing conspiracy than if the standard governing the trial had been the per se rule, which treats price fixing by competitors as illegal regardless of consequences or possible justifications." 703 F.3d at 1006 – 1007.

The rule of reason is discussed in more detail in §§5.10 – 5.15 below.

## B. [5.4] Horizontal Price-Fixing

"An arrangement is said to be 'horizontal' when its participants are (1) either actual or potential rivals at the time the agreement is made; and (2) the agreement eliminates some avenue of rivalry among them." 11 H. Hovenkamp, *Antitrust Law,* ¶1901b, p. 203 (2d ed.2005). As a general matter, "[r]estraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717, 99 L.Ed.2d 808, 108 S.Ct. 1515, 1522 – 1523 (1988). Horizontal price-fixing is thus a combination between competitors "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *Palmer v. BRG of Georgia, Inc.,* 498 U.S. 46, 112 L.Ed.2d 349, 111 S.Ct. 401, 402 (1990), quoting *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 84 L.Ed. 1129, 60 S.Ct. 811, 844 (1940). The agreement does not need to explicitly fix prices, nor does it matter whether the price-fixing is done directly or indirectly. *Socony-Vacuum Oil, supra,* 60 S.Ct. at 839 – 840. The sole issue is whether an agreement among competitors directly or indirectly tampers with or influences the price for goods or services. *See, e.g., Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 73 L.Ed.2d 48, 102 S.Ct. 2466 (1982).

It also does not matter what percentage of market share the competitors possess or the degree to which the agreement will influence price. *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 107 L.Ed.2d 851, 110 S.Ct. 768, 781 (1990). In *Superior Court Trial Lawyers Ass'n,* for example, the Supreme Court soundly rejected the idea that market share enters into the equation when horizontal restraints of trade are concerned. The Court stated that, in every such arrangement, the notion that market share enters into the equation is

> **flatly inconsistent with the clear course of our antitrust jurisprudence. Conspirators need not achieve the dimensions of a monopoly, or even a degree of market power any greater than that already disclosed by this record, to warrant condemnation under the antitrust laws.** 110 S.Ct. at 782.

Horizontal price-fixing may take a variety of forms. It may consist, for example, of direct price-fixing, which involves an explicit agreement or understanding, whether oral or in writing, that sets the price of a commodity or service. *See Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 79 L.Ed.2d 775, 104 S.Ct. 1464, 1471, 1473 (1984) (there must be "unity of purpose or a common design and understanding, or a meeting of minds" or "a conscious commitment to a common scheme"), quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.,* 637 F.2d 105, 111 (3d Cir. 1980). It may also take the form of an agreement to fix bids (*Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211, 44 L.Ed. 136, 20 S.Ct. 96 (1899)), to opt out of bidding (*National Society of Professional Engineers v. United States,* 435 U.S. 679, 55 L.Ed.2d 637, 98 S.Ct. 1355 (1978)), to not compete on bids (*JTC Petroleum Co. v. Piasa Motor Fuels, Inc.,* 179 F.3d 1073, 1075, *reh'g denied,* 190 F.3d 775 (7th Cir. 1999)), to set the maximum fees for services (*Maricopa County Medical Society, supra,* 102 S.Ct, at 2468), to restrict product output (*Kleen Products LLC v. International Paper Co.,* 831 F.3d 919 (7th Cir. 2016)), or to cease competition on the employment market (*In re High-Tech Employee Antitrust Litigation,* 856 F.Supp.2d 1103 (N.D.Cal. 2012); *Antitrust Guidance for Human Resource Professionals,* Department of Justice and Federal Trade Commission (Oct. 2016)), www.justice.gov.

### C. [5.5] Vertical Price-Fixing

A vertical restraint is a restraint of trade involving a combination of persons at different levels of the market structure. *Euromodas, Inc. v. Zanella, Ltd.,* 368 F.3d 11, 16 (1st Cir. 2004). Vertical restraints typically are recognized as having both procompetitive and anticompetitive effects. For this reason, such restraints generally are not deemed per se illegal but, rather, are tested under a rule of reason analysis. *Id.* Overruling a long-standing line of cases dating back to *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 55 L.Ed. 502, 31 S.Ct. 376 (1911), the Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 168 L.Ed.2d 623, 127 S.Ct. 2705, 2725 (2007), held that all vertical price restraints, including vertical minimum price-fixing agreements that up until then were considered per se illegal, "are to be judged according to the rule of reason." See §5.12 below for a discussion of vertical price-fixing and minimum resale price maintenance.

### D. [5.6] Horizontal Market Allocation (Customers and Territories)

As Justice Scalia observed, "collusion" is "the supreme evil of antitrust." *Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, L.L.P.,* 540 U.S. 398, 157 L.Ed.2d 823, 124 S.Ct. 872, 879 (2003). Accordingly, agreements between actual or potential competitors to allocate customers or territories are deemed to be per se offenses. *See, e.g., Blackburn v. Sweeney,* 53 F.3d 825 (7th Cir. 1995) (agreement among lawyers that they would not advertise in each other's designated territories); *United States v. Cooperative Theatres of Ohio, Inc.,* 845 F.2d 1367 (6th Cir. 1988) (agreement of theater booking agents not to solicit each other's customers);

*United States v. Koppers Co.,* 652 F.2d 290 (2d Cir.) (customer allocation scheme unlawful per se), *cert. denied,* 102 S.Ct. 639 (1981); *United States v. Flom,* 558 F.2d 1179 (5th Cir. 1977) (customers allocated by bid rigging).

The seminal case is *United States v. Topco Associates, Inc.,* 405 U.S. 596, 31 L.Ed.2d 515, 92 S.Ct. 1126, 1136 (1972), in which a cooperative of small grocery stores was held to have violated the Sherman Act by agreeing to sell only certain brands in their stores in defined market areas. *Topco* has since been applied in several different contexts. For example, in *Blackburn, supra,* 53 F.3d at 827 – 828, the Seventh Circuit held that an agreement between two former law partners to allocate advertising to specific territories in Indiana was an agreement to allocate markets and, thus, the per se rule should apply. Similarly, in *Palmer v. BRG of Georgia, Inc.,* 498 U.S. 46, 112 L.Ed.2d 349, 111 S.Ct. 401 (1990), the Supreme Court held that an agreement between two bar review course providers, who agreed not to compete against each other by assigning one provider to the entirety of Georgia, was per se unlawful. The Court in *Palmer* concluded that the agreement between the parties was a naked restraint because it was formed for the purpose of raising the price of the product in question. 111 S.Ct. at 401 – 402.

A potential defense to horizontal market allocation agreements is that the agreements are ancillary to the main business purpose of a lawful contract and necessary to protect the legitimate property interests of the parties. This defense may apply, for example, in connection with the sale of a business when the purchaser is unwilling to acquire the assets if it will continue to face competition by the seller. On the other hand, in *Compton v. Metal Products, Inc.,* 453 F.2d 38, 44 (4th Cir. 1971), the Fourth Circuit held that a patent license agreement was illegal when it provided that the licensee would not "engage in any business or activity relating to the manufacture or sale of equipment of the type licensed hereunder." The agreement was found to be illegal because the licensee agreed not to sell any competing product, whether covered by the patent, and thus removed itself completely from the market. The ancillary market restriction, therefore, must be as limited as is reasonable to protect the parties' legitimate interests. *Lektro-Vend Corp. v. Vendo Co.,* 660 F.2d 255, 265 (7th Cir. 1981).

In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 167 L.Ed.2d 929, 127 S.Ct. 1955, 1964 (2007), the Supreme Court reaffirmed the principle that, while parallel conduct among competitors may be admissible to assist in establishing an agreement to allocate a market, it is not sufficient to establish the existence of an illegal agreement. The Court further held that a complaint based solely on allegations of parallel conduct would not suffice to state a claim that the defendants had entered into an illegal agreement. 127 S.Ct. at 1965 – 1966. *See also In re Text Messaging Antitrust Litigation,* 782 F.3d 867 (7th Cir. 2015) (affirming summary judgment for defendant when no direct evidence supported express collusion and circumstantial evidence did not support inference either).

### E. [5.7] Restraints on Supply

A restraint on supply typically occurs in the context of some other restraint, such as a horizontal or vertical price arrangement, discussed in §§5.4 and 5.5 above. Generally, these violations are characterized by actions having an effect on supply, which, in turn, affects the market. One example of a horizontal restraint on supply is presented by *In re Cardizem CD*

*Antitrust Litigation,* 332 F.3d 896 (6th Cir. 2003). In *Cardizem,* the Sixth Circuit held that a drug manufacturer's payment to another manufacturer not to market its generic version of the same drug was a per se antitrust violation. 332 F.3d at 908. The defendant manufacturer argued that it was merely protecting its patent rights as a defense to the 15 U.S.C. §1 allegations. The court disagreed, concluding that "it is one thing to take advantage of a monopoly that naturally arises from a patent, but another thing altogether to bolster the patent's effectiveness in inhibiting competitors by paying the only potential competitor $40 million per year to stay out of the market." *Id.*

The Eleventh Circuit, however, specifically disagreed with *Cardizem* and held that a per se analysis was appropriate. In *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.,* 344 F.3d 1294, 1310 – 1311 (11th Cir. 2003), the appellate court noted that "we do not think that a payment from the patentee to the alleged infringer should be automatically condemned under the antitrust laws."

In *Federal Trade Commission v. Actavis,* ___ U.S. ___, 186 L.Ed.2d 343, 133 S.Ct. 2223 (2013), the Supreme Court held that reverse payment settlement agreements — essentially a drug manufacturer's payment to another manufacturer not to market its generic version of the same drug — should be analyzed under the rule of reason. *Actavis* left more questions than answers, allowing the lower courts extensive liberty in applying the rule of reason to these cases. In *In re Opana ER Antitrust Litigation,* 162 F.Supp.3d 704 (N.D.Ill. 2016), the Northern District of Illinois weighed in, finding a rule of reason violation when the settlement agreement contained a reverse payment; the reverse payment was large and unjustified, not reflecting traditional settlement considerations; and an antitrust injury occurred, *i.e.,* the reverse payment stifled competition.

### F. [5.8] Boycotts

It is well-settled that a manufacturer generally has the right to deal, or refuse to deal, with whomever it chooses, as long as it does so independently. *United States v. Colgate,* 250 U.S. 300, 63 L.Ed. 992, 39 S.Ct. 465, 468 (1919). As the Court stated in *Colgate,* the Sherman Act does not restrict "the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell." *Id.* The Supreme Court reaffirmed this principle in *NYNEX Corp. v. Discon, Inc.,* 525 U.S. 128, 142 L.Ed.2d 510, 119 S.Ct. 493, 495 (1998), holding that a single buyer's decision to purchase from a competitor of an existing supplier was not an illegal boycott — even when that decision could not be justified in terms of ordinary competitive practices.

The *Colgate* doctrine is not without limits, however. Horizontal group boycotts are agreements among competitors within the same market tier not to deal with other competitors or market participants. *See Oreck Corp. v. Whirlpool Corp.,* 579 F.2d 126, 131 (2d Cir. 1978). Horizontal group boycotts are generally considered to be per se illegal. *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 3 L.Ed.2d 741, 79 S.Ct. 705, 708 – 709 (1959); *NYNEX, supra; Primetime 24 Joint Venture v. National Broadcasting Co.,* 219 F.3d 92, 102 (2d Cir. 2000).

Vertical group boycotts, on the other hand, are agreements among persons or organizations at different levels of the market structure not to deal with other market participants. Vertical group

boycotts are generally subject to a rule of reason analysis. *See NYNEX,* 119 S.Ct. at 498 – 499; *Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717, 99 L.Ed.2d 808, 108 S.Ct. 1515, 1519 – 1520 (1988).

While the foregoing describes the general trend concerning application of the per se rule, the Supreme Court has noted that there is substantial confusion surrounding the scope and operation of the per se rule in regard to group boycotts. *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.,* 472 U.S. 284, 86 L.Ed.2d 202, 105 S.Ct. 2613, 2619 (1985). *See also Federal Trade Commission v. Indiana Federation of Dentists,* 476 U.S. 447, 90 L.Ed.2d 445, 106 S.Ct. 2009, 2018 (1986) (observing that courts should exercise great caution in extending per se analysis "to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious"). Cases appropriate for application of the per se rule involve boycotts that "cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete . . . and frequently the boycotting firms possessed a dominant position in the relevant market." [Citation omitted.] *Northwest Wholesale, supra,* 105 S.Ct. at 2619. In *Hartford Fire Insurance Co. v. California,* 509 U.S. 764, 125 L.Ed.2d 612, 113 S.Ct. 2891, 2914 (1993), Justice Scalia also distinguished a "boycott," which involves group refusal to engage in any transactions with a targeted entity, from a concerted refusal to deal, which involves a group refusal to engage in a particular kind of transaction. According to Justice Scalia, not all concerted refusals to deal are predominantly anticompetitive. Thus, a plaintiff seeking application of the per se rule must "present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Northwest Wholesale, supra,* 105 S.Ct. at 2621. For example, when a plaintiff challenges a concerted refusal to deal in the form of its expulsion from a joint buying cooperative, it must make some showing that the cooperative possesses market power or unique access to a business element necessary for effective competition. *Id.* If successful in making the showing, the per se rule likely will be held to apply.

The Seventh Circuit applied *Northwest Wholesale* in *Toys "R" Us, Inc. v. Federal Trade Commission,* 221 F.3d 928, 936 (7th Cir. 2000), in which it confirmed that "[h]orizontal agreements among competitors, including group boycotts, remain illegal per se." The court further observed that, for such boycott arrangements to be found illegal, "extensive inquiry into market power and economic pros and cons" would not be necessary when there was evidence that (1) the boycotting firm cut off access to a supply needed to compete for the boycotted firm, (2) the boycotting firm possesses a "dominant" position in the market, and (3) the boycott does not enhance overall efficiency in the market. *Id.*

### G. [5.9] Per Se Violations of the Illinois Antitrust Act

For the most part, the Illinois Antitrust Act regards as per se illegal the same offenses so adjudged at the federal level. *See Baker v. Jewel Food Stores, Inc.,* 355 Ill.App.3d 62, 823 N.E.2d 93, 291 Ill.Dec. 83 (1st Dist. 2005) (federal caselaw interpreting 15 U.S.C. §1 applies to state level); *Health Professionals, Ltd. v. Johnson,* 339 Ill.App.3d 1021, 791 N.E.2d 1179, 274 Ill.Dec. 768 (3d Dist. 2003) (Illinois follows federal standard with respect to horizontal restraints on trade). Under the express terms of the Illinois Antitrust Act, however, there are only three statutory per se violations: horizontal agreements to fix prices, to limit production, and to allocate

markets or customers. 740 ILCS 10/3(1). *See also Intercontinental Parts, Inc. v. Caterpillar, Inc.,* 260 Ill.App.3d 1085, 631 N.E.2d 1258, 1264, 197 Ill.Dec. 799 (1st Dist. 1994). Group boycotts are therefore not likely to be regarded as per se offenses under state law and must be analyzed under the rule of reason. 631 N.E.2d at 1266. Likewise, in *House of Brides, Inc. v. Alfred Angelo, Inc.,* No. 11 C 07834, 2014 WL 64657, *8, *11 (N.D.Ill. Jan. 08, 2014), a federal district court rejected an attempt to apply Illinois Antitrust Act to minimum resale price maintenance, instead following the federal court's rule of reason approach to vertical price restraints, as announced in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 168 L.Ed.2d 623, 127 S.Ct. 2705, 2709, 2717 (2007) (finding per se categorization inapplicable to conduct that could "have either procompetitive or anticompetitive effects").

## III. OFFENSES SUBJECT TO THE RULE OF REASON

### A. [5.10] Development of the Rule of Reason

Courts evaluate most market restraints under what is known as the "rule of reason." Justice Brandeis articulated the rationale and scope of the rule, stating:

> **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 was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.** *Board of Trade of City of Chicago v. United States,* 246 U.S. 231, 62 L.Ed. 683, 38 S.Ct. 242, 244 (1918).

The rule of reason is still applied today. *42nd Parallel North v. E Street Denim Co.,* 286 F.3d 401, 404 (7th Cir. 2002). *See also American Needle, Inc. v. National Football League,* 560 U.S. 183, 176 L.Ed.2d 947, 130 S.Ct. 2201 (2010) (observing that rule of reason applies to trade restraints imposed by sports league). The Supreme Court has indicated that the rule does not require a court to consider any argument in favor of a challenged restraint just because it may fall within the "realm of reason," but a court instead must focus directly on the impact of the challenged restraint on competitive conditions. *National Society of Professional Engineers v. United States,* 435 U.S. 679, 55 L.Ed.2d 637, 98 S.Ct. 1355, 1363 (1978).

Due to the lengthy analysis required in a full rule of reason inquiry, courts on occasion have attempted to articulate shorter tests to determine unfair restraints of trade. Several circuit courts, for example, have adopted a "market power screen" inquiry, which asks first whether the firm in question has market power sufficient to actually impose an unreasonable restraint of trade. *Retina Associates, P.A. v. Southern Baptist Hospital of Florida, Inc.,* 105 F.3d 1376, 1383 (11th Cir. 1997). These courts hold that restraints that are imposed by firms without market power are

unable to result in an unreasonable restraint of trade. *L.A.P.D., Inc. v. General Electric Corp.,* 132 F.3d 402, 405 (7th Cir. 1997). Notwithstanding the inquiry into market power as part of the market power screen inquiry, the Supreme Court has long held that the rule of reason does not require proof of market power. *Federal Trade Commission v. Indiana Federation of Dentists,* 476 U.S. 447, 90 L.Ed.2d 445, 106 S.Ct. 2009, 2018 – 2019 (1986).

Some courts have also applied a truncated rule of reason, which allows a finding of an unreasonable restraint of trade if after a "quick look" there are demonstrable anticompetitive effects from a restraint. *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma,* 468 U.S. 85, 82 L.Ed.2d 70, 104 S.Ct. 2948, 2965 (1984). However, the truncated rule of reason may not be used when anticompetitive effects are not "obvious." *California Dental Ass'n v. Federal Trade Commission,* 526 U.S. 756, 143 L.Ed.2d 935, 119 S.Ct. 1604, 1613 (1999). "[T]he quick look approach falls somewhere in the continuum between the per se rule and the rule of reason, and applies to those intermediate cases where the anticompetitive impact of a restraint is clear from a quick look, as in a per se case, but procompetitive justifications for it also exist." *Terazosin Hydrochloride Antitrust Litigation,* 352 F.Supp.2d 1279, 1312 (S.D.Fla. 2005), citing *National Collegiate Athletic Ass'n, supra,* 104 S.Ct. at 2960. An intermediate "quick look" doctrine also exists for cases that do not fall in per se illegal categories, yet do not require elaborate industry analysis to determine their overall anticompetitive effect. Such conduct can be condemned short of full rule of reason analysis if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental Ass'n v. Federal Trade Commission,* 526 U.S. 756, 143 L.Ed.2d 935, 19 S.Ct. 1604, 1612 (1999). *See also Law v. National Collegiate Athletic Ass'n,* 134 F.3d 1010, 1020 (10th Cir.1998); *Terazosin, supra,* 352 F.Supp. at 1312. The Supreme Court rejected the invitation to employ quick look analysis to reverse payment settlement agreements in pharmaceutical litigation. *Federal Trade Commission v. Actavis,* ___ U.S. ___, 186 L.Ed.2d 343, 133 S.Ct. 2223 (2013).

Illinois state courts also apply a rule of reason analysis to many alleged violations of the Illinois Antitrust Act. 740 ILCS 10/3(2); *Adkins v. Sarah Bush Lincoln Health Center,* 129 Ill.2d 497, 544 N.E.2d 733, 744 – 745, 136 Ill.Dec. 47 (1989). Illinois requires a trier of fact to look at all circumstances in determining the reasonableness of conduct restraining trade.

### B. [5.11] Exclusive Dealing

An exclusive dealing arrangement is an agreement whereby a buyer and seller agree to buy or sell exclusively from or to the other for an extended period of time. *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.,* 28 F.3d 1379, 1383 (5th Cir. 1994). The main concern with exclusive dealing is that it can foreclose new entities from entering the market. *Omega Environmental, Inc. v. Gilbarco, Inc.,* 127 F.3d 1157, 1162 (9th Cir. 1997). The agreement need not be explicit but may be implied. *Roland Machinery Co. v. Dresser Industries, Inc.,* 749 F.2d 380, 392 (7th Cir. 1984).

The key inquiry in determining whether there is an "implied" understanding is whether the participant has the freedom to purchase or sell the product in question from or to a source of its choice. *United Air Lines, Inc. v. Austin Travel Corp.,* 867 F.2d 737, 742 (2d Cir. 1989). An

implied understanding exists if the participant is given a special benefit that is not made available to others that do not deal exclusively or if the participant receives penalties for dealing in competitive goods. *Stitt Spark Plug Co. v. Champion Spark Plug Co.,* 840 F.2d 1253, 1257 – 1258 (5th Cir. 1988).

Exclusive dealing agreements are reviewed under a rule of reason because not every exclusive dealing arrangement is imposed for anticompetitive purposes. *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 5 L.Ed.2d 580, 81 S.Ct. 623, 628 (1961); *Omega, supra,* 127 F.3d at 1162. Courts prohibit such agreements only if they result in a lessening of competition. *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP,* 592 F.3d 991, 996 (9th Cir. 2010).

Challenges to exclusive dealing arrangements are brought under both §1 of the Sherman Act, 15 U.S.C. §1, and §3 of the Clayton Act, 15 U.S.C. §14. 592 F.3d at 996. Some circuits have held that "a greater showing of anticompetitive effect is required to establish a Sherman Act violation than a section three Clayton Act violation in Exclusive-dealing cases." 592 F.3d at 996 n. 1, quoting *Twin City Sportsservice, Inc. v. Charles O. Finley & Co., Inc.,* 676 F.2d 1291, 1304 n. 9 (9th Cir. 1982). Given that, "although a Clayton Act violation may be found where an agreement has the probable effect of foreclosing competition . . . in a case under Section 1 of the Sherman Act, the plaintiff must prove that the exclusive dealing arrangement actually foreclosed competition." 592 F.3d at 996 n. 1.

Exclusive dealing claims often arise in distribution disputes, and in that context, "[e]xclusive dealing arrangements imposed on distributors [dealers] rather than end-users are generally less cause for anticompetitive concern." *Omega, supra,* 127 F.3d at 1162. That is because "[i]f competitors can reach the ultimate consumers of the product by employing existing or potential *alternative channels of distribution,* it is unclear whether such restrictions foreclose from competition *any* part of the relevant market." [Emphasis added.] 127 F.3d at 1163. *See Ryko Manufacturing Co. v. Eden Services,* 823 F.2d 1215, 1235 (8th Cir. 1987) ("Where the exclusive dealing restraint operates at the distributor level, rather than at the consumer level, we require a higher standard of proof of 'substantial foreclosure,' because it is less clear that a restraint involving a distributor will have a corresponding impact on the level of competition in the consumer market."). See generally ABA Antitrust Section, Monograph No. 8, *Vertical Restrictions Upon Buyers Limiting Purchases of Goods from Others,* 92 (1982).

Two tests are typically used to assess market foreclosure: the quantitative substantiality test and the qualitative substantiality test. The Supreme Court developed both tests and has not indicated which test is preferable, although some members of the Court once stated they prefer the qualitative substantiality test. *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2, 80 L.Ed.2d 2, 104 S.Ct. 1551, 1576 (1984) (O'Connor, J., concurring). The quantitative substantiality test presumes an anticompetitive effect if the exclusive arrangement involves a "substantial" market measurement, such as the number of the outlets or sales volume foreclosed to competitors. *Standard Oil Co. of California v. United States,* 337 U.S. 293, 93 L.Ed. 1371, 69 S.Ct. 1051, 1054 (1949) (developing test). The more recently developed and popularly applied qualitative substantiality test requires an appraisal of the probable impact of the challenged agreement on the vigor of competition in the relevant market, based on an analysis of relevant

business factors. *Tampa Electric, supra* (developing test); *Stitt Spark Plug, supra,* 840 F.2d at 1257 (recognizing test as preferred over quantitative analysis test).

There is no set percentage for how much of the relevant market must be foreclosed, but it must be substantial enough that competitors are truly frozen out of the market. *Masimo Corp. v. Tyco Health Care Group, L.P.,* No. CV 02-4770 MRP, 2006 WL 1236666, *4 (C.D.Cal. Mar. 22, 2006) (foreclosure of 24 percent of market was substantial). In making this determination, courts evaluate several factors, including (1) whether alternative distribution channels were available; (2) whether the challenged contracts were in practice terminable on short notice; (3) whether one or more competitors was able to enter or expand business in the relevant market during the time in which the challenged contracts were in effect. 2006 WL 1236666 at *4.

When market competitors can reach ultimate product consumers by using existing, or potential, alternate channels of distributions, an exclusive distributorship agreement does not foreclose competition in the market. *Omega, supra,* 127 F.3d at 1163; *CDC Technologies, Inc. v. IDEXX Laboratories, Inc.,* 7 F.Supp.2d 119, 121 (D.Conn. 1998).

Contracts of short duration that are easily terminable are of less concern. *Omega, supra,* 127 F.3d at 1163 (holding "the short duration and easy terminability" of dealer agreements negate substantially their potential to foreclose competition). Exclusive dealing contracts terminable in less than a year are presumptively lawful under §3 of the Clayton Act. *Roland Machinery Co. v. Dresser Industries, Inc.,* 749 F.2d 380, 395 (7th Cir. 1984); *U.S. Healthcare, Inc. v. Healthsource, Inc.,* 986 F.2d 589, 596 (1st Cir. 1993) (termination on 30 days' notice normally a de minimis constraint). "In general, exclusive dealing arrangements that are terminable on short notice are not anticompetitive because foreclosure is very unlikely. . . . Even if a buyer has an agreement to purchase 100% of its requirements from a single supplier, if the buyer is free to terminate the agreement on short notice, the agreement is generally not anticompetitive. In the absence of long-term commitments, an efficient competitor can offer a competitive price at any time and win the buyer's business." [Citations omitted.] *Masimo, supra,* 2006 WL 1236666 at *5.

Consistent with the *Colgate* doctrine, even a monopolist can refuse to deal with its competitors if there are legitimate competitive reasons for the refusal. *United States v. Colgate,* 250 U.S. 300, 63 L.Ed. 992, 39 S.Ct. 465 (1919). *See High Technology Careers v. San Jose Mercury News,* 996 F.2d 987, 990 (9th Cir. 1993); *Oahu Gas Service, Inc. v. Pacific Resources, Inc.,* 838 F.2d 360, 369 (9th Cir. 1988) ("[T]he desire to maintain market power — even a monopolist's market power — cannot create antitrust liability if there was a legitimate business justification" for its "exclusive dealings" provisions). *See Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 119 L.Ed.2d 265, 112 S.Ct. 2072, 2091 n.32 (1992) (suggesting that monopolist may rebut an inference of exclusionary conduct by establishing "legitimate competitive reasons for the refusal"). The plaintiff bears the burden of proving lack of legitimate business justification in a §2 claim. *City of Vernon v. South California Edison Co.,* 955 F.2d 1361, 1366 (9th Cir. 1992); *Calculators Hawaii, Inc. v. Brandt, Inc.,* 724 F.2d 1332, 1339 (9th Cir. 1983).

Under the Illinois Antitrust Act, Illinois courts typically apply a two-part analysis of alleged exclusive dealing. *Ray Dancer, Inc. v. DMC Corp.,* 230 Ill.App.3d 40, 594 N.E.2d 1344, 1351, 171 Ill.Dec. 824 (2d Dist. 1992). They require, first, that two parties have entered into an agreement under which one refuses to deal in a competitive product and, second, that the agreement is likely to have a substantial anticompetitive effect on the market. *Id.*

**C. [5.12] Vertical Price-Fixing/Minimum Resale Price Maintenance**

Because vertical restraints typically have both procompetitive and anticompetitive effects, they generally are not deemed per se illegal, but, since 2007, they have been assessed under the rule of reason. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 168 L.Ed.2d 623, 127 S.Ct. 2705, 2725 (2007) (holding that all vertical price restraints, including vertical minimum price-fixing agreements that up until then were considered per se illegal, "are to be judged according to the rule of reason"). The specific elements for a claim based on vertical minimum price-fixing will thus need to be developed anew by the courts. *See PSKS, Inc. v. Leegin Creative Leather Products, Inc.,* 615 F.3d 412 (5th Cir. 2010), for the Fifth Circuit's application of the rule of reason treatment as mandated by the Supreme Court.

Resale price maintenance (RPM) is a form of vertical price fixing that arises when a product manufacturer dictates the minimum price at which a retailer or a wholesaler can charge for the manufacturer's goods or services. Under the rule of reason, courts examine the following factors: "(1) the number of manufacturers engaged in the practice in the market; (2) whether the restraint comes at the behest of retailers or the manufacturer; and (3) whether the manufacturer or retailer(s) driving the practice possess market power." ANTITRUST LAW DEVELOPMENTS, p. 137 (American Bar Association, 8th ed. 2017), citing *Leegin, supra,* 127 S.Ct. at 2719 – 2720. "When only a few manufacturers lacking market power adopt [RPM], there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers." *Leegin, supra,* 127 S.Ct. at 2719. The same logic applies when a single manufacturer adopts an RPM policy; unless it has significant market power, the practice likely could not be utilized in an anticompetitive manner to "to keep competitors away from distribution outlets." *Id.* On the other hand, "[i]f there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel." *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.,* 530 F.3d 204, 225 (3d Cir. 2008) (illegal agreement when manufacturer "agreed to support the horizontal agreement among the dealers to control prices"), citing *Leegin, supra,* 127 S.Ct. at 2717.

In *Ryko Manufacturing Co. v. Eden Services,* 823 F.2d 1215, 122 – 1223 (8th Cir. 1987), the Eighth Circuit devised a four-part test for a resale price maintenance claim:

> **To establish a case of resale price maintenance by a manufacturer, the antitrust plaintiff must demonstrate that (1) the manufacturer has contracted, combined, or conspired (2) with a separate economic entity (3) to set the price at which the products are resold (4) in an independent commercial transaction with a subsequent purchaser.**

The test was again affirmed in *Ozark Heartland Electronics, Inc. v. Radio Shack,* 278 F.3d 759 (8th Cir. 2002), in which the court focused on the second element, requiring a separate economic

entity. As the *Ozark Heartland* court emphasized, manufacturers who enter into agreements with agents or subsidiaries concerning resale prices, and not with independent resellers, do not violate the Sherman Act. *See also Morrison v. Murray Biscuit Co.,* 797 F.2d 1430, 1437 (7th Cir. 1986).

*Leegin* notwithstanding, some states' laws continue to recognize RPM as per se illegal price fixing. Key states that have found RPM illegal include California (*Alsheikh v. Superior Court,* No. B249822, 2013 WL 5530508, *3 (Cal.App. Oct. 7, 2013) (acknowledging *Leegin* ruling but maintaining per se illegality for vertical price fixing under California Supreme Court precedent and Cartwright Act)) and Maryland (MD Code Ann., Com.Law §11-204(b) (finding unreasonable restraint of trade or commerce when any "contract, combination, or conspiracy [] establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service")).

As far as Illinois law is concerned, a 2008 challenge to an RPM agreement by several states' attorneys' general, including Illinois' Attorney General, suggested that Illinois might be on the side of the so-called "*Leegin*-repealer" states. *State v. Herman Miller, Inc.,* No. 08-2977 (S.D.N.Y. filed Mar. 21, 2008) (stipulated final judgment and consent decree was entered in post-*Leegin* challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law). More recently, however, an Illinois federal district court rejected a plaintiff's assertion that the per se rule applied to RPM in the context of Illinois state law claims. *House of Brides, Inc. v. Alfred Angelo, Inc.,* No. 11 C 07834, 2014 WL 64657, **8, 11 (N.D.Ill. Jan. 08, 2014). In so ruling, the court analogized Illinois' statute to §1 of the Sherman Act and followed the state statute's instruction that federal courts' construction should be looked to as a guide. 2014 WL 64657 at *8.

As discussed in §5.13 below, vertical maximum price-fixing agreements are subject to the rule of reason. *See State Oil Co. v. Khan,* 522 U.S. 3, 139 L.Ed.2d 199, 118 S.Ct. 275 (1997).

**D. [5.13] Vertical Maximum Price-Fixing**

Vertical price-fixing, also known as "resale price maintenance," occurs when a manufacturer and retailer agree to a resale price at which the retailer will sell. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 95 L.Ed. 219, 71 S.Ct. 259, 260 (1951). Vertical maximum price-fixing is judged under the rule of reason. *State Oil Co. v. Khan,* 522 U.S. 3, 139 L.Ed.2d 199, 118 S.Ct. 275, 279 (1997). Because low prices benefit consumers "regardless of how those prices are set," as long as they are not set at predatory levels to threaten competition, the Supreme Court declined to find them per se invalid. 118 S.Ct. at 282, quoting *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 109 L.Ed.2d 333, 110 S.Ct. 1884, 1892 (1990). Courts often find that parties charging vertical maximum price-fixing ultimately fail to show an antitrust injury. *Atlantic Richfield,* 110 S.Ct. at 1891 – 1892.

See §5.12 above for a discussion of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 168 L.Ed.2d 623, 127 S.Ct. 2705 (2007), which subjects vertical minimum price-fixing arrangements to the rule of reason.

Illinois courts do not appear to have addressed the issue of vertical maximum price-fixing. However, it is likely that, to the extent they would find that the practice violates the Illinois Antitrust Act, they would apply a rule of reason. *See Laughlin v. Evanston Hospital,* 133 Ill.2d 374, 550 N.E.2d 986, 989, 140 Ill.Dec. 861 (1990) (noting that comments to Illinois Antitrust Act contemplate application of rule of reason to numerous offenses, including vertical price-fixing).

**E. [5.14] Vertical Market Allocation**

Vertical market allocation typically involves restrictions on customers or territories imposed by upstream sellers on downstream market participants. The restrictions are judged under a rule of reason. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 53 L.Ed.2d 568, 97 S.Ct. 2549, 2557 (1977). Customer restrictions often involve a manufacturer limiting the type of customers to whom a wholesaler or retailer may resell the products. Territorial restrictions often involve the manufacturer limiting the areas in which the retailer may resell the products. Because there may be valid business reasons for these restrictions, courts decline to find them per se invalid. Instead, the relevant rule of reason inquiry is whether the challenged restraint ultimately promotes or suppresses competition in the relevant market. *National Society of Professional Engineers v. United States,* 435 U.S. 679, 55 L.Ed.2d 637, 98 S.Ct. 1355, 1364 – 1365 (1978).

To date, Illinois courts have not addressed this issue.

**F. [5.15] Tying**

A tying arrangement is "an agreement by a party to sell one product but 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." *Northern Pacific Ry. v United States,* 356 U.S. 1, 2 L.Ed.2d 545, 78 S.Ct. 514, 518 (1958). *See, e.g., Image Technical Service, Inc. v. Eastman Kodak Co.,* 903 F.2d 612, 615 – 616 (9th Cir. 1990) (seller may require purchaser to either buy particular product from seller or not purchase particular product from other sellers). The danger in tying arrangements is that the seller's market control over the tying product is so great that the buyer is forced "into the purchase of a tied product that [it] either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2, 80 L.Ed.2d 2, 104 S.Ct. 1551, 1558 (1984).

Tying agreements may be characterized as per se violations if the following four elements are shown: (1) there are two separate products or services; (2) the sale of one of the products or services is conditioned on the purchase of the other product; (3) the seller has appreciable economic power in the market for the tying product to enable it to restrain trade in the market for the tied product; and (4) a "not insubstantial" amount of commerce in the market for the tied product is foreclosed. 104 S.Ct. 1551. *See also United States v. International Business Machines Corp.,* 163 F.3d 737, 741 (2d Cir. 1998). The requirement that a market analysis be conducted, however, often results in a de facto application of the rule of reason. *See Jefferson Parish, supra,* 104 S.Ct. at 1575 – 1576 (O'Connor, J., concurring). A tying arrangement that is not a per se violation may still violate the rule of reason, and courts have found a violation of the rule of reason without making a per se violation inquiry. *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.,* 826 F.2d 712 (7th Cir. 1987).

Firms imposing tying agreements can assert a “business justification” defense by arguing that such agreements are necessary when a seller has to protect customer satisfaction or its trademarks. *See, e.g., Virtual Maintenance, Inc. v. Prime Computer, Inc.,* 957 F.2d 1318, 1323 (6th Cir.), *vacated on other grounds,* 113 S.Ct. 314 (1992). Firms may also try to assert a “new business” justification by arguing that the tied product is so new that there is no other seller capable of providing the second product. *United States v. Jerrold Electronics Corp.,* 187 F.Supp. 545 (E.D.Pa. 1960), *aff’d per curiam,* 81 S.Ct. 755 (1961). This justification, however, has either been rejected outright (*Carpa, Inc. v. Ward Foods, Inc.,* 536 F.2d 39 (5th Cir. 1976)) or found inapplicable once a business becomes established (*Jefferson Parish, supra*).

Courts have also addressed variations of two-product tying agreements. “Block booking,” for example, is the practice of licensing groups of movies in a package to theaters and TV stations or of licensing music libraries by music pooling organizations to radio, TV, and businesses. *United States v. Loew’s, Inc.,* 371 U.S. 38, 9 L.Ed.2d 11, 83 S.Ct. 97, 103 (1962). In *Loew’s,* the Supreme Court struck down block booking of motion pictures when the licensing of individual films was not permitted. The Supreme Court did later rule that the issuance of blanket licenses, under which music publishing organizations permitted any members to perform any of the songs owned by any of the organizations’ members, did not violate the per se rule. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 60 L.Ed.2d 1, 99 S.Ct. 1551, 1556 – 1557 (1979). However, circuit courts still sometimes follow the *Loew’s* application of a per se prohibition against block booking. *MCA Television Ltd. v. Public Interest Corp.,* 171 F.3d 1265, 1278 (11th Cir. 1999) (finding agreement under which television production company required broadcasting company to license syndicated television show in return for right to license premium syndicated television shows was per se violation).

Courts have become increasingly less likely to analyze a tying arrangement as a per se violation of the Sherman Act. *See Illinois Tool Works, Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 164 L.Ed.2d 26, 126 S.Ct. 1281, 1287 (2006). *See also In re Visa Check/Mastermoney Antitrust Litigation,* No. 96-CV-5238 (JG), 2003 WL 1712568, *4 (E.D.N.Y. Apr. 1, 2003) (“Per se analysis has generally fallen into disfavor in modern antitrust law.”). Even pre-*Illinois Tool Works* cases held that per se illegality of tying arrangements should not apply in many situations. *See All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc.,* 135 F.3d 740, 748 (11th Cir. 1998) (stating that per se treatment is only given to practices that have *history of anticompetitive effects*). “The rule of reason is the presumptive or default standard, and it requires the antitrust plaintiff to ‘demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive.’ ” *California ex rel. Harris v. Safeway, Inc.,* 651 F.3d 1118, 1133 (9th Cir. 2011), quoting *Texaco Inc. v. Dagher,* 547 U.S. 1, 164 L.Ed.2d 1, 126 S.Ct. 1276, 1279 (2006).

This does not mean that per se has been completely eradicated in tying cases. Instead, “per se liability is reserved for only those agreements that are ‘so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.’ ” *Kamakahi v. American Society for Reproductive Medicine,* No. C 11-01781 SBA, 2013 WL 1768706, *6 (N.D.Cal. Mar. 29, 2013), quoting *Texaco, supra,* 126 S.Ct. at 1279. Moreover, *Illinois Tool Works* made clear that a party claiming per se tying is still required to prove market power. *See Illinois Tool Works,* 126 S.Ct. at 1293. This makes current per se analysis very similar to rule of reason analysis

because of the factual inquiry that must take place to find a violation. Indeed, a number of the cases cited above may have been abrogated by *Illinois Tool Works,* in which the Supreme Court reviewed prior decisions and, noting that the vast majority of academic literature recognizes that a patent does not necessarily confer market power, held:

> [T]**ying arrangements involving patented products should be evaluated under the standards applied in cases like** [*United States Steel Corp. v. Fortner Enterprises, Inc.,* 429 U.S. 610, 51 L.Ed.2d 80, 97 S.Ct. 861 (1977)] **and Jefferson Parish rather than under the per se rule applied in** [*Morton Salt Co. v. G.S. Suppiger Co.,* 314 U.S. 488, 86 L.Ed. 363, 62 S.Ct. 402 (1942)] **and Loew's. While some such arrangements are still unlawful, such as those that are the product of a true monopoly or a marketwide conspiracy, see, *e.g., United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 145-146, 68 S.Ct. 915, 92 L.Ed. 1260 (1948), that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption thereof.** *Illinois Tool Works,* 126 S.Ct. at 1291.

Market power is no longer presumed even in situations in which a party is granted a virtual monopoly, such as in the patent context. *Illinois Tool Works* held that tying arrangements involving patents need to be evaluated based on market power as opposed to presuming market power under the per se rule. *Id*. There is a great deal of overlap between the two standards, and the "Seventh Circuit does not distinguish between a per se tying claim and rule of reason tying claim." *McLaughlin Equipment Co. v. Servaas,* No. IP98-0127,-C-T/K, 2004 WL 1629603, *16 (S.D.Ind. Feb. 18, 2004). Overall, the analysis performed by a court when a tying claim is alleged is fact-based, and there is not a great deal of consistency on how claims involving certain scenarios will unfold. Much of the analysis comes down to the market power analysis that will be relevant whether per se or rule of reason analysis is employed.

Even when treated as per se, tying arrangements require a factual inquiry that must take place before finding a Sherman Act violation. *See Roy B. Taylor Sales, Inc. v. Hollymatic Corp.,* 28 F.3d 1379 (5th Cir. 1994). In *Hollymatic,* a dealer of hamburger patty machines sued the supplier for conditioning the purchase of the machines on the purchase of patty papers. 28 F.3d at 1381. The court stated that using the "per se" label is confusing in the tying context "because it insists on an inquiry into market power as a predicate to 'per se' illegality." 28 F.3d at 1382. The *Hollymatic* court held that no antitrust tying violation existed because there was no evidence that the tying arrangement, if there was one, had an adverse effect on competition. 28 F.3d at 1385. Overall, courts may use different language but the analysis will likely include a look at market power and the actual anticompetitive effect a tying arrangement has before a court finds a valid tying claim. Additionally, the market power requirement also means that expert testimony is likely needed to prove a tying claim. *See, e.g., American Express Co. v. Italian Colors Restaurant,* ___ U.S. ___, 186 L.Ed.2d 417, 133 S.Ct. 2304, 2314 (2013) (Kagan, J., dissenting) (describing arbitration clause in which "agreement might block the claimant from presenting the kind of proof that is necessary to establish the defendant's liability — say, by prohibiting any economic testimony *(good luck proving an antitrust claim without that!)*" (Emphasis added.)).

Illinois courts apply a per se rule to tying arrangements under the Illinois Antitrust Act. *People ex rel. Scott v. Schwulst Building Center, Inc.,* 89 Ill.2d 365, 432 N.E.2d 855, 860 – 861, 59 Ill.Dec. 911 (1982). However, a federal court in Illinois, applying the Illinois statute, disagreed

with the holding in *Scott* and held that the per se approach advocated in Illinois is softened by *Jefferson Parish, supra,* which requires some degree of analysis of market factors and the effect of the arrangement on the market. *Collins v. Associated Pathologists, Ltd.,* 676 F.Supp.1388 (C.D.Ill. 1987), *cert. denied,* 109 S.Ct. 137 (1988).

## IV. MONOPOLIES

### A. [5.16] Overview

Section 2 of the Sherman Act, 15 U.S.C. §2, provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize" any part of interstate commerce or foreign trade shall be deemed guilty of a felony. The section proscribes three offenses — monopolization, attempted monopolization, and conspiracies to monopolize. *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 122 L.Ed.2d 247, 113 S.Ct. 884, 889 (1993). While §2 speaks in terms of criminal conduct, it may be enforced both criminally and civilly. *United Phosphorus, Ltd. v. Angus Chemical Co.,* 322 F.3d 942, 956 (7th Cir. 2003), *overruled on other grounds by Minn-Chem, Inc. v. Agrium, Inc.,* 683 F.3d 845 (7th Cir. 2012). However, neither §2 nor any other section of the Sherman Act provides a definition of these offenses. Because there is no statutory definition, the courts have had to give definition to the offenses and their elements.

### B. [5.17] Actual Monopolization Offense

Monopolization under §2 of the Sherman Act, 15 U.S.C. §2, consists of two basic elements: (1) the possession of monopoly power, *i.e.,* the power to control prices or exclude competition in a relevant market; and (2) an element of deliberateness, *i.e.,* 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. *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 119 L.Ed.2d 265, 112 S.Ct. 2072, 2089 (1992), quoting *United States v. Grinnell Corp.,* 384 U.S. 563, 16 L.Ed.2d 778, 86 S.Ct. 1698, 1704 (1966); *Alcatel USA, Inc., v. DGI Technologies, Inc.,* 166 F.3d 772, 781 (5th Cir. 1999).

#### 1. [5.18] Monopoly Power

"Monopoly power" has long been defined as the power to exclude competition or to control price. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.,* 864 F.2d 1409, 1414 (7th Cir. 1989). Market power may be proven either through direct evidence of anticompetitive effects or by proving relevant product and geographic markets and showing that the defendant's share exceeds whatever threshold is important for the practice in that case. *Toys "R" Us, Inc. v. Federal Trade Commission,* 221 F.3d 928, 937 (7th Cir. 2000). The definition of the relevant market has two aspects: the relevant product market and the relevant geographic market. *Holleb & Co. v. Produce Terminal Cold Storage Co.,* 532 F.2d 29, 33 (7th Cir. 1976). A product is in the same product market as other products with which it is reasonably interchangeable. *Minnesota Mining & Manufacturing Co. v. Pribyl,* 259 F.3d 587, 603 (7th Cir. 2001). The geographic market is the area in which a potential buyer may practicably look for the goods or services sought. *Republic*

*Tobacco Co. v. North Atlantic Trading Co.,* 381 F.3d 717, 738 (7th Cir. 2004). The purpose of defining the relevant market is to determine the degree of competition faced by the firm charged with monopolization and whether that competition effectively constrains the defendant's exercise of its power. In assessing the defendant's power, courts may consider a myriad of factors, but market share is the leading indicator of monopoly power. It is important to note that there is a distinction between market power and market share. The amount of market share a firm has in a properly defined market is only a way of estimating market power. *Toys "R" Us,* 221 F.3d at 937. In most respects, the terms "monopoly power" and "market power" are synonymous and are sometimes used interchangeably. *See, e.g., Cost Management Services, Inc. v. Washington Natural Gas Co.,* 99 F.3d 937, 950 n.15 (9th Cir. 1996). The existence of monopoly power ordinarily may be inferred from predominant market share. *United States v. Grinnell Corp.,* 384 U.S. 563, 16 L.Ed.2d 778, 86 S.Ct. 1698, 1704 (1966).

Although there are no hard rules on the percentage control of the relevant market that constitutes monopoly power, a market share of over 70 percent is usually said to be strong evidence of monopoly power, while a market share of under 40 percent usually precludes a finding of monopoly power. *State of Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.,* 935 F.2d 1469 (7th Cir. 1991); *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.,* 73 F.3d 756, 761 (7th Cir. 1996). In the middle range of 40- to 70-percent market share, the courts come to differing conclusions. *See Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic,* 65 F.3d 1406, 1411 (7th Cir. 1995); *Indiana Grocery, supra,* 864 F.2d at 1414; *Holleb & Co., supra,* 532 F.2d at 33. Less than 30 percent seems to be almost a safe harbor. *See Commercial Data Servers v. International Business Machine Corp.,* 262 F.Supp.2d 50, 74 (S.D.N.Y. 2003) ("Courts have consistently held that firms with market shares of less than 30% are presumptively incapable of exercising market power."); *ID Security Systems Canada, Inc. v. Checkpoint Systems, Inc.,* 249 F.Supp.2d 622, 648 (E.D.Pa. 2003) ("As a matter of law, a market share of less than 30 percent is presumptively insufficient to establish the market power that is a prerequisite to a defendant's enjoying a dangerous probability of achieving monopoly power.").

While market share is the leading indicator of monopoly power, market share alone is not always conclusive. Rather, the effect of a higher or lower market share may vary with the setting in which this factor is placed. Other factors that may play a role include the relative size and strength of the defendant, fluctuations in the defendant's market share, development of the industry, entry barriers, excess capacity, evidence of monopoly profit, and the impact of regulation. *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.,* 784 F.2d 1325, 1336 (7th Cir. 1986). Some courts have also said that proof of monopoly power requires that the defendant have both the ability to control prices and the power to exclude competitors from the market. *See Fineman v. Armstrong World Industries, Inc.,* 980 F.2d 171, 201 (3d Cir. 1992); *Full Draw Productions v. Easton Sports, Inc.,* 182 F.3d 745, 757 (10th Cir. 1999). Other courts have held that the ability to control prices or the power to exclude competitors will suffice. *Great Western Directories, Inc. v. Southwestern Bell Telephone Co.,* 63 F.3d 1378, 1384 (5th Cir. 1995); *Conwood Co. v. United States Tobacco Co.,* 290 F.3d 768, 782 (6th Cir. 2002); *City of Malden, Missouri v. Union Electric Co.,* 887 F.2d 157, 162 – 163 (8th Cir. 1989). *See also JamSports & Entertainment, LLC v. Paradama Productions, Inc.,* 336 F.Supp.2d 824, 837 – 839 (N.D.Ill. 2004) (discussing monopolization claim under "essential facilities doctrine," which requires that firm controlling essential facility (*e.g.,* stadium) make it available to competitors on

nondiscriminatory terms). Under either approach, it is not necessary to prove that prices actually have been controlled or that competitors actually were excluded from the market. The Supreme Court has emphasized that the potential ability to do so is sufficient. *United States v. Griffith,* 334 U.S. 100, 92 L.Ed. 1236, 68 S.Ct. 941, 945 (1948) (monopoly power may be condemned "even though it remains unexercised"); *Burris, supra; Tarrant Service Agency, Inc. v. American Standard, Inc.,* 12 F.3d 609, 615 (6th Cir. 1993).

### 2. [5.19] Monopoly Conduct: Deliberateness

The second element of monopolization — deliberateness — involves the willful acquisition or exercise of monopoly power. In *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 122 L.Ed.2d 247, 113 S.Ct. 884, 891 – 892 (1993), the Supreme Court held that what §2 of the Sherman Act, 15 U.S.C. §2, prohibits is not conduct that is competitive, even severely so, but conduct that unfairly tends to destroy competition. Similarly, in *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 81 L.Ed.2d 628, 104 S.Ct. 2731, 2739 (1984), the Supreme Court emphasized that the purpose of the Sherman Act is to foster competition, even to the extent of allowing one competitor to capture customers from an inefficient rival. Thus, neither size alone nor the continued exercise of lawful powers by even a monopolist is illegal when that size and power have been obtained by lawful means and developed by natural growth. *United States v. United States Steel Corp.,* 251 U.S. 417, 64 L.Ed. 343, 40 S.Ct. 293, 296 (1920). Monopolies coming about through non-predatory, nonexclusionary, and essentially fair competitive practices — *e.g.,* aggressive merchandising and vigorous, but nevertheless honest, economic maneuvers to enlarge market position — are therefore not condemned ipso facto. What is condemned is growth by business methods designed for and having the effect of impeding new entry into the market or excluding those whose occupancy is already precarious.

Most courts have also held that illicit intent alone, without illegitimate conduct, is insufficient to prove the deliberateness element of the monopolization test. The Seventh Circuit, for one, has expressed strong skepticism concerning evidence of intent in a monopolization case. In *State of Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.,* 935 F.2d 1469, 1481 (7th Cir. 1991), the court took great pains to flesh out the role of intent in a monopolization case:

> **The "intent" to achieve or maintain a monopoly is no more unlawful than the possession of a monopoly. Indeed, the goal of any profit-maximizing firm is to obtain a monopoly by capturing an ever increasing share of the market. . . . Monopolies achieved through superior skill are no less intentional than those achieved by anticompetitive means (as Learned Hand observed, "no monopolist monopolizes unconscious of what he is doing"), so the intent relevant to a §2 Sherman Act claim is only the intent to maintain or achieve monopoly power by *anticompetitive means.* Section 2 forbids not the intentional pursuit of monopoly power but the employment of unjustifiable means to gain that power. [**Emphasis in original.**]** [Footnote omitted.]

In contrast, other circuits have held that both intent and effect must be proven in a monopolization case. *United States Football League v. National Football League,* 842 F.2d 1335, 1358 – 1359 (2d Cir. 1988); *Rural Telephone Service Co. v. Feist Publications, Inc.,* 957 F.2d 765, 768 (10th Cir. 1992).

Although there is disagreement in the courts over the need for intent in acquiring a monopoly, the Seventh Circuit has held that once a company has legally acquired a monopoly (*e.g.,* through a patent), it has no obligation "to cooperate with rivals by selling them products that would help the rivals to compete." *Schor v. Abbott Laboratories,* 457 F.3d 608, 610 (7th Cir. 2006). Thus, once legally acquired, a monopoly may be legally maintained.

## C. [5.20] Attempted Monopolization

In addition to actual monopolization, §2 of the Sherman Act, 15 U.S.C. §2, establishes the distinct offense of attempted monopolization. To demonstrate attempted monopolization, a plaintiff must prove (1) a specific intent to monopolize, (2) predatory or anticompetitive conduct, and (3) a dangerous probability of success in achieving monopoly power. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.,* 864 F.2d 1409, 1413 (7th Cir. 1989). Each of these elements is discussed in §§5.21 – 5.23 below.

Attempted monopolization differs from actual monopolization in two important respects. First, there must be a specific intent to achieve monopoly power. The general intent standard that applies in actual monopolization cases does not suffice. Second, an attempt to monopolize implies that monopoly has not yet been attained. Consequently, the possession of monopoly power is not an essential element of an attempt to monopolize; rather, there need only be a dangerous probability that the attempt will succeed. *Taylor Publishing Co. v. Jostens Inc.,* 216 F.3d 465, 474 (5th Cir. 2000).

### 1. [5.21] Specific Intent

The specific intent may be proved by direct evidence, but it can also be — and most often is — inferred from the defendant's unfair or predatory conduct. *Great Escape, Inc. v. Union City Body Co.,* 791 F.2d 532, 541 (7th Cir. 1986). Such conduct is generally defined as actions that independently violate the antitrust laws or that have no legitimate business justification. *Id.* In analyzing whether a plaintiff has proven this element, courts frequently look to the proofs of the predatory or anticompetitive conduct as proof of this issue as well. *See, e.g., L&W/Lindco Products, Inc. v. Pure Asphalt Co.,* 979 F.Supp. 632, 638 – 639 (N.D.Ill. 1997).

### 2. [5.22] Predatory or Anticompetitive Conduct

This element of attempted monopolization has been characterized as "the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.' " *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 119 L.Ed.2d 265, 112 S.Ct. 2072, 2090 (1992), quoting *United States v. Griffith,* 334 U.S. 100, 92 L.Ed. 1236, 68 S.Ct. 941, 945 (1948). Predatory conduct has been generally defined as conduct "that has no legitimate business justification other than to destroy or damage competition." *Great Escape, Inc. v. Union City Body Co.,* 791 F.2d 532, 541 (7th Cir. 1986). However, the Seventh Circuit cautions that "if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.,* 797 F.2d 370, 379 (7th Cir. 1986).

#### 3. [5.23] Dangerous Probability of Success

In evaluating this element of attempted monopolization, courts must consider the firm's capacity to commit the offense, the scope of its objective, and the character of its conduct with the ultimate concern being the firm's actual or threatened impact on competition. *Lektro-Vend Corp. v. Vendo Co.,* 660 F.2d 255, 271 (7th Cir. 1981). The requirement of a "dangerous probability" of achieving success is typically found when the defendant has a market share of 50 percent or more. *Photovest Corp. v. Fotomat Corp.,* 606 F.2d 704, 711 (7th Cir. 1979). Defendants with shares less than 30 percent are rarely determined to have a dangerous probability of succeeding. *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.,* 73 F.3d 756, 761 (7th Cir. 1996). Those with shares between 30 percent and 50 percent may have a dangerous probability of success if other factors are present. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.,* 864 F.2d 1409, 1414 (7th Cir. 1989). Other factors that may bear on a dangerous probability of success include barriers to entry, the relative size of the defendant, and whether the defendant's market share is rising or declining. 864 F.2d at 1413; *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.,* 784 F.2d 1325, 1335 (7th Cir. 1986).

### D. [5.24] Conspiracy To Monopolize

The combination or conspiracy provision of §2 of the Sherman Act, 15 U.S.C. §2, is aimed at concerted action to achieve monopoly power by two or more participants, even if unsuccessful. Liabilities may thus arise even if monopoly power is never attained. While courts differ as to the precise elements of a conspiracy to monopolize, proof of the following elements is standard: a combination or conspiracy; an overt act in support of the conspiracy; an effect on a substantial amount of interstate commerce; and a specific intent to monopolize. *Great Escape, Inc. v. Union City Body Co.,* 791 F.2d 532, 540 (7th Cir. 1986).

### E. [5.25] Illinois Antitrust Act

Section 3(3) of the Illinois Antitrust Act, 740 ILCS 10/3(3), expressly prohibits monopolization and attempts to monopolize. The Illinois Antitrust Act for the most part requires the same evidentiary parameters as §2 of the Sherman Act, 15 U.S.C. §2. *See Ray Dancer, Inc. v. DMC Corp.,* 230 Ill.App.3d 40, 594 N.E.2d 1344, 171 Ill.Dec. 824 (2d Dist. 1992).

## V. OTHER ANTITRUST VIOLATIONS

### A. Price Discrimination

#### 1. [5.26] Basic Prohibition

The Robinson-Patman Anti-Discrimination Act, 15 U.S.C. §§13(a), 13(b), as incorporated into the Clayton Act, provides:

**(a) Price; selection of customers**

**It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.**

**(b) Burden of rebutting prima-facie case of discrimination**

**Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.**

Under this language, the key elements for establishing a prima facie case for a price discrimination violation are that the defendant seller is engaged in interstate commerce, that the defendant's sale of goods is to different purchasers, that the goods sold are commodities of like grade and quality, that the goods are sold in interstate commerce, that the defendant directly or indirectly has discriminated in price as between different purchasers, and that a reasonable possibility exists that the price discrimination will harm competition. *See Texaco Inc. v. Hasbrouck,* 496 U.S. 543, 110 L.Ed.2d 492, 110 S.Ct. 2535, 2543 (1990); *Feesers, Inc. v. Michael Foods, Inc.,* 498 F.3d 206, 212 (3d Cir. 2007) (discussing elements of cause of action); *W.H. Brady Co. v. Lem Products, Inc.,* 659 F.Supp. 1355, 1375 – 1376 (N.D.Ill. 1987). At least in the Seventh Circuit, bad intent is not part of the plaintiff's prima facie case under §13(a). *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper,* 462 F.3d 690, 698 (7th Cir. 2006). As noted, the prohibition applies to both direct and indirect discrimination. Direct discrimination occurs when a seller charges different prices to different buyers. *Lewis v. Philip Morris Inc.,* 355 F.3d 515, 521 (6th Cir. 2004). Indirect discrimination occurs when one buyer receives something of value not offered to other buyers, such as rebates, product promotions, payment of shipping costs, or free goods. 355 F.3d at 521, 534 – 535. See also 15 U.S.C. §§13(d), 13(e). *See Woodman's Food Market v. Clorox Co.,* 833 F.3d 743 (7th Cir. 2016) (holding that package size alone is not promotional service under §2(e) of Robinson-Patman Anti-Discrimination Act).

Two fundamental types of violations are recognized under the Robinson-Patman Anti-Discrimination Act: primary-line violations and secondary-line discrimination. Primary-line violations consist of discrimination tending to injure the defendant sellers' competitors. Secondary-line violations involve discrimination tending to injure the defendant sellers' customers. *See Lewis, supra,* 355 F.3d at 520; *Godfrey v. Pulitzer Publishing Co.,* 276 F.3d 405, 408 n.7 (8th Cir. 2002). Because different standards apply to these two types of violations, their basic requirements are outlined separately in §§5.27 and 5.28 below. Although much less common, the Robinson-Patman Anti-Discrimination Act also bars tertiary-line discrimination, which involves injury to competition at the level of the purchaser's customers. *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.,* 546 U.S. 164, 163 L.Ed.2d 663, 126 S.Ct. 860, 870 (2006).

### 2. [5.27] Primary-Line Violations

In 1993, the Supreme Court decided *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 125 L.Ed.2d 168, 113 S.Ct. 2578 (1993), which clarified much of the law regarding primary-line violations. *Brooke Group* involved an action between two competing cigarette manufacturers in which the plaintiff claimed injury due to the defendant's below-cost sales of generic cigarettes. A jury found in favor of the plaintiff, but the trial court held that the defendant was entitled to judgment as a matter of law because of the lack of impact on competition in the market for generic cigarettes. Both the Fourth Circuit and the Supreme Court affirmed.

In so doing, the Supreme Court stressed that the Robinson-Patman Anti-Discrimination Act "condemns price discrimination only to the extent that it threatens to injure competition" and that the primary-line competitive injury targeted by the Act "is of the same general character as the injury inflicted by predatory pricing schemes actionable under §2 of the Sherman Act [15 U.S.C.

§2].” 113 S.Ct. at 2586, 2587. On these premises, the Court determined that there are two main prerequisites to recovery for primary-line violations. The first is proof “that the prices complained of are below an appropriate measure of [the plaintiff’s] rival’s costs.” 113 S.Ct. at 2587. The second is that “the competitor had a reasonable prospect . . . of recouping its investment in below-cost prices.” 113 S.Ct. at 2588. Thus, stated the Court, the fact that the “below-cost pricing may impose painful losses on [the plaintiff] is of no moment to the antitrust laws if competition is not injured.” *Id.* Rather, “[t]he inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb.” 113 S.Ct. at 2589. However, even if it does succumb, according to the Court, there is still the further question of whether competition has been injured, which occurs only if the defendant has obtained enough market power “to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what [it] earlier gave up in below-cost prices.” 113 S.Ct. at 2589, quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1348, 1358 (1986).

The Court recognized the difficulty of meeting the standards it set, observing that “[t]hese prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury.” 113 S.Ct. at 2589. The Court’s decision requiring the recoupment of a predatory investment by the defendant was consistent with earlier Seventh Circuit law on the subject. *See A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.,* 881 F.2d 1396, 1401 – 1404 (7th Cir. 1989). *See also Malek Wholesaler, Inc. v. First Film Extruding, Ltd.,* No. 97 C 7087, 1998 WL 142385 (N.D.Ill. Mar. 20, 1998) (applying *Brooke Group* standards). The Seventh Circuit reiterated the requirement that the defendant be able to recoup its losses in *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper,* 462 F.3d 690, 695 – 696 (7th Cir. 2006), and *Wallace v. International Business Machines Corp.,* 467 F.3d 1104, 1106 (7th Cir. 2006). In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,* 549 U.S. 312, 166 L.Ed.2d 911, 127 S.Ct. 1069, 1078 (2007), the Supreme Court held that the same considerations that were applied to test the validity of a predatory pricing claim under *Brooke Group* also apply to predatory bidding claims on the “buy side” of the market.

### 3. [5.28] Secondary-Line Violations

The burden facing the plaintiff in secondary-line cases does not appear to be as great as that in primary-line cases. The plaintiff, who is the disfavored purchaser, must show initially that it competes with the favored purchaser at the same functional market level and in the same geographic market. *Lewis v. Philip Morris Inc.,* 355 F.3d 515, 521 (6th Cir. 2004); *Infusion Resources, Inc. v. Minimed, Inc.,* 351 F.3d 688, 693 (5th Cir. 2003). *See also Feesers, Inc. v. Michael Foods, Inc.,* 591 F.3d 191, 197 (3d Cir. 2010) (holding that two purchasers were acting on same distribution level and directly after same dollar). With respect to injury to competition, however, the Supreme Court held in *Federal Trade Commission v. Morton Salt Co.,* 334 U.S. 37, 92 L.Ed. 1196, 68 S.Ct. 822, 827 (1948), that the necessary injury could be inferred from substantial price differentials existing over time. This approach to establishing injury to competition appears to have continuing validity. *See Falls City Industries, Inc. v. Vanco Beverage, Inc.,* 460 U.S. 428, 75 L.Ed.2d 174, 103 S.Ct. 1282, 1289 (1983); *Stelwagon Manufacturing Co. v. Tarmac Roofing Systems, Inc.,* 63 F.3d 1267, 1272 (3d Cir. 1995); *Boise Cascade Corp. v. Federal Trade Commission,* 837 F.2d 1127, 1139 (D.C.Cir. 1988). The

Supreme Court has held, however, that for a manufacturer to be held liable for secondary-line price discrimination with respect to its sales to dealers, the plaintiff dealer must show that the manufacturer discriminated between the plaintiff and another dealer competing to resell the product to the same retail customer, so that discriminatory prices for resale to different customers would not suffice. *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.,* 546 U.S. 164, 163 L.Ed.2d 663, 126 S.Ct. 860, 871 – 872 (2006). *See also R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper,* 462 F.3d 690, 697 (7th Cir. 2006) (holding that manufacturer may condition discounts given to customers on customers' agreement to reduce prices they charge to consumers).

Secondary-line violations in the form of functional discounts — perhaps the most frequently litigated area of price discrimination — were addressed by the Supreme Court in *Texaco Inc. v. Hasbrouck,* 496 U.S. 543, 110 L.Ed.2d 492, 110 S.Ct. 2535 (1990). A functional discount is one given to a purchaser based on its role in the seller's distribution system, *e.g.,* as a distributor, wholesaler, or retailer. 110 S.Ct. at 2542 n.11. The Court held that a functional discount will not violate the Robinson-Patman Anti-Discrimination Act if it "is reasonable and . . . did not cause any substantial lessening of competition." 110 S.Ct. at 2545. Thus, "a functional discount that constitutes a reasonable reimbursement for the purchasers' actual marketing functions will not violate the Act." 110 S.Ct. at 2550. On the other hand, if the discount is shown to be disproportionate to the market function performed for which the discount was given and thereby to have "anticompetitive effects," as was the case in *Hasbrouck,* 110 S.Ct. at 2551, the discount will be prohibited by the Act. *See also Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.,* 477 F.3d 854, 866 – 867 (6th Cir. 2007) (discussing "functional availability" doctrine under which purchaser cannot recover damages for lower prices paid by competitor if those same prices were available to plaintiff "from a practical standpoint").

#### 4. [5.29] Illinois Antitrust Act

The Illinois Antitrust Act contains no counterpart of 15 U.S.C. §13. See Bar Committee Comments — 1967, Section 3(2), Rule of Reason, S.H.A., 740 ILCS 10/3. Thus, price discrimination, at least if not of the predatory kind, will not give rise, in and of itself, to a violation of the Illinois Antitrust Act. *Laughlin v. Evanston Hospital,* 133 Ill.2d 374, 550 N.E.2d 986, 989 – 992, 140 Ill.Dec. 861 (1990). *See also Regal Motors, Inc. v. Fiat Motors of North America, Inc.,* 133 Ill.App.3d 370, 479 N.E.2d 1, 4, 88 Ill.Dec. 666 (1st Dist. 1985) ("price discrimination prohibited under the Clayton Act [is not] actionable under the Illinois statute"). Depending on the nature of the price discrimination, however, it is possible that a violation might be recognized under 740 ILCS 10/3(2), which prohibits unreasonable restraints of trade, or 740 ILCS 10/3(3), which prohibits maintaining or attempting to maintain monopoly power. *See Laughlin, supra,* 550 N.E.2d at 992; Bar Committee Comments — 1967, Section 3(2), Rule of Reason; Section 3(3), Monopolization, S.H.A., 740 ILCS 10/3.

### B. Mergers and Acquisitions

#### 1. [5.30] Basic Prohibition

The Clayton Act provides in relevant part:

> **No person engaged in commerce . . . shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce . . . where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.** 15 U.S.C. §18.

This language applies to anticompetitive mergers and acquisitions, whether "horizontal" (*i.e.,* when both parties are in the same product and geographic market) or "vertical" (*i.e.,* when the two parties are in a supplier-customer relationship). However, the section generally does not apply to transactions within a government-regulated industry. *See United States v. Rockford Memorial Corp.,* 898 F.2d 1278, 1280 (7th Cir. 1990) (interpreting 15 U.S.C. §21).

The three basic steps in analyzing a merger's compliance with 15 U.S.C. §18 are determining (a) the "line of commerce," usually referred to as a product market, for the transaction; (b) the "section of the country," or geographic market, for the transaction; and (c) whether the proposed transaction may substantially lessen competition in that defined product and geographic market, often referred to as the "relevant market." *See FTC v. Advocate Health Care Network,* 841 F.3d 460, 467, 468 (7th Cir. 2016) (ruling that relevant geographic market was not inclusive of every competitor but rather was "the area of effective competition"), quoting *United States v. E.I du Pont de Nemours & Co.,* 353 U.S. 586, 1 L.Ed.2d 1057, 77 S.Ct. 872, 877 (1957). *See also United States v. UPM-Kymmene Oyj,* No. 03 C 2528, 2003 WL 21781902, *12 (N.D.Ill. July 25, 2003). In light of the language " 'may' be . . . to lessen," 15 U.S.C. §18 does not require a certainty of the lessening of competition, only a high probability. *Federal Trade Commission v. Elders Grain, Inc.,* 868 F.2d 901, 906 (7th Cir. 1989). *See also Panache Broadcasting of Pennsylvania, Inc. v. Richardson Electronics, Ltd.,* No. 90 C 6400, 1995 WL 584345, *13 (N.D.Ill. Oct. 2, 1995) ("Section seven of the Clayton Act prohibits mergers and other acquisitions that may lessen competition or tend to create a monopoly."). *See also United States v. Dairy Farmers of America, Inc.,* 426 F.3d 850, 859 – 860 (6th Cir. 2005) (holding that control of another company is not prerequisite for defendant's violation of Clayton Act when defendant has acquired significantly sufficient portion of competitor's stock to have impact on competition). On the other hand, speculative monopoly power and remote injuries also are not likely to justify relief under this section. *Ginsburg v. INBEV NV/SA,* 623 F.3d 1229, 1236 (8th Cir. 2010) ("Hypothetical anticompetitive conduct, speculative monopoly power, and remote injuries do not merit the extreme remedy of divestiture."), quoting *Broadcom Corp. v. Qualcomm Inc.,* 501 F.3d 297, 322 (3d Cir. 2007).

While §18 sets forth the basic prohibition, Congress, as with other areas of antitrust law, has left it to the courts to define the specific parameters. *See Brown Shoe Co. v. United States,* 370 U.S. 294, 8 L.Ed.2d 510, 82 S.Ct. 1502, 1521 (1962) ("Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets. . . . Nor did it adopt a definition of the word 'substantially,' whether in quantitative terms of sales or assets or market shares or in designated qualitative terms, by which a merger's effects on competition were to be measured."). *See also Gulf States Reorganization Group, Inc. v. Nucor Corp.,* 466 F.3d 961,

966 – 967 (11th Cir. 2006) (discussing court-created "failing company defense," which allows dominant firm to acquire assets of competing failing company but only if there is no preferable purchaser of those assets).

In addition to the courts, however, the governmental enforcement agencies have established their own guidelines for enforcement. At the federal level, the Department of Justice and the Federal Trade Commission have published HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), www.justice.gov/atr/horizontal-merger-guidelines-08192010. These guidelines attempt to set forth the federal agencies' general views on defining the relevant market, assessing market concentrations through the use of the Herfindahl-Hirschman Index, determining the potential adverse competitive effects of a merger, analyzing the ease of entry into a market and the effect of market entry capability on the overall anticompetitive effect, and evaluating the positive efficiencies generated by a merger. *See Chicago Bridge & Iron Company N.V. v. Federal Trade Commission,* 534 F.3d 410, 429 – 434 (5th Cir. 2008), for an example of the discussion and application of the guidelines. At the state level, the National Association of Attorneys General has issued a comparable set of horizontal merger guidelines, dated March 10, 1987, and revised as of March 30, 1993, www.naag.org/assets/files/pdf/at-hmerger_guidelines.pdf.

### 2. [5.31] Notice Requirements

To assist in enforcement of 15 U.S.C. §18, Congress added §18a to the Clayton Act as part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub.L. 87-664, 76 Stat. 548. Section 18a requires that acquiring entities involved in generally larger mergers give premerger notification of the merger to the federal enforcement agencies and wait at least 30 days prior to consummating the merger. 15 U.S.C. §18a. This section helps to assure that anticompetitive mergers may be prevented before they take place and that divestiture of assets will not come to be the only form of relief under §18a. The Federal Trade Commission has promulgated rules, regulations, and interpretations of the Hart-Scott-Rodino amendments to assist in their implementation. See 16 C.F.R. pt. 801.1.

The Department of Justice and the Federal Trade Commission review Hart-Scott-Rodino filings and determine if further investigation is needed; if so, they engage in a "clearance" process to determine which agency will have responsibility for the investigation. The parties may seek "early termination" of the waiting period as part of their filing, and if granted, they are free to close. If the reviewing agency has substantial concerns that the parties are unable to resolve during the waiting period, the agency may issue what is referred to as a "second request" for information, which is generally a very broad and probing set of document requests and interrogatories. The issuance of a second request tolls the running of the waiting period until the parties have "substantially complied" with the request, at which time the agency then has 30 days to determine whether it will oppose the transaction by seeking an injunction in court, or allow the transaction to proceed unopposed. The above is a very generalized and high-level description of the processes, and practitioners should realize that there are many nuances involved at each stage.

### 3. [5.32] Illinois Antitrust Act

The Illinois Antitrust Act contains no provision comparable to 15 U.S.C. §18; thus,

> **the legality of a merger will be tested under the unreasonable restraint of trade provisions of Section 3(2) or under the monopolization provisions of Section 3(3) after an examination of the competitive and economic consequences of the merger.** Bar Committee Comments — 1967, Section 3(1), "Per Se" Offenses, S.H.A., 740 ILCS 10/3.

Lacking a provision prohibiting anticompetitive mergers and acquisitions, the Illinois Antitrust Act does not require that premerger notification be provided to the state.