IV. AGREEMENTS

A. Overview

The first pillar of the U.S. antitrust system is the prohibition on anticompetitive agreements in Section 1 of the Sherman Act, 15 U.S.C. § 1. It provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal[.]"

A violation of Section 1 has two central elements. First, the defendant must have entered into a "contract, combination, or conspiracy"—*i.e.*, an *agreement*. If that agreement is between actual or potential competitors, it is said to be a "horizontal" agreement; if it is between entities at different levels of a supply chain (or between suppliers of complements) it is said to be a "vertical" agreement.[239] Second, the agreement must constitute an *unlawful restraint of trade*—*i.e.*, it must be unreasonably harmful to competition.

Each of these two elements raises complexities and challenges in practice. The first piece—the definition of an agreement—is notoriously elusive. Courts have struggled *both* to define what an agreement is for the purposes of antitrust law, *and* to specify the circumstances under which the existence of such an agreement can be inferred from the behavior of the relevant firms.

Courts have devised an elaborate framework for evaluating the second piece: that is, whether an agreement unreasonably restrains competition. That framework involves the choice of one of three possible analytical standards, although some courts have emphasized that in practice the analysis more closely resembles a continuum than a three-tier test.[240] The standards differ with respect to the burdens they impose on a plaintiff to show that an agreement is "anticompetitive" (*i.e.*, tends to inflict harm by restricting competition), and with respect to the room they leave for a defendant to show that the agreement has "procompetitive" benefits (*i.e.*, benefits relating to the better satisfaction of market demand). They are:

1. A "per se rule" of automatic illegality for a small set of "nakedly" harmful types of agreement. Certain agreements that are well known to be almost invariably harmful to competition and are unrelated to any procompetitive purpose are "*per se* illegal," regardless of their purpose, circumstances, or effects. This includes practices like agreements to fix prices, rig bids, or divide markets. Once a court concludes that this standard applies, a plaintiff need not show any harmful effects at all, and a defendant has no opportunity to introduce evidence of benefits: if *per se* treatment applies, the plaintiff wins.

2. A "rule of reason" for most other agreements. The default standard of legality for agreements that are not *per se* illegal is called the "rule of reason." That approach measures the anticompetitive harms of the agreement against its procompetitive benefits, and condemns the agreement only when its harmful tendency can be shown to predominate. The rule of reason has been articulated and applied in various different ways by courts. In the most common formulation it is applied as follows: at the first step, the burden is on the plaintiff to establish the anticompetitive effect of the agreement; if this burden is satisfied, at the second step, the burden passes to the defendant to demonstrate its redeeming procompetitive benefits; and if this burden is satisfied, the burden passes back to the plaintiff to establish, at the third step, that the harmful effects outweigh the beneficial ones and/or that

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[239] An agreement can, therefore, have *both* horizontal and vertical dimensions, if it connects two parties that are at different levels of the same supply chain *and* one of them is a potential entrant into the market in which the other one is active.

[240] *See*, *e.g.*, California Dental Association v. FTC, 526 U.S. 756, 779 (1999) ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear. We have recognized, for example, that there is often no bright line separating per se from Rule of Reason analysis, since considerable inquiry into market conditions may be required before the application of any so-called 'per-se' condemnation is justified."); PolyGram Holding, Inc. v. FTC, 416 F.3d 29, 35 (D.C. Cir. 2005) ("It would be somewhat misleading, however, to say the 'quick look' is just a new category of analysis intermediate in complexity between 'per se' condemnation and full-blown 'rule of reason' treatment, for that would suggest the Court has moved from a dichotomy to a trichotomy, when in fact it has backed away from any reliance upon fixed categories and toward a continuum"); NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 104 n.26 (1984) ("[T]here is often no bright line separating per se from Rule of Reason analysis.").

the claimed procompetitive benefits could be achieved through some less harmful (or "less restrictive") means. (Occasionally the two pieces of step three are separated, creating a four-step framework.) This standard requires a plaintiff to prove that the agreement has actual or likely anticompetitive effects—often a challenging task in practice—and, if it does so, the defendant has a full opportunity to prove that the agreement has countervailing benefits.

3. "Intermediate" scrutiny for a subset of facially suspicious agreements. In a fairly small number of cases, courts or agencies apply an intermediate standard sometimes called "quick look" review (or "inherently suspect" review by the FTC), for agreements that present obvious threats to competition give their nature and context, but which are not so nakedly harmful that they make it into the *per se* category. Once a court concludes that this standard applies, the plaintiff may rely on the obviously harmful nature of the agreement to infer anticompetitive harm, but, unlike *per se* analysis, a defendant may offer evidence that, despite appearances, the agreement nevertheless generates sufficient benefits to offset the harms.

In the second half of this chapter, we will set out the three main versions of Section 1's reasonableness test, aiming to understand how the *per se* rule, the rule of reason, and the intermediate-scrutiny test are each applied. In Chapter V, when we discuss horizontal restraints, we will focus more directly on the challenge of figuring out how practices should be classified among the three categories. In Chapter VI, we will see that vertical restraints are almost invariably analyzed under the rule of reason, so the challenge of classification is primarily a matter for horizontal cases.

As you might guess, the choice of standard is often dispositive of the outcome of an antitrust case. The vast majority of agreements are analyzed under the rule of reason, and this has significant implications for the reality of antitrust litigation. For one thing, plaintiffs overwhelmingly lose rule-of-reason cases.[241] For another thing, rule-of-reason litigation is notoriously lengthy and expensive, promising vast discovery costs (particularly for large corporate litigants with many documents), low chances of success for plaintiffs, and long delays for everyone. The Supreme Court has alluded to some of these realities when setting the pleading hurdles for an antitrust claim to clear.[242]

The *per se* rule and the intermediate scrutiny standard are intended, among other things, to make adjudication easier and more efficient, by obviating the need for expensive discovery or detailed analysis when judicial experience shows that a particular kind of agreement is always, or nearly always, unreasonably restrictive in practice.[243] But the efficiency benefits of such a rule can only be realized if plaintiffs can be confident in a *per se* case that they need not *also* develop a discovery record for a full-blown effects-based showing, just in case a judge decides that per se analysis is inappropriate. In practice, courts often decline to apply *per se* scrutiny in all but the very clearest cases: so a plaintiff faces strong incentives to prepare a full rule-of-reason case anyway.[244]

Choosing the Standard v. Applying the Standard

As we will see, judicial opinions often read as if there were a strict separation between a first step of choosing a standard (*i.e.*, *per se*, rule of reason, or intermediate scrutiny) and a second, subsequent, step of applying that standard. And, certainly, that is the way in which an antitrust analysis is often written up by a judge or briefed by a litigant. But that is probably not the best way of understanding what is really going on in the mind of a judge, or an antitrust agency, when working through an analysis. Among other things, in order to figure out what standard

[241] Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 828 (2009) ("Courts dispose of 97% of [rule of reason] cases at the first stage, on the grounds that there is no anticompetitive effect.").

[242] *See*, *e.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 546 (2007) (noting expense of antitrust discovery in shaping motion-to-dismiss standard).

[243] *See*, *e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979) (key question is "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.").

[244] *See* Herbert Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005), 115–16; *see*, *e.g.*, 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 116–17 (2d Cir. 2021) (declining to apply abbreviated scrutiny); Diaz v. Farley, 215 F.3d 1175, 1182 (10th Cir. 2000) ("Because plaintiffs conceded below that they did not have sufficient evidence to proceed under a theory that defendants' conduct violated the rule of reason, if we find, as the district court did, that the *per se* rule does not apply, the order dismissing plaintiffs' antitrust claims must be affirmed."); *see also* Texaco Inc. v. Dagher, 547 U.S. 1 (2006) (rejecting *per se* claim in the absence of a rule-of-reason theory).

should apply, a court or agency will often need to think about the practice's nature and effects: it's hard to determine that a practice is nakedly anticompetitive without thinking about whether it is linked to any procompetitive benefits!

So it might be helpful to keep in the back of your mind the idea that a court, or an investigating agency, will often really approach a problem by asking two questions: (1) what are the reasons of theory and evidence to fear that a practice will result in anticompetitive harm, and (2) what are the reasons of theory and evidence to expect that a practice will elicit procompetitive benefits (*i.e.*, benefits related to the satisfaction of demand)? If the balance tips very sharply in favor of harm, and the conduct is of a kind that courts have summarily condemned in the past, *per se* condemnation may be in line. If the conduct seems facially very troubling, but the balancing is not so overwhelming (or the conduct is not so familiar) that the court should declare it illegal out of hand—or the practice seems only very distantly related to some legitimate procompetitive collaboration—intermediate scrutiny may be in order. In all other cases, the rule of reason is the default analytical frame for articulating and weighing stories of harm and benefit against one another.

This three-part division has some implications for the scope of criminal antitrust enforcement. For some decades before 2022,[245] criminal enforcement was limited to *per se* violations of Section 1: including price-fixing (including wage-fixing), market division, and bid-rigging.[246] Courts have held that the scope of *per se* illegality is sufficiently clear to satisfy the constitutional "fair notice" requirement for criminal statutes.[247] But in 2022, DOJ expanded its criminal program to cover monopolization, and it remains to be seen whether this presages an expansion of criminal Section 1 enforcement beyond the *per se* category.

The rest of this chapter will focus on Section 1. But it may be helpful to remember that Section 1 exhibits some overlap with Section 2 and Section 7. For example, if a monopolist uses agreements to improperly exclude rivals, those agreements might violate *both* Section 1 and Section 2.[248] Likewise, if a business enters into an agreement to acquire a rival, the merger agreement might violate § 1, while the merger itself could violate § 7 of the Clayton Act.[249] Section 1 also overlaps with Section 3 of the Clayton Act, which is generally understood to provide for modestly elevated scrutiny of certain exclusivity and tying arrangements.[250]

This chapter is the beginning of our survey of the law of agreements. Chapter IV focuses on some issues that are common to the analysis of all agreements, including horizontal agreements (among actual and potential competitors) as well as vertical ones (among entities at different levels of the supply chain, or suppliers of complements). We will focus on three questions. In Section B we will ask when antitrust law considers two entities to be separate, such that they are capable of entering into an agreement that is subject to Section 1. In Section C we will meet antitrust's definition of an "agreement." In Section D we will focus on the three standards of antitrust legality used to appraise the reasonableness of an agreement under Section 1: per se illegality; the rule of reason; and intermediate scrutiny. In Chapter V, we will discuss some specific topics in the study of horizontal restraints on competition, with a focus on figuring out when to apply the different standards of scrutiny. In Chapter VI, we will turn to vertical restraints.

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[245] Daniel A. Crane, *Criminal Enforcement of Section 2 of the Sherman Act*, 84 Antitrust L.J. 753 (2022).

[246] For a recent DOJ initiative aimed at procurement bid-rigging, *see*, *e.g.*, Daniel W. Glad, *The Procurement Collusion Strike Force: A Whole-of-Government Approach to Combating a Whole-of-Government Problem* (remarks of Oct. 13, 2021).

[247] *See*, *e.g.*, United States v. Jindal, No. CV-4:20-CR-00358, 2021 WL 5578687, at *9–10 (E.D. Tex. Nov. 29, 2021) (fair notice that wage-fixing was *per se* illegal); United States v. Miller, 771 F.2d 1219, 1225 (9th Cir. 1985) (fair notice that price-fixing was per se illegal); *see also* Nash v. United States, 229 U.S. 373, 376–78 (1913) ("[T]here is no constitutional difficulty in the way of enforcing the criminal part of the act[.]").

[248] *See*, *e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001) ("In this case, plaintiffs challenged Microsoft's exclusive dealing arrangements . . . under both §§ 1 and 2 of the Sherman Act.").

[249] *See*, *e.g.*, Complaint, United States v. Booz Allen Hamilton Holding Corp., No. 1:22-cv-01603 (D. Md. filed June 29, 2022) ¶¶ 60–61 ("The merger agreement has sharply reduced incentives for the Defendants to compete vigorously for [a government contract] and therefore constitutes an unreasonable restraint of trade, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Unless enjoined, completion of the merger is likely to substantially lessen competition and tend to create a monopoly in interstate trade and commerce for the [contract], in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.").

[250] 15 U.S.C. § 14.

B. Contracts, Combinations, and Conspiracies

1. Unilateral v. Joint Action

Before we can have an agreement, we need more than one participant able to agree with one another for the purposes of antitrust analysis. And this is not quite as straightforward as it sounds.

Section 1 of the Sherman Act prohibits "contracts," "combinations," and "conspiracies" in restraint of trade. (Nothing turns on any difference between these three synonyms for "agreement.") But not every instance of literal concerted action constitutes an agreement for the purposes of antitrust analysis. Among other things, concerted action by persons employed by the same corporation, or concerted action between a corporation and its own officers or employees, is not a conspiracy within the meaning of § 1. For example, it is not illegal "price fixing" for two employees of one business—say, a supermarket or bookstore chain—to agree on the prices that they will charge for particular products and services. (That would turn every business into a felonious conspiracy!) So antitrust needs an account of when entities will be treated as separate, such that an agreement may exist between them for the purposes of Section 1.

This issue is often raised in connection with corporate "families." Certainly an agreement within a single corporation (*e.g.*, among employees) is not a conspiracy for the purposes of Section 1.[251] But what about agreements between a corporation and its wholly owned, separately incorporated subsidiaries? These are different *legal* persons: but are they separate for antitrust purposes, such that they are capable of violating Section 1 by entering into an agreement? Or, to put it another way: does antitrust law care whether a corporation implements a practice through an unincorporated division or through a separately incorporated subsidiary?

In *Copperweld* in 1984, the Supreme Court said no, repudiating some earlier understandings that an "intraenterprise" conspiracy of this kind could constitute an unlawful restraint of trade. That case involved private litigation by one business, Independence Tube, against Copperweld and its wholly-owned subsidiary, Regal Tube, on the theory that they had colluded to harm Independence Tube.

Copperweld Corp. v. Independence Tube Corp.

467 U.S. 752 (1984)

Chief Justice Burger.

[1] We granted certiorari to determine whether a parent corporation and its wholly owned subsidiary are legally capable of conspiring with each other under § 1 of the Sherman Act.

[2] The predecessor to petitioner Regal Tube Co. was established in Chicago in 1955 to manufacture structural steel tubing used in heavy equipment, cargo vehicles, and construction. From 1955 to 1968 it remained a wholly owned subsidiary of C.E. Robinson Co. In 1968 Lear Siegler, Inc., purchased Regal Tube Co. and operated it as an unincorporated division. David Grohne, who had previously served as vice president and general manager of Regal, became president of the division after the acquisition.

[3] In 1972 petitioner Copperweld Corp. purchased the Regal division from Lear Siegler; the sale agreement bound Lear Siegler and its subsidiaries not to compete with Regal in the United States for five years. Copperweld then transferred Regal's assets to a newly formed, wholly owned Pennsylvania corporation, petitioner Regal Tube Co. The new subsidiary continued to conduct its manufacturing operations in Chicago but shared Copperweld's corporate headquarters in Pittsburgh.

[251] *See*, *e.g.*, Holter v. Moore & Co., 702 F.2d 854, 855 (10th Cir. 1983) ("Since a corporation has no way of acting except through officers and employees, the officers and employees are part of the same economic unit as the corporation for antitrust purposes. Thus, officers and employees of a corporation are generally incapable of conspiring with the corporation or with each other.") (footnote omitted). For a thoughtful and provocative critical discussion of antitrust's relationship with the corporate form, *see* Sanjukta Paul, *On Firms*, 90 U. Chi. L. Rev. 579 (2023).

[4] Shortly before Copperweld acquired Regal, David Grohne accepted a job as a corporate officer of Lear Siegler. After the acquisition, while continuing to work for Lear Siegler, Grohne set out to establish his own steel tubing business to compete in the same market as Regal. In May 1972 he formed respondent Independence Tube Corp., which soon secured an offer from the Yoder Co. to supply a tubing mill. In December 1972 respondent gave Yoder a purchase order to have a mill ready by the end of December 1973.

[5] When executives at Regal and Copperweld learned of Grohne's plans, they initially hoped that Lear Siegler's noncompetition agreement would thwart the new competitor. Although their lawyer advised them that Grohne was not bound by the agreement, he did suggest that petitioners might obtain an injunction against Grohne's activities if he made use of any technical information or trade secrets belonging to Regal. The legal opinion was given to Regal and Copperweld along with a letter to be sent to anyone with whom Grohne attempted to deal. The letter warned that Copperweld would be "greatly concerned if [Grohne] contemplates entering the structural tube market in competition with Regal Tube" and promised to take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler." . . .

[6] When Yoder accepted respondent's order for a tubing mill on February 19, 1973, Copperweld sent Yoder one of these letters; two days later Yoder voided its acceptance . . . .

[7] Although the letter to Yoder was [the] most successful effort [by Copperweld and Regal] to discourage those contemplating doing business with [Independence Tube], it was not their only one. Copperweld repeatedly contacted banks that were considering financing [Independence Tube]'s operations. One or both [of Copperweld and Regal] also approached real estate firms that were considering providing plant space to [Independence Tube] and contacted prospective suppliers and customers of the new company.

[8] In 1976 [Independence Tube] filed this action in the District Court against petitioners [*i.e.*, Copperweld and Regal] and Yoder. The jury found that Copperweld and Regal had conspired [with one another] to violate § 1 of the Sherman Act, but that Yoder was not part of the conspiracy. [. . .]

[9] Review of this case calls directly into question whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by § 1 of the Sherman Act, constitute a combination or conspiracy. The so-called "intra-enterprise conspiracy" doctrine provides that § 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership. The doctrine derives from declarations in several of this Court's opinions. [. . .]

[10] Petitioners [Copperweld and Regal], joined by the United States as amicus curiae, urge us to repudiate the intra-enterprise conspiracy doctrine. The central criticism is that the doctrine gives undue significance to the fact that a subsidiary is separately incorporated and thereby treats as the concerted activity of two entities what is really unilateral behavior flowing from decisions of a single enterprise. We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.

[11] The Sherman Act contains a basic distinction between concerted and independent action. The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. . . . In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

[12] Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities. It does not reach conduct that is "wholly unilateral." Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. Other combinations, such as mergers, joint ventures,

and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect. Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.

[13] The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

[14] The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination . . . or conspiracy" in § 1. Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the same company. But it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.

[15] There is also general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions. Although this Court has not previously addressed the question, there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny.

[16] Indeed, a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits. This would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.

[17] For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

[19] Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. A § 1 agreement may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement. But in reality a parent and a wholly owned subsidiary always have a unity of purpose or a common design. They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.

[20] The intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. A corporation has complete power to maintain a wholly owned subsidiary in either form. The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition. Rather, a corporation may adopt the subsidiary form of organization for valid management and related purposes . . . . Because there is nothing inherently anticompetitive about a corporation's decision to create a subsidiary, the intra-enterprise conspiracy doctrine imposes grave legal consequences upon organizational distinctions that are of de minimis meaning and effect. [. . .]

[21] The error of treating a corporate division differently from a wholly owned subsidiary is readily seen from the facts of this case. Regal was operated as an unincorporated division of Lear Siegler for four years before it became a wholly owned subsidiary of Copperweld. Nothing in this record indicates any meaningful difference between Regal's operations as a division and its later operations as a separate corporation. Certainly nothing suggests that Regal was a greater threat to competition as a subsidiary of Copperweld than as a division of Lear Siegler. Under either arrangement, Regal might have acted to bar a new competitor from entering the market. In one case it could have relied on economic power from other quarters of the Lear Siegler corporation; instead it drew on the strength of its separately incorporated parent, Copperweld. From the standpoint of the antitrust laws, there is no reason to treat one more harshly than the other. . . .

[22] Any reading of the Sherman Act that remains true to the Act's distinction between unilateral and concerted conduct will necessarily disappoint those who find that distinction arbitrary. It cannot be denied that § 1's focus on concerted behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability.

[23] We have already noted that Congress left this "gap" for eminently sound reasons. Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote. Moreover, whatever the wisdom of the distinction, the Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct. Had Congress intended to outlaw unreasonable restraints of trade as such, § 1's requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of § 2. . . .

[24] The appropriate inquiry in this case, therefore, is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects, as the dissent suggests. Nor is it whether the term "conspiracy" will bear a literal construction that includes parent corporations and their wholly owned subsidiaries. For if these were the proper inquiries, a single firm's conduct would be subject to § 1 scrutiny whenever the coordination of two employees was involved. Such a rule would obliterate the Act's distinction between unilateral and concerted conduct, contrary to the clear intent of Congress as interpreted by the weight of judicial authority. Rather, the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny, and to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary. Unless we second-guess the judgment of Congress to limit § 1 to concerted conduct, we can only conclude that the coordinated behavior of a parent and its wholly owned subsidiary falls outside the reach of that provision.

[25] Although we recognize that any "gap" the Sherman Act leaves is the sensible result of a purposeful policy decision by Congress, we also note that the size of any such gap is open to serious question. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act. Thereafter, the enterprise is fully subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act. . . .

[26] We hold that Copperweld and its wholly owned subsidiary Regal are incapable of conspiring with each other for purposes of § 1 of the Sherman Act. To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled. Accordingly, the judgment of the Court of Appeals is reversed. [. . .]

* * *

Copperweld raised as many questions as it answered, not least because it was not entirely clear what definition of "joint conduct" really drove the Court's analysis. Subsequent cases did not clear things up very much. In *Texaco Inc. v. Dagher*, for example, in 2006, the Supreme Court held that when Texaco and Shell formed the "Equilon" joint venture as a home for their retail assets (*i.e.*, service stations and related facilities), it was not price-fixing for the purposes of Section 1 for Equilon to set prices for gasoline, because such price-setting was not joint conduct at all, but rather the unilateral decision of an integrated "legitimate joint venture."[252] A couple of years later, concurring in a prominent Second Circuit decision, then-Judge Sotomayor expressed the fear that price-fixing cartels might evade detection (or at least evade per se condemnation) if they were cleverly labeled as joint ventures.[253]

More guidance was needed. And in 2010 it arrived, in the Supreme Court's *American Needle* decision. That case arose from NFL teams' practice of coordinating their activities for IP licensing through a common agent. When this activity came under antitrust scrutiny, the participants responded that, just like Equilon, the agent was a legitimate joint venture and was entitled to be treated as a single actor for the purposes of joint licensing.[254] The Court disagreed.

American Needle, Inc. v. National Football League

560 U.S. 183 (2010)

Justice Stevens.

[1] "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade" is made illegal by § 1 of the Sherman Act. The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade. This case raises that antecedent question about the business of the 32 teams in the National Football League (NFL) and a corporate entity that they formed to manage their intellectual property. We conclude that the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of § 1. The legality of that concerted action must be judged under the Rule of Reason.

[2] . . . [T]he NFL is an unincorporated association that now includes 32 separately owned professional football teams. Each team has its own name, colors, and logo, and owns related intellectual property. . . .

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252 Texaco Inc. v. Dagher, 547 U.S. 1, 5–6 (2006) (finding no agreement and explaining: "Texaco and Shell Oil did not compete with one another in the relevant market—namely, the sale of gasoline to service stations in the western United States—but instead participated in that market jointly through their investments in Equilon. In other words, the pricing policy challenged here amounts to little more than price setting by a single entity—albeit within the context of a joint venture—and not a pricing agreement between competing entities with respect to their competing products. Throughout Equilon's existence, Texaco and Shell Oil shared in the profits of Equilon's activities in their role as investors, not competitors. When persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit[,] such joint ventures are regarded as a single firm competing with other sellers in the market.") (internal quotation marks, citations, ellipses, and brackets omitted); *id.* at 8 ("[T]he pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful[.]").

253 *See* Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 335–37 (2d Cir. 2008) (Sotomayor, J., concurring) (expressing fear that "competing companies could evade the antitrust laws simply by creating a 'joint venture' to serve as the exclusive seller of their competing products" and stating: "[T]he antitrust laws prohibit two companies A and B, producers of X, from agreeing to set the price of X. Likewise, A and B cannot simply get around this rule by agreeing to set the price of X through a third-party intermediary or "joint venture" if the purpose and effect of that agreement is to raise, depress, fix, peg, or stabilize the price of X.").

254 *See*, *e.g.*, Brief for the NFL Respondents, American Needle, Inc. v. NFL, No. 08-661 (filed Nov. 17, 2009), 51 ("Under *Copperweld*, unless its member clubs are independent sources of economic power previously pursuing separate interests, a legitimately formed sports league is ordinarily a single economic entity in the production and promotion of its entertainment product.") (internal quotation marks and citation omitted).

[3] Prior to 1963, the teams made their own arrangements for licensing their intellectual property and marketing trademarked items such as caps and jerseys. In 1963, the teams formed National Football League Properties (NFLP) to develop, license, and market their intellectual property. Most, but not all, of the substantial revenues generated by NFLP have either been given to charity or shared equally among the teams. However, the teams are able to and have at times sought to withdraw from this arrangement.

[4] Between 1963 and 2000, NFLP granted nonexclusive licenses to a number of vendors, permitting them to manufacture and sell apparel bearing team insignias. Petitioner, American Needle, Inc., was one of those licensees. In December 2000, the teams voted to authorize NFLP to grant exclusive licenses, and NFLP granted Reebok International Ltd. an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 teams. It thereafter declined to renew American Needle's nonexclusive license.

[5] American Needle filed this action in the Northern District of Illinois, alleging that the agreements between the NFL, its teams, NFLP, and Reebok violated §§ 1 and 2 of the Sherman Act. In their answer to the complaint, the defendants averred that the teams, the NFL, and NFLP were incapable of conspiring within the meaning of § 1 "because they are a single economic enterprise, at least with respect to the conduct challenged." [T]he District Court granted summary judgment . . . concluding "that in that facet of their operations they have so integrated their operations that they should be deemed a single entity rather than joint ventures cooperating for a common purpose."

[6] The Court of Appeals for the Seventh Circuit affirmed. The panel . . . discounted the significance of potential competition among the teams regarding the use of their intellectual property because the teams "can function only as one source of economic power when collectively producing NFL football . . ." Moreover, "NFL teams share a vital economic interest in collectively promoting NFL football to compete with other forms of entertainment." "It thus follows," the court found, "that only one source of economic power controls the promotion of NFL football," and "it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football." Recognizing that NFL teams have "licensed their intellectual property collectively" since 1963, the court held that § 1 did not apply. [. . .]

[7] . . . [W]e have only a narrow issue to decide: whether the NFL respondents are capable of engaging in a "contract, combination . . . , or conspiracy" as defined by § 1 of the Sherman Act, or, as we have sometimes phrased it, whether the alleged activity by the NFL respondents must be viewed as that of a single enterprise for purposes of § 1.

[8] The meaning of the term "contract, combination . . . , or conspiracy" is informed by the basic distinction in the Sherman Act between concerted and independent action that distinguishes § 1 of the Sherman Act from § 2. Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action monopolizes or threatens actual monopolization, a category that is narrower than restraint of trade. Monopoly power may be equally harmful whether it is the product of joint action or individual action.

[9] Congress used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations. The distinction also avoids judicial scrutiny of routine, internal business decisions.

[10] Thus, in § 1 Congress treated concerted behavior more strictly than unilateral behavior. This is so because unlike independent action, concerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct. . . .

[11] We have long held that concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.

[12] As a result, we have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. In *United States v. Sealy, Inc.,* 388 U.S. 350 (1967), for example, a group of mattress manufacturers operated and controlled Sealy, Inc., a company that licensed the Sealy trademark to the manufacturers, and dictated that each operate within a specific geographic area. The Government alleged that the licensees and Sealy were conspiring in violation of § 1, and we agreed. We explained that we seek the central substance of the situation and therefore we are moved by the identity of the persons who act, rather than the label of their hats. We thus held that Sealy was not a separate entity, but an instrumentality of the individual manufacturers. . . . We have similarly looked past the form of a legally single entity when competitors were part of professional organizations or trade groups.

[13] Conversely, there is not necessarily concerted action simply because more than one legally distinct entity is involved. Although, under a now-defunct doctrine known as the "intraenterprise conspiracy doctrine," we once treated cooperation between legally separate entities as necessarily covered by § 1, we now embark on a more functional analysis. [. . .]

[14] As *Copperweld* exemplifies, substance, not form, should determine whether an entity is capable of conspiring under § 1. This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination, or conspiracy" is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination, or conspiracy" amongst "separate economic actors pursuing separate economic interests," such that the agreement "deprives the marketplace of independent centers of decisionmaking," and therefore of "diversity of entrepreneurial interests," and thus of actual or potential competition. [. . .]

[15] The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business . . . . The teams compete with one another, not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel.

[16] Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the common interests of the whole league but is instead pursuing interests of each corporation itself, teams are acting as separate economic actors pursuing separate economic interests, and each team therefore is a potential independent center of decisionmaking. Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that deprive the marketplace of independent centers of decisionmaking, and therefore of actual or potential competition.

[17] In defense, respondents argue that by forming NFLP, they have formed a single entity, akin to a merger, and market their NFL brands through a single outlet. But it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property. An ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label. Perhaps every agreement and combination in restraint of trade could be so labeled.

[18] The NFL respondents may be similar in some sense to a single enterprise that owns several pieces of intellectual property and licenses them jointly, but they are not similar in the relevant functional sense. Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned. . . .

[19] It may be, as respondents argue, that NFLP has served as the single driver of the teams' promotional vehicle, pursuing the common interests of the whole. But illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties. It is true, as respondents describe, that they have for

some time marketed their trademarks jointly. But a history of concerted activity does not immunize conduct from § 1 scrutiny. Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself.

[20] Respondents argue that nonetheless, as the Court of Appeals held, they constitute a single entity because without their cooperation, there would be no NFL football. It is true that the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival. But the Court of Appeals' reasoning is unpersuasive. The justification for cooperation is not relevant to whether that cooperation is concerted or independent action. . . .

[21] The question whether NFLP decisions can constitute concerted activity covered by § 1 is closer than whether decisions made directly by the 32 teams are covered by § 1. This is so both because NFLP is a separate corporation with its own management and because the record indicates that most of the revenues generated by NFLP are shared by the teams on an equal basis. Nevertheless we think it clear that for the same reasons the 32 teams' conduct is covered by § 1, NFLP's actions also are subject to § 1, at least with regards to its marketing of property owned by the separate teams. NFLP's licensing decisions are made by the 32 potential competitors, and each of them actually owns its share of the jointly managed assets. Apart from their agreement to cooperate in exploiting those assets, including their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear, to the sale of such items, and to the granting of licenses to use its trademarks.

[22] We generally treat agreements within a single firm as independent action on the presumption that the components of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.

[23] For that reason, decisions by NFLP regarding the teams' separately owned intellectual property constitute concerted action. Thirty-two teams operating independently through the vehicle of NFLP are not like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being. Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders. And each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits. The 32 teams capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for NFLP. NFLP's decisions thus affect each team's profits from licensing its own intellectual property. . . . In making the relevant licensing decisions, NFLP is therefore "an instrumentality" of the teams.

[24] If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from § 1, then any cartel could evade the antitrust laws simply by creating a "joint venture" to serve as the exclusive seller of their competing products. So long as no agreement, other than one made by the cartelists sitting on the board of the joint venture, explicitly listed the prices to be charged, the companies could act as monopolies through the "joint venture." (Indeed, a joint venture with a single management structure is generally a better way to operate a cartel because it decreases the risks of a party to an illegal agreement defecting from that agreement.) However, competitors cannot simply get around antitrust liability by acting through a third-party intermediary or "joint venture."

[25] Football teams that need to cooperate are not trapped by antitrust law. The special characteristics of this industry may provide a justification for many kinds of agreements. The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to § 1 analysis.

NOTES

1) Why, if at all, does antitrust really need a separate entity requirement? What is the value or point, if any, of making this an important issue in antitrust doctrine and a limiting principle of Section 1?

2) Is there a sensible argument that the *Copperweld* majority was wrong about whether a wholly-owned subsidiary and its parent should be capable of entering into a "contract, combination, or conspiracy" as that term is understood in the context of Section 1? Is that, in fact, the law after *American Needle*?
3) The *Copperweld* Court identifies a "gap" between Section 2's coverage of unilateral conduct by current or prospective monopolists, and Section 1's coverage of multi-party conduct. Is this gap a problem? What kind of behavior falls into it?
4) Note that the *Copperweld* Court's holding is a limited one: the Court holds *only* that a parent and its wholly-owned subsidiary cannot conspire. But should the same rule apply to a majority-owned subsidiary?[255] What about a 50%-owned subsidiary? Or a corporate relationship involving less than 50% ownership but rights of veto or management? And what about two corporations not in a parent-subsidiary relationship with one another both owned by a single parent (*i.e.*, corporate "siblings")—can they conspire?[256]
5) Would *American Needle* have come out differently if the teams had simply transferred ownership of their intellectual property to NFLP?
6) In paragraph 15 of the *American Needle* extract, the Court states that the teams are competitors in the market for licensing their intellectual property. Is that statement correct? In what market are the teams competitors to license their IP? Is this an important issue for the purposes of the separate-entities analysis?
7) Suppose that a price-fixing cartel agreed to share its profits and losses. Would that cartel then become a single entity and thus beyond the scope of Section 1? Alternatively: would it become a joint venture that should be analyzed under the rule of reason?
8) With the rise of the gig economy, and some blurring of the lines between "employee" and "independent contractor," does it make sense to apply per se immunity under Section 1 to all employees and no independent contractors? What are the advantages and disadvantages of that approach?

2. Defining and Proving an Agreement

Antitrust courts face the difficult task of sorting between two types of behavior that often are difficult to distinguish from the outside and yet are treated very differently under § 1: agreements, on the one hand, and purely unilateral conduct, on the other. Agreements, of course, are scrutinized under Section 1 for their impact on competition, and may be unlawful or even criminal. Purely unilateral conduct, on the other hand, cannot be challenged or condemned under Section 1. A source of particular difficulty is that businesses may decide to behave in certain ways in light of what rivals (and others) are doing, have done, or seem likely to do in future, all without entering into an "agreement" in the sense that antitrust law understands this term.

A classic example, and a perennial puzzle for antitrust policy, is "conscious parallelism" or "tacit collusion." As we saw in Chapter II, under some circumstances firms may act in mutually interdependent ways (*e.g.*, keeping prices high on the understanding that others will do the same) that may closely replicate the operation of a price-fixing cartel, but without actually agreeing that they will in fact behave in this way. From a legal perspective, if nothing more than parallel conduct is going on, the rivals have not actually agreed, so Section 1 is not implicated.[257]

In light of this reality, and given that businesses commonly adjust their behavior in light of what other market participants do, courts in antitrust cases have struggled to pin down exactly what the concept of agreement really means, or should mean. This is a lawyers' problem rather than an economists' one: antitrust economics generally does not have, or require, a theory of what an agreement is.

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[255] *See, e.g.*, Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125, 1133 (3d Cir. 1995); In re Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d 827, 885 (N.D. Ill. 2010).

[256] *See, e.g.*, Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1233 (10th Cir. 2017); In re Lantus Direct Purchaser Antitrust Litig., No. CV 16-12652-JGD, 2021 WL 8016913, at *3 (D. Mass. June 11, 2021).

[257] Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954) ("[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. . . . '[C]onscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."); E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984) ("The mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws.").

In the landmark *Monsanto* and *Matsushita* cases that follow, the Supreme Court attempted to articulate two different things: (1) the *definition* of an agreement; and (2) what nature and cogency of *evidence* is required to demonstrate that one exists following the close of discovery. Did the Court succeed? And what are the possible alternatives?

Monsanto Co. v. Spray-Rite Service Corp.

465 U.S. 752 (1984)

Justice Powell.

[1] This case presents a question as to the standard of proof required to find a vertical [resale price maintenance agreement (*i.e.*, an agreement between a manufacturer and distributors on the resale price of a product or service), which at the time of this case was *per se* illegal] in violation of Section 1 of the Sherman Act.

[2] Petitioner Monsanto Company manufactures chemical products, including agricultural herbicides. By the late 1960's, the time at issue in this case, its sales accounted for approximately 15% of the corn herbicide market and 3% of the soybean herbicide market. In the corn herbicide market, the market leader commanded a 70% share. In the soybean herbicide market, two other competitors each had between 30% and 40% of the market. Respondent Spray-Rite Service Corporation was engaged in the wholesale distribution of agricultural chemicals from 1955 to 1972. Spray-Rite was essentially a family business, whose owner and president, Donald Yapp, was also its sole salaried salesman. Spray-Rite was a discount operation, buying in large quantities and selling at a low margin.

[3] Spray-Rite was an authorized distributor of Monsanto herbicides from 1957 to 1968. In October 1967, Monsanto announced that it would appoint distributors for one-year terms, and that it would renew distributorships according to several new criteria. Among the criteria were: (i) whether the distributor's primary activity was soliciting sales to retail dealers; (ii) whether the distributor employed trained salesmen capable of educating its customers on the technical aspects of Monsanto's herbicides; and (iii) whether the distributor could be expected "to exploit fully" the market in its geographical area of primary responsibility. Shortly thereafter, Monsanto also introduced a number of incentive programs, such as making cash payments to distributors that sent salesmen to training classes, and providing free deliveries of products to customers within a distributor's area of primary responsibility.

[4] In October 1968, Monsanto declined to renew Spray-Rite's distributorship. At that time, Spray-Rite was the tenth largest out of approximately 100 distributors of Monsanto's primary corn herbicide. Ninety percent of Spray-Rite's sales volume was devoted to herbicide sales, and 16% of its sales were of Monsanto products. After Monsanto's termination, Spray-Rite continued as a herbicide dealer until 1972. It was able to purchase some of Monsanto's products from other distributors, but not as much as it desired or as early in the season as it needed. Monsanto introduced a new corn herbicide in 1969. By 1972, its share of the corn herbicide market had increased to approximately 28%. Its share of the soybean herbicide market had grown to approximately 19%.

[5] Spray-Rite brought this action under Section 1 of the Sherman Act. It alleged that Monsanto and some of its distributors conspired to fix the resale prices of Monsanto herbicides. Its complaint further alleged that Monsanto terminated Spray-Rite's distributorship, adopted compensation programs and shipping policies, and encouraged distributors to boycott Spray-Rite in furtherance of this conspiracy. Monsanto denied the allegations of conspiracy, and asserted that Spray-Rite's distributorship had been terminated because of its failure to hire trained salesmen and promote sales to dealers adequately.

[6] The case was tried to a jury. The District Court instructed the jury that Monsanto's conduct was *per se* unlawful if it was in furtherance of a conspiracy to fix prices. In answers to special interrogatories, the jury found that (i) the termination of Spray-Rite was pursuant to a conspiracy between Monsanto and one or more of its distributors to set resale prices, (ii) the compensation programs, areas of primary responsibility, and/or shipping policies were created by Monsanto pursuant to such a conspiracy, and (iii) Monsanto conspired with one or more distributors to limit Spray-Rite's access to Monsanto herbicides after 1968. The jury awarded $3.5 million in damages, which was trebled to $10.5 million. Only the first of the jury's findings is before us today.

[7] The Court of Appeals for the Seventh Circuit affirmed. It held that there was sufficient evidence to satisfy Spray-Rite's burden of proving a conspiracy to set resale prices. The court stated that "proof of termination following competitor complaints is sufficient to support an inference of concerted action." Canvassing the testimony and exhibits that were before the jury, the court found evidence of numerous complaints from competing Monsanto distributors about Spray-Rite's price-cutting practices. It also noted that there was testimony that a Monsanto official had said that Spray-Rite was terminated because of the price complaints.

[8] In substance, the Court of Appeals held that an antitrust plaintiff can survive a motion for a directed verdict if it shows that a manufacturer terminated a price-cutting distributor in response to or following complaints by other distributors. This view brought the Seventh Circuit into direct conflict with a number of other Courts of Appeals. We granted certiorari to resolve the conflict. We reject the statement by the Court of Appeals for the Seventh Circuit of the standard of proof required to submit a case to the jury in distributor-termination litigation, but affirm the judgment under the standard we announce today.

[9] This Court has drawn two important distinctions that are at the center of this and any other distributor-termination case. First, there is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination or conspiracy" between the manufacturer and other distributors in order to establish a violation. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919). Under *Colgate,* the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

[10] The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. {*Eds: At the time this case was decided, the former were treated as per se illegal and the latter were judged under the rule of reason. Virtually all vertical restraints are now subject to rule of reason analysis. See Chapter VI.*}

[11] While these distinctions in theory are reasonably clear, often they are difficult to apply in practice. In [*Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977)] we emphasized that the legality of arguably anticompetitive conduct should be judged primarily by its "market impact." But the economic effect of all of the conduct described above—unilateral and concerted vertical price-setting, agreements on price and nonprice restrictions—is in many, but not all, cases similar or identical. And judged from a distance, the conduct of the parties in the various situations can be indistinguishable. For example, the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market. Moreover, it is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors' resale prices. The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that "free-riders" do not interfere. Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the *Colgate* doctrine allows.

[12] Nevertheless, it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages. On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded.

[13] The flaw in the evidentiary standard adopted by the Court of Appeals in this case is that it disregards this danger. Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about in response to complaints, could deter or penalize perfectly legitimate conduct. As Monsanto points out, complaints about price-cutters are natural—and from the manufacturer's perspective,

unavoidable—reactions by distributors to the activities of their rivals. Such complaints, particularly where the manufacturer has imposed a costly set of nonprice restrictions, arise in the normal course of business and do not indicate illegal concerted action. Moreover, distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market. In sum, to permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute.[8]

[14] Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.… [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.[9]

[15] Applying this standard to the facts of this case, we believe there was sufficient evidence for the jury reasonably to have concluded that Monsanto and some of its distributors were parties to an "agreement" or "conspiracy" to maintain resale prices and terminate price-cutters. In fact there was substantial *direct* evidence of agreements to maintain prices. There was testimony from a Monsanto district manager, for example, that Monsanto on at least two occasions in early 1969, about five months after Spray-Rite was terminated, approached price-cutting distributors and advised that if they did not maintain the suggested resale price, they would not receive adequate supplies of Monsanto's new corn herbicide. When one of the distributors did not assent, this information was referred to the Monsanto regional office, and it complained to the distributor's parent company. There was evidence that the parent instructed its subsidiary to comply, and the distributor informed Monsanto that it would charge the suggested price. Evidence of this kind plainly is relevant and persuasive as to a meeting of minds.[10]

[16] An arguably more ambiguous example is a newsletter from one of the distributors to his dealer-customers. The newsletter is dated October 1, 1968, just four weeks before Spray-Rite was terminated. It was written after a meeting between the author and several Monsanto officials, and discusses Monsanto's efforts to "get the market place in order." The newsletter reviews some of Monsanto's incentive and shipping policies, and then states that in addition "every effort will be made to maintain a minimum market price level." The newsletter relates these efforts as follows:

> In other words, we are assured that Monsanto's company-owned outlets will not retail at less than their suggested retail price to the trade as a whole. Furthermore, those of us on the distributor level are not likely to deviate downward on price to anyone as the idea is implied that doing this possibly could discolor the outlook for continuity as one of the approved distributors during the future upcoming seasons. So, [no-one] interested in the retention of this arrangement is likely to risk being deleted from this customer service opportunity. Also, so far as the national accounts are concerned, they are sure to recognize the desirability of retaining Monsanto's favor on a continuing basis by respecting the wisdom of participating in the suggested program in a manner assuring order on the retail level "playground" throughout the entire country. It is elementary that harmony can only come from following the rules of the game and that in case of dispute, the decision of the umpire is final.

[17] It is reasonable to interpret this newsletter as referring to an agreement or understanding that distributors and retailers would maintain prices, and Monsanto would not undercut those prices on the retail level and would

[8] We do not suggest that evidence of complaints has no probative value at all, but only that the burden remains on the antitrust plaintiff to introduce additional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy.

[9] The concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

[10] In addition, there was circumstantial evidence that Monsanto sought agreement from the distributor to conform to the resale price. The threat to cut off the distributor's supply came during Monsanto's "shipping season" when herbicide was in short supply. The jury could have concluded that Monsanto sought this agreement at a time when it was able to use supply as a lever to force compliance.

terminate competitors who sold at prices below those of complying distributors; these were "the rules of the game."[11]

[18] If, as the courts below reasonably could have found, there was evidence of an agreement with one or more distributors to maintain prices, the remaining question is whether the termination of Spray-Rite was part of or pursuant to that agreement. It would be reasonable to find that it was, since it is necessary for competing distributors contemplating compliance with suggested prices to know that those who do not comply will be terminated. Moreover, there is some circumstantial evidence of such a link. Following the termination, there was a meeting between Spray-Rite's president and a Monsanto official. There was testimony that the first thing the official mentioned was the many complaints Monsanto had received about Spray-Rite's prices.[12] In addition, there was reliable testimony that Monsanto never discussed with Spray-Rite prior to the termination the distributorship criteria that were the alleged basis for the action. By contrast, a former Monsanto salesman for Spray-Rite's area testified that Monsanto representatives on several occasions in 1965–1966 approached Spray-Rite, informed the distributor of complaints from other distributors—including one major and influential one—and requested that prices be maintained. Later that same year, Spray-Rite's president testified, Monsanto officials made explicit threats to terminate Spray-Rite unless it raised its prices.[13]

[19] We conclude that the Court of Appeals applied an incorrect standard to the evidence in this case. The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. Under this standard, the evidence in this case created a jury issue as to whether Spray-Rite was terminated pursuant to a price-fixing conspiracy between Monsanto and its distributors. The judgment of the court below is affirmed.

* * *

Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp.

475 U.S. 574 (1986)

Justice Powell.

[1] This case requires that we again consider the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case. [. . .]

[2] Petitioners, defendants below, are 21 corporations that manufacture or sell "consumer electronic products" (CEPs)—for the most part, television sets. Petitioners include both Japanese manufacturers of CEPs and American firms, controlled by Japanese parents, that sell the Japanese-manufactured products. Respondents, plaintiffs below, are Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE). Zenith is an American firm that manufactures and sells television sets. NUE is the corporate successor to Emerson Radio Company, an American firm that manufactured and sold television sets until 1970, when it withdrew from the market after sustaining substantial losses. Zenith and NUE began this lawsuit in 1974, claiming that petitioners had illegally conspired to drive American firms from the American CEP market. According to respondents, the gist of this conspiracy was a "scheme to raise, fix and maintain artificially *high* prices for television receivers sold by

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[11] The newsletter also is subject to the interpretation that the distributor was merely describing the likely reaction to unilateral Monsanto pronouncements. But Monsanto itself appears to have construed the flyer as reporting a price-fixing understanding. Six weeks after the newsletter was written, a Monsanto official wrote its author a letter urging him to "correct immediately any misconceptions about Monsanto's marketing policies." The letter disavowed any intent to enter into an agreement on resale prices. The interpretation of these documents and the testimony surrounding them properly was left to the jury.

[12] Monsanto argues that the reference could have been to complaints by Monsanto employees rather than distributors, suggesting that the price controls were merely unilateral action, rather than accession to the demands of the distributors. The choice between two reasonable interpretations of the testimony properly was left for the jury. . . .

[13] The existence of the illegal joint boycott after Spray-Rite's termination, a finding that the Court of Appeals affirmed and that is not before us, is further evidence that Monsanto and its distributors had an understanding that prices would be maintained, and that price-cutters would be terminated. This last, however, is also consistent with termination for other reasons, and is probative only of the ability of Monsanto and its distributors to act in concert.

[petitioners] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States." These "low prices" were allegedly at levels that produced substantial losses for petitioners. The conspiracy allegedly began as early as 1953, and according to respondents was in full operation by sometime in the late 1960's. [. . .]

[3] The District Court [granted] petitioners' motions for summary judgment. In an opinion spanning 217 pages, the court found that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy. At bottom, the court found, respondents' claims rested on the inferences that could be drawn from petitioners' parallel conduct in the Japanese and American markets, and from the effects of that conduct on petitioners' American competitors. After reviewing the evidence both by category and *in toto,* the court found that any inference of conspiracy was unreasonable, because (i) some portions of the evidence suggested that petitioners conspired in ways that did not injure respondents, and (ii) the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it. Summary judgment therefore was granted on respondents' claims under § 1 of the Sherman Act. . . .

[4] The Court of Appeals for the Third Circuit reversed. [. . .]

[5] The court acknowledged that "there are legal limitations upon the inferences which may be drawn from circumstantial evidence," but it found that "the legal problem is different" when "there is direct evidence of concert of action." Here, the court concluded, "there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred." Thus, the court reasoned, cases concerning the limitations on inferring conspiracy from ambiguous evidence were not dispositive. Turning to the evidence, the court determined that a factfinder reasonably could draw the following conclusions:

1. The Japanese market for CEPs was characterized by oligopolistic behavior, with a small number of producers meeting regularly and exchanging information on price and other matters. This created the opportunity for a stable combination to raise both prices and profits in Japan. American firms could not attack such a combination because the Japanese Government imposed significant barriers to entry.

2. Petitioners had relatively higher fixed costs than their American counterparts, and therefore needed to operate at something approaching full capacity in order to make a profit.

3. Petitioners' plant capacity exceeded the needs of the Japanese market.

4. By formal agreements arranged in cooperation with Japan's Ministry of International Trade and Industry (MITI), petitioners fixed minimum prices for CEPs exported to the American market. The parties refer to these prices as the "check prices," and to the agreements that require them as the "check price agreements."

5. Petitioners agreed to distribute their products in the United States according to a "five company rule": each Japanese producer was permitted to sell only to five American distributors.

6. Petitioners undercut their own check prices by a variety of rebate schemes. Petitioners sought to conceal these rebate schemes both from the United States Customs Service and from MITI [(*i.e.*, the Japanese Ministry of International Trade and Industry)], the former to avoid various customs regulations as well as action under the antidumping laws, and the latter to cover up petitioners' violations of the check-price agreements.

[6] Based on inferences from the foregoing conclusions,[5] the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently

[5] In addition to these inferences, the court noted that there was expert opinion evidence that petitioners' export sales generally were at prices which produced losses, often as high as twenty-five percent on sales. The court did not identify any direct evidence of below-cost pricing; nor did it place particularly heavy reliance on this aspect of the expert evidence.

did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial. [. . .]

[7] We granted certiorari to determine . . . whether the Court of Appeals applied the proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment. We reverse. . . .

[8] We begin by emphasizing what respondents' claim is *not*. Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies. Nor can respondents recover damages for any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price in CEPs. Finally, for the same reason, respondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supracompetitive pricing more attractive. Thus, neither petitioners' alleged supracompetitive pricing in Japan, nor the five-company rule that limited distribution in this country, nor the check prices insofar as they established minimum prices in this country, can by themselves give respondents a cognizable claim against petitioners for antitrust damages. The Court of Appeals therefore erred to the extent that it found evidence of these alleged conspiracies to be "direct evidence" of a conspiracy that injured respondents.

[9] Respondents nevertheless argue that these supposed conspiracies, if not themselves grounds for recovery of antitrust damages, are circumstantial evidence of another conspiracy that *is* cognizable: a conspiracy to monopolize the American market by means of pricing below the market level. The thrust of respondents' argument is that petitioners used their monopoly profits from the Japanese market to fund a concerted campaign to price predatorily and thereby drive respondents and other American manufacturers of CEPs out of business. Once successful, according to respondents, petitioners would cartelize the American CEP market, restricting output and raising prices above the level that fair competition would produce. The resulting monopoly profits, respondents contend, would more than compensate petitioners for the losses they incurred through years of pricing below market level.

[10] The Court of Appeals found that respondents' allegation of a horizontal conspiracy to engage in predatory pricing,[8] if proved,[9] would be a *per se* violation of § 1 of the Sherman Act. Petitioners did not appeal from that conclusion. The issue in this case thus becomes whether respondents adduced sufficient evidence in support of their theory to survive summary judgment. We therefore examine the principles that govern the summary judgment determination.

[11] To survive petitioners' motion for summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. This showing has two components. First, respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. Respondents charge petitioners with a whole host of conspiracies in restraint of trade. Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an "antitrust injury," because they actually tended to benefit respondents. Therefore, unless,

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[8] Throughout this opinion, we refer to the asserted conspiracy as one to price "predatorily." This term has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in. In such cases, "predatory pricing" means pricing below some appropriate measure of cost.

There is a good deal of debate, both in the cases and in the law reviews, about what "cost" is relevant in such cases. We need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act § 1 case. For purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost. An agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices. Respondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at *any* level.

[9] We do not consider whether recovery should *ever* be available on a theory such as respondents' when the pricing in question is above some measure of incremental cost. As a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies such as this one.

in context, evidence of these "other" conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioners' summary judgment motion.

[12] Second, the issue of fact must be "genuine." . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

[13] It follows from these settled principles that if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. . .

[14] Respondents correctly note that on summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. [. . .]

[15] A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. As then-Professor Bork, discussing predatory pricing by a single firm, explained:

> Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses.

[Robert H. Bork, THE ANTITRUST PARADOX (1978) 145.]

[16] As this explanation shows, the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, the predator must make a substantial investment with no assurance that it will pay off. For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.

[17] These observations apply even to predatory pricing by a *single firm* seeking monopoly power. In this case, respondents allege that a large number of firms have conspired over a period of many years to charge below-market prices in order to stifle competition. Such a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator. The conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success. Precisely because success is speculative and depends on a willingness to endure losses for an indefinite period, each conspirator has a strong incentive to cheat, letting its partners suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds. The necessary allocation is therefore difficult to accomplish. Yet if conspirators cheat to any substantial extent, the conspiracy must fail, because its success depends on depressing the market price for *all* buyers of CEPs. If there are too few goods at the artificially low price to satisfy demand, the would-be victims of the conspiracy can continue to sell at the "real" market price, and the conspirators suffer losses to little purpose.

[18] Finally, if predatory pricing conspiracies are generally unlikely to occur, they are especially so where, as here, the prospects of attaining monopoly power seem slight. In order to recoup their losses, petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices. Two decades after their conspiracy is alleged to have commenced, petitioners appear to be far from achieving this goal: the two largest shares of the retail market in television sets are held by RCA and respondent Zenith, not by any of petitioners. Moreover, those shares, which together approximate 40% of sales, did not decline appreciably during the 1970's. Petitioners' collective share rose rapidly during this period, from one-fifth or less of the relevant markets to close to 50%. Neither the District Court nor the Court of Appeals found, however, that petitioners' share presently allows them to charge monopoly prices; to the contrary, respondents contend that the conspiracy is ongoing—that petitioners are still artificially *depressing* the market price in order to drive Zenith out of the market. The data in the record strongly suggest that that goal is yet far distant.

[19] The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist. Since the losses in such a conspiracy accrue before the gains, they must be "repaid" with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidentally) on the conspirators' ability to escape antitrust liability for their *minimum* price-fixing cartel.[16] Each of these factors weighs more heavily as the time needed to recoup losses grows. If the losses have been substantial—as would likely be necessary in order to drive out the competition[17] —petitioners would most likely have to sustain their cartel for years simply to break even.

[20] Nor does the possibility that petitioners have obtained supracompetitive profits in the Japanese market change this calculation. Whether or not petitioners have the *means* to sustain substantial losses in this country over a long period of time, they have no *motive* to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off. The courts below found no evidence of any such success, and—as indicated above—the facts actually are to the contrary . . . . More important, there is nothing to suggest any relationship between petitioners' profits in Japan and the amount petitioners could expect to gain from a conspiracy to monopolize the American market. In the absence of any such evidence, the possible existence of supracompetitive profits in Japan simply cannot overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy.[18]

[21] In *Monsanto,* we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. Respondents, petitioners' competitors, seek to hold petitioners liable for damages caused by the alleged conspiracy to cut prices. Moreover, they seek to establish this conspiracy indirectly, through evidence of other combinations (such as the check-price agreements and the five company rule) whose natural tendency is to raise prices, and through evidence of rebates and other price-cutting activities that respondents argue tend to prove a combination to suppress prices.[19] But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.

[22] In most cases, this concern must be balanced against the desire that illegal conspiracies be identified and punished. That balance is, however, unusually one-sided in cases such as this one. As we earlier explained,

[16] The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price fixing *after* they have succeeded in driving competitors from the market. Such price fixing would, of course, be an independent violation of § 1 of the Sherman Act.

[17] The predators' losses must actually *increase* as the conspiracy nears its objective: the greater the predators' market share, the more products the predators sell; but since every sale brings with it a loss, an increase in market share also means an increase in predatory losses.

[18] The same is true of any supposed excess production capacity that petitioners may have possessed. The existence of plant capacity that exceeds domestic demand does tend to establish the ability to sell products abroad. It does not, however, provide a motive for selling at prices lower than necessary to obtain sales; nor does it explain why petitioners would be willing to *lose* money in the United States market without some reasonable prospect of recouping their investment.

predatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed. These economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the conspirators. Finally, unlike predatory pricing by a single firm, *successful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation. Thus, there is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage such conspiracies. [. . .]

[23] The Court of Appeals did not take account of the absence of a plausible motive to enter into the alleged predatory pricing conspiracy. It focused instead on whether there was "direct evidence of concert of action." The Court of Appeals erred in two respects: (i) the "direct evidence" on which the court relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing.

[24] The "direct evidence" on which the court relied was evidence of *other* combinations, not of a predatory pricing conspiracy. Evidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents' claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another. Evidence that petitioners agreed to fix *minimum* prices (through the check-price agreements) for the American market actually works in petitioners' favor, because it suggests that petitioners were seeking to place a floor under prices rather than to lower them. The same is true of evidence that petitioners agreed to limit the number of distributors of their products in the American market—the so-called five company rule. That practice may have facilitated a horizontal territorial allocation, but its natural effect would be to raise market prices rather than reduce them. Evidence that tends to support any of these collateral conspiracies thus says little, if anything, about the existence of a conspiracy to charge below-market prices in the American market over a period of two decades.

[25] That being the case, the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy. Here, the conduct in question consists largely of (i) pricing at levels that succeeded in taking business away from respondents, and (ii) arrangements that may have limited petitioners' ability to compete with each other (and thus kept prices from going even lower). This conduct suggests either that petitioners behaved competitively, or that petitioners conspired to *raise* prices. Neither possibility is consistent with an agreement among 21 companies to price below-market levels. Moreover, the predatory pricing scheme that this conduct is said to prove is one that makes no practical sense: it calls for petitioners to destroy companies larger and better established than themselves, a goal that remains far distant more than two decades after the conspiracy's birth. Even had they succeeded in obtaining their monopoly, there is nothing in the record to suggest that they could recover the losses they would need to sustain along the way. In sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial."[21]

[26] On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must tend to exclude the possibility that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy.

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[21] We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.

In the absence of such evidence, there is no "genuine issue for trial" under Rule 56(e), and petitioners are entitled to have summary judgment reinstated. [. . .]

[27] The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice White, with whom Justice Brennan, Justice Blackmun, and Justice Stevens join, dissenting.

[28] In defining what respondents must show in order to recover, the Court makes assumptions that invade the factfinder's province. The Court states with very little discussion that respondents can recover under § 1 of the Sherman Act only if they prove that "petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." This statement is premised on the assumption that "[a]n agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices." In making this assumption, the Court ignores the contrary conclusions of respondents' expert DePodwin, whose report in very relevant part was erroneously excluded by the District Court.

[29] The DePodwin Report, on which the Court of Appeals relied along with other material, indicates that respondents were harmed in two ways that are independent of whether petitioners priced their products below the level necessary to sell their products or some appropriate measure of cost. First, the Report explains that the price-raising scheme in Japan resulted in lower consumption of petitioners' goods in that country and the exporting of more of petitioners' goods to this country than would have occurred had prices in Japan been at the competitive level. Increasing exports to this country resulted in depressed prices here, which harmed respondents. Second, the DePodwin Report indicates that petitioners exchanged confidential proprietary information and entered into agreements such as the five company rule with the goal of avoiding intragroup competition in the United States market. The Report explains that petitioners' restrictions on intragroup competition caused respondents to lose business that they would not have lost had petitioners competed with one another.

[30] The DePodwin Report alone creates a genuine factual issue regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among petitioners in this country. No doubt the Court prefers its own economic theorizing to Dr. DePodwin's, but that is not a reason to deny the factfinder an opportunity to consider Dr. DePodwin's views on how petitioners' alleged collusion harmed respondents. [. . .]

[31] In reversing the Third Circuit's judgment, the Court identifies two alleged errors: "(i) [T]he 'direct evidence' on which the [Court of Appeals] relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing." The Court's position is without substance.

[32] The first claim of error is that the Third Circuit treated evidence regarding price fixing in Japan and the so-called five company rule and check prices as "'direct evidence' of a conspiracy that injured respondents." The passage from the Third Circuit's opinion in which the Court locates this alleged error makes what I consider to be a quite simple and correct observation, namely, that this case is distinguishable from traditional "conscious parallelism" cases, in that there is direct evidence of concert of action among petitioners. The Third Circuit did not, as the Court implies, jump unthinkingly from this observation to the conclusion that evidence regarding the five company rule could support a finding of antitrust injury to respondents. The Third Circuit twice specifically noted that horizontal agreements allocating customers, though illegal, do not ordinarily injure competitors of the agreeing parties. However, after reviewing evidence of cartel activity in Japan, collusive establishment of dumping prices in this country, and long-term, below-cost sales, the Third Circuit held that a factfinder could reasonably conclude that the five company rule was not a simple price-raising device:

> [A] factfinder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market.

I see nothing erroneous in this reasoning.

[33] The Court's second charge of error is that the Third Circuit was not sufficiently skeptical of respondents' allegation that petitioners engaged in predatory pricing conspiracy. But the Third Circuit is not required to engage in academic discussions about predation; it is required to decide whether respondents' evidence creates a genuine issue of material fact. The Third Circuit did its job, and remanding the case so that it can do the same job again is simply pointless.

[34] The Third Circuit indicated that it considers respondents' evidence sufficient to create a genuine factual issue regarding long-term, below-cost sales by petitioners. The Court tries to whittle away at this conclusion by suggesting that the "expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors that suggest that such conduct is irrational." But the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court's analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other factfinder could reasonably conclude that petitioners engaged in long-term, below-cost sales. I agree with the Third Circuit that the answer to this question is "yes."

* * *

It has long been clear that a plaintiff in a conspiracy case need not plead or prove the existence of a "formal" or "explicit" agreement to prevail.[258] Among other things, it is probably not realistic to expect plaintiffs to have access to information about what is likely, if they are right, to be a secret illegal agreement! As a result, a critical issue in antitrust litigation is what kind of allegations and evidence might be necessary at each stage of a litigation to support the inference that the parties reached an actual agreement. And, as *Matsushita* illustrates, courts weigh the factual evidence that such an agreement may have been reached—documents, testimony, and so on—in light of economic theory about whether the purported agreement would in fact have been rational for the participants.

Inferring Conspiracy: **Interstate Circuit** *and the Role of "Plus Factors"*

Interstate Circuit v. United States, 306 U.S. 208 (1939)

One famous early case in which conspiracy was inferred without direct evidence of the existence and terms of an agreement was *Interstate Circuit* (1939). [259] In that case, two affiliated movie cinema chains in Texas ("Interstate") wrote to eight movie distributors to request that they each commit to maintaining a minimum admission price for the showing of certain of their movies in all subsequent cinema runs after the first, and that they each commit that those movies would never be shown as part of a double feature. The purpose of the request was to protect Interstate's first-run showings of movies from low-price competition from subsequent-run showings elsewhere. Most of the distributors effectively acquiesced, imposing the restrictions on other cinemas in the relevant cities. DOJ challenged the practice under Section 1 as a conspiracy that included a horizontal agreement among the distributors, despite the lack of direct evidence of communications among them to that effect.

The Supreme Court held that an agreement among the distributors could be inferred from the "course of conduct" in which they had engaged. The Court pointed out that each distributor knew that no one distributor could profitably have imposed the conditions unless all did so. "[F]rom the beginning each of the distributors knew that the proposals were under consideration by the others," and that "without substantially unanimous action . . . there was risk of a substantial loss of . . . business . . . but that with it there was the prospect of increased profits. There was, therefore, strong motive for concerted action [among the distributors], full advantage of which was taken by Interstate . . . in presenting [its] demands to all in a single document." "It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance." Finally, the Court noted that the distributors declined to offer testimony from any "officer or agent of a distributors who knew, or was in a position to know, whether in fact an agreement had been reached[.]" This choice was "itself persuasive," given that the record otherwise supported the inference of conspiracy: in fact, it was "evidence of the most convincing character." In

[258] American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946); United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948).
[259] Interstate Circuit v. United States, 306 U.S. 208 (1939).

sum: the observed behavior of the distributors was itself evidence from which a hidden agreement could be inferred, as it would have been implausible for the distributors to behave as they did without having previously entered into one.

Finally, in the alternative, the Court noted that it would also have been enough for DOJ merely to show that each defendant had knowingly joined an existing concerted scheme knowing that "concerted action was contemplated and invited." After all, "[e]ach distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan [to restrain trade] is sufficient to establish [a] conspiracy[.]"

Today, courts and commentators often refer to a set of "plus factors" that, in addition to parallel conduct, can support the inference of an agreement among businesses by tending to exclude the hypothesis of independent action.[260] Such plus factors are identified variously by courts and commentators, but can include among other things: (1) the existence of a common motive to conspire; (2) conduct that would appear to be against the participants' economic self-interest in the absence of an agreement; (3) the existence of government antitrust investigations or enforcement action; (4) uniform increases in prices or reductions in output, particularly when demand, prices, and profits are high and with excess capacity; (5) extensive interfirm communications, especially with respect to price and/or output; (6) market structures and conditions (including concentration, high barriers to entry, and product homogeneity) that would make cartelization profitable; (7) stable market shares despite rising prices and excess capacity; (8) mechanisms of distributing profits to participants; and (9) joint conduct to exclude rivals.[261]

Monsanto and *Matsushita* each dealt, in part, with the question of what evidence a plaintiff must develop in discovery in order to reach a trial before a factfinder: *i.e.*, the summary judgment standard under Rule 56. But, in practice, the motion-to-dismiss standard under Rule 12 is at least as important to antitrust litigation, because it is the gatekeeper to the (notoriously expensive and lengthy) antitrust discovery process. What must a plaintiff allege in an antitrust complaint in order to be given access to the tools of factfinding?

The leading modern case on antitrust pleading standards at the motion-to-dismiss stage is 2007's *Twombly* decision, which re-set the standard that *all* complaints—antitrust and non-antitrust alike—must satisfy to withstand a challenge under Rule 12(b)(6) for failure to state claim.[262] Before *Twombly*, a complaint would proceed to discovery "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[263] *Twombly* materially raised the bar of factual detail and specificity a complaint alleging an "agreement" under Section 1 must clear to survive dismissal.

Bell Atlantic Corp. v. Twombly

550 U.S. 544 (2007)

Justice Souter.

[1] Liability under § 1 of the Sherman Act requires a contract, combination, or conspiracy, in restraint of trade or commerce. The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to

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[260] *See generally* Christopher R. Leslie, *The Probative Synergy of Plus Factors in Price-Fixing Litigation*, 115 Nw. U. L. Rev. 1581 (2021); William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 Mich. L.Rev. 393 (2011).

[261] *See, e.g.*. Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 193 (3d Cir. 2017); Gelboim v. Bank of Am. Corp., 823 F.3d 759, 781 (2d Cir. 2016); In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1194 (9th Cir. 2015); Hyland v. HomeServices of Am., Inc., 771 F.3d 310, 320 (6th Cir. 2014); Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013); Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1301 (11th Cir. 2003); City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 572 (11th Cir. 1998); In re Coordinated Pretrial Proc. in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 446–47 (9th Cir. 1990) *see also* note 260 and works cited therein.

[262] *See* Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) (confirming that *Twombly* is not confined to antitrust cases).

[263] Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.

[2] The upshot of the 1984 divestiture of the American Telephone & Telegraph Company's (AT & T) local telephone business was a system of regional service monopolies (variously called "Regional Bell Operating Companies," "Baby Bells," or "Incumbent Local Exchange Carriers" (ILECs)), and a separate, competitive market for long-distance service from which the ILECs were excluded. More than a decade later, Congress withdrew approval of the ILECs' monopolies by enacting the Telecommunications Act of 1996 (1996 Act), which fundamentally restructured local telephone markets and subjected ILECs to a host of duties intended to facilitate market entry. In recompense, the 1996 Act set conditions for authorizing ILECs to enter the long-distance market.

[3] Central to the new scheme was each ILEC's obligation to share its network with competitors, which came to be known as "competitive local exchange carriers" (CLECs). A CLEC could make use of an ILEC's network in any of three ways: by (1) purchasing local telephone services at wholesale rates for resale to end users, (2) leasing elements of the ILEC's network on an unbundled basis, or (3) interconnecting its own facilities with the ILEC's network. Owing to the considerable expense and effort required to make unbundled network elements available to rivals at wholesale prices, the ILECs vigorously litigated the scope of the sharing obligation imposed by the 1996 Act, with the result that the Federal Communications Commission (FCC) three times revised its regulations to narrow the range of network elements to be shared with the CLECs.

[4] Respondents William Twombly and Lawrence Marcus (hereinafter plaintiffs) represent a putative class consisting of all subscribers of local telephone and/or high speed internet services from February 8, 1996 to present. In this action against petitioners, a group of ILECs, plaintiffs seek treble damages and declaratory and injunctive relief for claimed violations of § 1 of the Sherman Act. . . .

[5] The complaint alleges that the ILECs conspired to restrain trade in two ways, each supposedly inflating charges for local telephone and high-speed Internet services. Plaintiffs say, first, that the ILECs "engaged in parallel conduct" in their respective service areas to inhibit the growth of upstart CLECs. Their actions allegedly included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers. According to the complaint, the ILECs' compelling common motivation to thwart the CLECs' competitive efforts naturally led them to form a conspiracy; had any one ILEC not sought to prevent CLECs from competing effectively, the resulting greater competitive inroads into that ILEC's territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct.

[6] Second, the complaint charges agreements by the ILECs to refrain from competing against one another. These are to be inferred from the ILECs' common failure meaningfully to pursue attractive business opportunities in contiguous markets where they possessed substantial competitive advantages, and from a statement of Richard Notebaert, chief executive officer (CEO) of the ILEC Qwest, that competing in the territory of another ILEC "might be a good way to turn a quick dollar but that doesn't make it right."

[7] The complaint couches its ultimate allegations this way:

> In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.

[8] The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. . . . The District Court found plaintiffs' allegations of parallel ILEC actions to discourage competition inadequate because the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory. As to the ILECs'

supposed agreement against competing with each other, the District Court found that the complaint does not allege facts suggesting that refraining from competing in other territories as CLECs was contrary to the ILECs' apparent economic interests, and consequently does not raise an inference that the ILECs' actions were the result of a conspiracy.

[9] The Court of Appeals for the Second Circuit reversed, holding that the District Court tested the complaint by the wrong standard. It held that plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal. Although the Court of Appeals took the view that plaintiffs must plead facts that include conspiracy among the realm of "plausible" possibilities in order to survive a motion to dismiss, it then said that to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.

[10] We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, and now reverse.

[11] Because § 1 of the Sherman Act does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense. Even "conscious parallelism," a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions[,] is not in itself unlawful.

[12] The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence. An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict . . . ; proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, see *Monsanto Co. v. Spray–Rite Service Corp.,* 465 U.S. 752 (1984); and at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, see *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986).

[13] This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act [and thus avoid dismissal under Rule 12(b)(6)]. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the claim is and the grounds upon which it rests." While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

[14] In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.[4] And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and

[4] Commentators have offered several examples of parallel conduct allegations that would state a § 1 claim under this standard. *See, e.g.*, 6 Areeda & Hovenkamp ¶ 1425, at 167–185 (discussing "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties"); Blechman, *Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. S. L.Rev. 881, 899 (1979) (describing "conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement"). The parties in this case agree that complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason, would support a plausible inference of conspiracy.

that a recovery is very remote and unlikely. In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators . . . that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

[15] The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the "plain statement" possess enough heft to "show that the pleader is entitled to relief." A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief.

[16] We alluded to the practical significance of the Rule 8 entitlement requirement in Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005), when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value. . . .

[17] Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago . . . a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. . . .

[18] It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by careful scrutiny of evidence at the summary judgment stage, much less lucid instructions to juries; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim. [. . .]

[19] When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations. Thus, the complaint first takes account of the alleged "absence of any meaningful competition between the ILECs in one another's markets," "the parallel course of conduct that each ILEC engaged in to prevent competition from CLECs," "and the other facts and market circumstances alleged [earlier]"; "in light of" these, the complaint concludes "that the ILECs have entered into a contract, combination or conspiracy to prevent competitive entry into their markets and have agreed not to compete with one another." The nub of the complaint, then, is the ILECs' parallel behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.

[20] We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, we agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional

dominance. The 1996 Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing.

[21] The complaint makes its closest pass at a predicate for conspiracy with the claim that collusion was necessary because success by even one CLEC in an ILEC's territory "would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories." But, its logic aside, this general premise still fails to answer the point that there was just no need for joint encouragement to resist the 1996 Act; as the District Court said, "each ILEC has reason to want to avoid dealing with CLECs" and "each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs."

[22] Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act, which was supposedly passed in the hope that the large incumbent local monopoly companies . . . might attack their neighbors' service areas, as they are the best situated to do so. Contrary to hope, the ILECs declined to enter each other's service territories in any significant way, and the local telephone and high-speed Internet market remains highly compartmentalized geographically, with minimal competition. Based on this state of affairs, and perceiving the ILECs to be blessed with "especially attractive business opportunities" in surrounding markets dominated by other ILECs, the plaintiffs assert that the ILECs' parallel conduct was "strongly suggestive of conspiracy."

[23] But it was not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

[24] In fact, the complaint itself gives reasons to believe that the ILECs would see their best interests in keeping to their old turf. Although the complaint says generally that the ILECs passed up especially attractive business opportunities by declining to compete as CLECs against other ILECs, it does not allege that competition as CLECs was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period, and the complaint is replete with indications that any CLEC faced nearly insurmountable barriers to profitability owing to the ILECs' flagrant resistance to the network sharing requirements of the 1996 Act. Not only that, but even without a monopolistic tradition and the peculiar difficulty of mandating shared networks, firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets. The upshot is that Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible. We agree with the District Court's assessment that antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim. [. . .]

[25] . . .[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed..

Justice Stevens, with whom Justice Ginsburg joins except as to Part IV {*Eds.: Part IV is not excerpted here*}, dissenting.

[26] In the first paragraph of its 23-page opinion the Court states that the question to be decided is whether allegations that "major telecommunications providers engaged in certain parallel conduct unfavorable to competition" suffice to state a violation of § 1 of the Sherman Act. The answer to that question has been settled

for more than 50 years. If that were indeed the issue, a summary reversal . . . would adequately resolve this case. . . . [P]arallel conduct is circumstantial evidence admissible on the issue of conspiracy, but it is not itself illegal.

[27] Thus, this is a case in which there is no dispute about the substantive law. If the defendants acted independently, their conduct was perfectly lawful. If, however, that conduct is the product of a horizontal agreement among potential competitors, it was unlawful. The plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion that the charge is not "plausible" provide a legally acceptable reason for dismissing the complaint? I think not. [. . .]

[28] . . . [A] judge ruling on a defendant's motion to dismiss a complaint must accept as true all of the factual allegations contained in the complaint. But . . . the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. The Court embraces the argument of those lawyers that there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; that there was just no need for joint encouragement to resist the 1996 Act; and that the natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

[29] The Court and petitioners' legal team are no doubt correct that the parallel conduct alleged is consistent with the absence of any contract, combination, or conspiracy. But that conduct is also entirely consistent with the *presence* of the illegal agreement alleged in the complaint. And the charge that petitioners agreed not to compete with one another is not just one of a few stray statements; it is an allegation describing unlawful conduct. As such, the Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before dismissing the case.

[30] Two practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions. Those concerns merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. More importantly, they do not justify an interpretation of Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency. [. . .]

[31] This case is a poor vehicle for the Court's new pleading rule, for we have observed that in antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. [. . .]

[32] The Court does not suggest that an agreement to do what the plaintiffs allege would be permissible under the antitrust laws. Nor does the Court hold that these plaintiffs have failed to allege an injury entitling them to sue for damages under those laws. Rather, the theory on which the Court permits dismissal is that, so far as the Federal Rules are concerned, no agreement has been alleged at all. This is a mind-boggling conclusion.

[33] As the Court explains, prior to the enactment of the Telecommunications Act of 1996 the law prohibited the defendants from competing with each other. The new statute was enacted to replace a monopolistic market with a competitive one. The Act did not merely require the regional monopolists to take affirmative steps to facilitate entry to new competitors; it also permitted the existing firms to compete with each other and to expand their operations into previously forbidden territory. Each of the defendants decided not to take the latter step. That was obviously an extremely important business decision, and I am willing to presume that each company acted entirely independently in reaching that decision. I am even willing to entertain the majority's belief that any agreement among the companies was unlikely. But the plaintiffs allege in three places in their complaint, that the ILECs did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with

each other. And as the Court recognizes, at the motion to dismiss stage, a judge assumes "that all the allegations in the complaint are true (even if doubtful in fact)."

[34] The majority circumvents this obvious obstacle to dismissal by pretending that it does not exist. The Court admits that "in form a few stray statements in the complaint speak directly of agreement," but disregards those allegations by saying that "on fair reading these are merely legal conclusions resting on the prior allegations" of parallel conduct. The Court's dichotomy between factual allegations and "legal conclusions" is the stuff of a bygone era. That distinction was a defining feature of code pleading, but was conspicuously abolished when the Federal Rules were enacted in 1938.

[35] Even if I were inclined to accept the Court's anachronistic dichotomy and ignore the complaint's actual allegations, I would dispute the Court's suggestion that any inference of agreement from petitioners' parallel conduct is "implausible." . . . Respondents' complaint points not only to petitioners' numerous opportunities to meet with each other, but also to [ILEC CEO Richard] Notebaert's curious statement that encroaching on a fellow incumbent's territory "might be a good way to turn a quick dollar but that doesn't make it right." What did he mean by that? One possible (indeed plausible) inference is that he meant that while it would be in his company's economic self-interest to compete with its brethren, he had agreed with his competitors not to do so. . . .

[36] Perhaps Notebaert meant instead that competition would be sensible in the short term but not in the long run. That's what his lawyers tell us anyway. But I would think that no one would know better what Notebaert meant than Notebaert himself. Instead of permitting respondents to ask Notebaert, however, the Court looks to other quotes from that and other articles and decides that what he meant was that entering new markets as a competitive local exchange carrier would not be a "sustainable economic model." . . . But . . . the District Court was required at this stage of the proceedings to construe Notebaert's ambiguous statement in the plaintiffs' favor. The inference the statement supports—that simultaneous decisions by ILECs not even to attempt to poach customers from one another once the law authorized them to do so were the product of an agreement—sits comfortably within the realm of possibility. That is all the Rules require. [. . .]

[37] I fear that the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence. It is no surprise that the antitrust defense bar—among whom "lament" as to inadequate judicial supervision of discovery is most common—should lobby for this state of affairs. But we must recall that their primary responsibility is to win cases for their clients, not to improve law administration for the public. As we did in our prior decisions, we should have instructed them that their remedy was to seek to amend the Federal Rules—not our interpretation of them. [. . .]

[38] Accordingly, I respectfully dissent.

* * *

So how does a court apply these rules in practice? A famous illustration-in-two-acts is found in the *In re Text Messaging Antitrust Litigation* saga, which gave Judge Richard Posner not one but two opportunities to pronounce on whether the plaintiffs had provided a basis from which an unlawful price-fixing agreement could be inferred. In December 2010, he held that the plaintiffs in that case had alleged enough in a complaint to make the inference of a price-fixing conspiracy among AT & T, Verizon, Sprint, and T–Mobile "plausible," and thus to clear the threshold established in *Twombly* for surviving a motion to dismiss. The litigation accordingly rumbled on. But in April 2015, he held that the plaintiffs had not mustered enough evidence in discovery to survive summary judgment.

In re Text Messaging Antitrust Litigation

630 F.3d 622 (7th Cir. 2010)

Judge Posner.

[1] A class action suit that has been consolidated for pretrial proceedings in the district court in Chicago charges the defendants with conspiring to fix prices of text messaging services in violation of federal antitrust law. [. . .]

[2] The complaint in *Twombly* alleged that the regional telephone companies that were the successors to the Bell Operating Companies which AT & T had been forced to divest in settlement of the government's antitrust suit against it were engaged in "parallel behavior." Bluntly, they were not competing. But section 1 of the Sherman Act, under which the suit had been brought, does not require sellers to compete; it just forbids their agreeing or conspiring not to compete. So as the Court pointed out, a complaint that merely alleges parallel behavior alleges facts that are equally consistent with an inference that the defendants are conspiring and an inference that the conditions of their market have enabled them to avoid competing without having to agree not to compete. The core allegations of the complaint in *Twombly* were simply that

> In the absence of any meaningful competition between the defendants in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from other carriers within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that the defendants have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.

[3] Our defendants contend that in this case too the complaint alleges merely that they are not competing. But we agree with the district judge that the complaint alleges a conspiracy with sufficient plausibility to satisfy the pleading standard of *Twombly*. It is true as the defendants contend that the differences between the first amended complaint, which the judge dismissed, and the second, which he refused to dismiss, are slight; but if his refusal to dismiss the second complaint is properly described as a reconsideration of his ruling on the first, so what? Judges are permitted to reconsider their rulings in the course of a litigation.

[4] The second amended complaint alleges a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion. There is nothing incongruous about such a mixture. If parties agree to fix prices, one expects that as a result they will not compete in price—that's the purpose of price fixing. Parallel behavior of a sort anomalous in a competitive market is thus a symptom of price fixing, though standing alone it is not proof of it; and an industry structure that facilitates collusion constitutes supporting evidence of collusion. An accusation that the thousands of children who set up makeshift lemonade stands all over the country on hot summer days were fixing prices would be laughed out of court because the retail sale of lemonade from lemonade stands constitutes so dispersed and heterogeneous and uncommercial a market as to make a nationwide conspiracy of the sellers utterly implausible. But the complaint in this case alleges that the four defendants sell 90 percent of U.S. text messaging services, and it would not be difficult for such a small group to agree on prices and to be able to detect "cheating" (underselling the agreed price by a member of the group) without having to create elaborate mechanisms, such as an exclusive sales agency, that could not escape discovery by the antitrust authorities.

[5] Of note is the allegation in the complaint that the defendants belonged to a trade association and exchanged price information directly at association meetings. This allegation identifies a practice, not illegal in itself, that facilitates price fixing that would be difficult for the authorities to detect. The complaint further alleges that the defendants, along with two other large sellers of text messaging services, constituted and met with each other in an elite "leadership council" within the association—and the leadership council's stated mission was to urge its members to substitute "co-opetition" for competition.

[6] The complaint also alleges that in the face of steeply falling costs, the defendants increased their prices. This is anomalous behavior because falling costs increase a seller's profit margin at the existing price, motivating him, in the absence of agreement, to reduce his price slightly in order to take business from his competitors, and certainly not to increase his price. And there is more: there is an allegation that all at once the defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third. The change in the industry's pricing structure was so rapid, the complaint suggests, that it could not have been accomplished without agreement on the details of the new structure, the timing of its adoption, and the specific uniform price increase that would ensue on its adoption.

[7] A footnote in *Twombly* had described the type of evidence that enables parallel conduct to be interpreted as collusive: "Commentators have offered several examples of parallel conduct allegations that would state a

Sherman Act § 1 claim under this standard[,] namely, parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties; conduct that indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement. The parties in this case agree that complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason would support a plausible inference of conspiracy." That is the kind of "parallel plus" behavior alleged in this case.

[8] What is missing, as the defendants point out, is the smoking gun in a price-fixing case: direct evidence, which would usually take the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise price. The second amended complaint does allege that the defendants agreed to uniformly charge an unprecedented common per-unit price of ten cents for text messaging services, but does not allege direct evidence of such an agreement; the allegation is an inference from circumstantial evidence. Direct evidence of conspiracy is not a sine qua non, however. Circumstantial evidence can establish an antitrust conspiracy. We need not decide whether the circumstantial evidence that we have summarized is sufficient to compel an inference of conspiracy; the case is just at the complaint stage and the test for whether to dismiss a case at that stage turns on the complaint's "plausibility."

[9] The [Supreme] Court [has said] that the plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. This is a little unclear because plausibility, probability, and possibility overlap. Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as "preponderance of the evidence" connote.

[10] The plaintiffs have conducted no discovery. Discovery may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability. All that we conclude at this early stage in the litigation is that the district judge was right to rule that the second amended complaint provides a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery.

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In re Text Messaging Antitrust Litigation

782 F.3d 867 (7th Cir. 2015)

Judge Posner.

[1] This class action antitrust suit is before us for the second time. More than four years ago we granted the defendants' petition to take an interlocutory appeal . . . from the district judge's refusal to dismiss the complaint for failure to state a claim. But we upheld the judge's ruling. Three years of discovery ensued, culminating in the district judge's grant of the defendants' motion for summary judgment, followed by entry of final judgment dismissing the suit, precipitating this appeal by the plaintiffs.

[2] The suit is on behalf of customers of text messaging—the sending of brief electronic messages between two or more mobile phones or other devices, over telephone systems (usually wireless systems), mobile communications systems, or the Internet. (The most common method of text messaging today is to type the message into a cellphone, which transmits it instantaneously over a telephone or other communications network to a similar device.) Text messaging is thus an alternative both to email and to telephone calls. The principal defendants are four wireless network providers—AT & T, Verizon, Sprint, and T–Mobile—and a trade association, The Wireless Association, to which those companies belong. The suit claims that the defendants, in violation of section 1 of the Sherman Act, conspired with each other to increase one kind of price for text messaging service—price per use (PPU), each "use" being a message, separately priced. This was the original method of pricing text messaging; we'll see that it has largely given way to other methods, but it still has some customers and they are the plaintiffs and the members of the plaintiff class.

[3] The defendants' unsuccessful motion to dismiss the complaint—the motion the denial of which we reviewed and upheld in the first appeal—invoked *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which requires a complaint to pass a test of "plausibility" in order to avoid dismissal. The reason for this requirement is to spare defendants the burden of a costly defense against charges likely to prove in the end to have no merit. We decided that the plaintiffs' second amended complaint passed the test[.] [. . .]

[4] In short, we pointed to the small number of leading firms in the text messaging market, which would facilitate concealment of an agreement to fix prices; to the alleged exchanges of price information, orchestrated by the firms' trade association; to the seeming anomaly of a price increase in the face of falling costs; and to the allegation of a sudden simplification of pricing structures followed very quickly by uniform price increases.

[5] With dismissal of the complaint refused and the suit thus alive in the district court, the focus of the lawsuit changed to pretrial discovery by the plaintiffs, which in turn focused on the alleged price exchange through the trade association and the sudden change in pricing structure followed by uniform price increases. Other factors mentioned in our first opinion—the small number of firms, and price increases in the face of falling costs—were conceded to be present but could not be thought dispositive. It is true that if a small number of competitors dominates a market, they will find it safer and easier to fix prices than if there are many competitors of more or less equal size. For the fewer the conspirators, the lower the cost of negotiation and the likelihood of defection; and provided that the fringe of competitive firms is unable to expand output sufficiently to drive the price back down to the competitive level, the leading firms can fix prices without worrying about competition from the fringe. But the other side of this coin is that the fewer the firms, the easier it is for them to engage in "follow the leader" pricing ("conscious parallelism," as lawyers call it, "tacit collusion" as economists prefer to call it)—which means coordinating their pricing without an actual agreement to do so. As for the apparent anomaly of competitors' raising prices in the face of falling costs, that is indeed evidence that they are not competing in the sense of trying to take sales from each other. However, this may be not because they've agreed not to compete but because all of them have determined independently that they may be better off with a higher price. That higher price, moreover—the consequence of parallel but independent decisions to raise prices—may generate even greater profits (compared to competitive pricing) if costs are falling, provided that consumers do not have attractive alternatives.

[6] Important too is the condition of entry. If few firms can or want to enter the relevant market, a higher price generating higher profits will not be undone by the output of new entrants. Indeed, prospective entrants may be deterred from entering by realization that their entry might lead simply to a drastic fall in prices that would deny them the profits from having entered. And that drastic fall could well be the result of parallel but independent pricing decisions by the incumbent firms, rather than of agreement.

[7] The challenge to the plaintiffs in discovery was thus to find evidence that the defendants had colluded expressly—that is, had explicitly agreed to raise prices—rather than tacitly ("follow the leader" or "consciously parallel" pricing). The focus of the plaintiffs' discovery was on the information exchange orchestrated by the trade association, the change in the defendants' pricing structures and the defendants' ensuing price hikes, and the possible existence of the smoking gun—and let's begin there, for the plaintiffs think they have found it, and they have made it the centerpiece—indeed, virtually the entirety—of their argument.

[8] Their supposed smoking gun is a pair of emails from an executive of T-Mobile named Adrian Hurditch to another executive of the firm, Lisa Roddy. Hurditch was not a senior executive but he was involved in the pricing of T-Mobile's products, including its text messaging service. The first of the two emails to Roddy, sent in May 2008, said "Gotta tell you but my gut says raising messaging pricing again is nothing more than a price gouge on consumers. I would guess that consumer advocates groups are going to come after us at some point. It's not like we've had an increase in the cost to carry message to justify this or a drop in our subscription SOC rates? I know the other guys are doing it but that doesn't mean we have to follow." ("SOC" is an acronym for "system on a chip," a common component of cellphones.) The second email, sent in September 2008 in the wake of a congressional investigation of alleged price gouging by the defendants, said that "at the end of the day we know there is no higher cost associated with messaging. The move [the latest price increase by T-Mobile] was colusive [sic] and opportunistic." The misspelled "collusive" is the heart of the plaintiffs' case.

[9] It is apparent from the emails that Hurditch disagreed with his firm's policy of raising the price of its text messaging service. (The price increase, however, was limited to the PPU segment of the service; we'll see that this is an important qualification.) But that is all that is apparent. In emphasizing the word "col[l]usive"—and in arguing in their opening brief that "Hurditch's statement that the price increases were collusive is thus dispositive. Hurditch's statement is a party admission and a co-conspirator statement"—the plaintiffs' counsel demonstrate a failure to understand the fundamental distinction between express and tacit collusion. Express collusion violates antitrust law; tacit collusion does not. There is nothing to suggest that Hurditch was referring to (or accusing his company of) express collusion. In fact the first email rather clearly refers to tacit collusion; for if Hurditch had thought that his company had agreed with its competitors to raise prices he wouldn't have said "I know the other guys are doing it but that doesn't mean we have to follow" (emphasis added). They would have to follow, or at least they would be under great pressure to follow, if they had agreed to follow.

[10] As for the word "opportunistic" in the second email, this is a reference to the remark in the first email that T-Mobile and its competitors were seizing an opportunity to gouge consumers—and in a highly concentrated market, seizing such an opportunity need not imply express collusion.

[11] Consider the last sentence in the second, the "colusive," email: "Clearly get why but it doesn't surprise me why public entities and consumer advocacy groups are starting to groan." This accords with another of Hurditch's emails, in which he predicted that the price increase would cause "bad PR [public relations]." Those concerns would be present whether the collusion among the carriers was tacit or express.

[12] Nothing in any of Hurditch's emails suggests that he believed there was a conspiracy among the carriers. There isn't even evidence that he had ever communicated on any subject with any employee of any of the other defendants. The reference to "the other guys" was not to employees of any of them but to the defendants themselves—the companies, whose PPU prices were public knowledge.

[13] The plaintiffs make much of the fact that Hurditch asked Roddy to delete several emails in the chain that culminated in the "colusive" email. But that is consistent with his not wanting to be detected by his superiors criticizing their management of the company. The plaintiffs argue that, no, the reason for the deletion was to destroy emails that would have shown that T-Mobile was conspiring with the other carriers. If this were true, the plaintiffs would be entitled to have a jury instructed that it could consider the deletion of the emails to be evidence (not conclusive of course) of the defendants' (or at least of T-Mobile's) guilt. But remember that there is no evidence that Hurditch was involved in, or had heard about, any conspiracy, and there is as we've just seen an equally plausible reason for the deletion of the emails in question. There's nothing unusual about sending an intemperate email, regretting sending it, and asking the recipient to delete it. And abusing one's corporate superiors—readily discernible even in Hurditch's emails that were not deleted—is beyond intemperate; it is career-endangering, often career-ending. Hurditch and Roddy acknowledged in their depositions that at least one of the deleted emails had criticized T-Mobile's senior management in "emotional" terms. Furthermore, if T-Mobile destroyed emails that would have revealed a conspiracy with its competitors, why didn't it destroy the "smoking gun" email—the "colusive" email?

[14] Even if the district judge should have allowed a jury to draw an adverse inference from the destruction of the emails, this could not have carried the day for the plaintiffs or even gotten them a trial. T-Mobile's Record Retention Guidelines indicate that Hurditch and Roddy had no obligation to retain their correspondence, because the guidelines state that employees need not retain "routine letters and notes that require no acknowledgment or follow-up" as distinct from "letters of general inquiry and replies that complete a cycle of correspondence." Hurditch's emails to Roddy were not inquiries; they were gripes and worries. Nor can a subordinate employee's destruction of a document, even if in violation of company policy, be automatically equated to a bad-faith act by the company.

[15] The problems with the plaintiff's case go beyond the inconclusiveness of the "colusive" email on which their briefs dwell at such length. The point that they have particular difficulty accepting is that the Sherman Act imposes no duty on firms to compete vigorously, or for that matter at all, in price. This troubles some antitrust experts, such as Harvard Law School Professor Louis Kaplow, whose book COMPETITION POLICY AND PRICE FIXING (2013) argues that tacit collusion should be deemed a violation of the Sherman Act. That of course is not the law,

and probably shouldn't be. A seller must decide on a price; and if tacit collusion is forbidden, how does a seller in a market in which conditions (such as few sellers, many buyers, and a homogeneous product, which may preclude nonprice competition) favor convergence by the sellers on a joint profit-maximizing price without their actually agreeing to charge that price, decide what price to charge? If the seller charges the profit-maximizing price (and its "competitors" do so as well), and tacit collusion is illegal, it is in trouble. But how is it to avoid getting into trouble? Would it have to adopt cost-plus pricing and prove that its price just covered its costs (where cost includes a "reasonable return" to invested capital)? Such a requirement would convert antitrust law into a scheme resembling public utility price regulation, now largely abolished.

[16] And might not entry into concentrated markets be deterred because an entrant who, having successfully entered such a market, charged the prevailing market price would be a tacit colluder and could be prosecuted as such, if tacit collusion were deemed to violate the Sherman Act? What could be more perverse than an antitrust doctrine that discouraged new entry into highly concentrated markets? Prices might fall if the new entrant's output increased the market's total output, but then again it might not fall; the existing firms in the market might reduce their output in order to prevent the output of the new entrant from depressing the market price. If as a result the new entrant found itself charging the same price as the incumbent firms, it would be tacitly colluding with them and likewise even if it set its price below that of those firms in order to maximize its profit from entry yet above the price that would prevail were there no tacit collusion.

[17] Further illustrating the danger of the law's treating tacit collusion as if it were express collusion, suppose that the firms in an oligopolistic market don't try to sell to each other's sleepers, "sleepers" being a term for a seller's customers who out of indolence or ignorance don't shop but instead are loyal to whichever seller they've been accustomed to buy from. Each firm may be reluctant to "awaken" any of the other firms' sleepers by offering them discounts, fearing retaliation. To avoid punishment under antitrust law for such forbearance (which would be a form of tacit collusion, aimed at keeping prices high), would firms be required to raid each other's sleepers? It is one thing to prohibit competitors from agreeing not to compete; it is another to order them to compete. How is a court to decide how vigorously they must compete in order to avoid being found to have tacitly colluded in violation of antitrust law? Such liability would, to repeat, give antitrust agencies a public-utility style regulatory role.

[18] Or consider the case, of which the present one may be an exemplar, in which there are four competitors and one raises its price and the others follow suit. Maybe they do that because they think the first firm—the price leader—has insights into market demand that they lack. Maybe they're afraid that though their sales will increase if they don't follow the leader up the price ladder, the increase in their sales will induce the leader to reduce his price, resulting in increased sales by him at the expense of any firm that had refused to increase its price. Or the firms might fear that the price leader had raised his price in order to finance product improvements that would enable him to hold on to his existing customers—and win over customers of the other firms. If any of these reflections persuaded the other firms—without any communication with the leader—to raise their prices, there would be no conspiracy, but merely tacit collusion, which to repeat is not illegal despite the urging of Professor Kaplow and others.

[19] Competitors in concentrated markets watch each other like hawks. Think of what happens in the airline industry, where costs are to a significant degree a function of fuel prices, when those prices rise. Suppose one airline thinks of and implements a method for raising its profit margin that it expects will have a less negative impact on ticket sales than an increase in ticket prices—such as a checked-bag fee or a reservation-change fee or a reduction in meals or an increase in the number of miles one needs in order to earn a free ticket. The airline's competitors will monitor carefully the effects of the airline's response to the higher fuel prices afflicting the industry and may well decide to copy the response should the responder's response turn out to have increased its profits.

[20] The collusion alleged by the plaintiffs spanned the period 2005 to 2008 (the year the suit was filed), and we must consider closely the evolution of the text messaging market in that period. Text messaging (a descendant of the old telex service) started in the 1990s and started slowly. In 2005, 81 billion text messages were sent in the United States, which sounds like a lot; in fact it was peanuts—for by 2008 the number had risen to a trillion and by 2011 to 2.3 trillion. One reason for the rapid increase was the advent and increasing popularity of volume-discounted text messaging plans. These plans entitled the buyer to send a large number of messages (often an

unlimited number) at a fixed monthly price that made each message sent very cheap to the sender. We'll call these plans "bundles," and ignore the fact that often a text messaging bundle includes services in addition to text messaging, such as voice and video messaging. The pricing of text messaging bundles (for example charging a fixed monthly rate for unlimited messaging) largely replaced the original method of pricing text messages, which had been price per use (PPU), that is, price per individual message, not per month or per some fixed number of messages. Once text messaging bundles became popular, the PPU market shrunk to the relative handful of people who send text messages infrequently. The collusion alleged in this case is limited to that market.

[21] In 2005 the price per use was very low—as low as 2 cents, though more commonly 5 cents. But between then and late 2008 all four defendant companies, in a series of steps (10 steps in all for the four companies), raised each of their PPUs to 20 cents. The increase attracted congressional concern and an investigation by the Justice Department's antitrust division, but neither legislative nor prosecutorial action resulted—only the series of class actions suits consolidated in 2009 in the suit before us.

[22] The popularity of text messaging bundles took a big bite out of the PPU market. The consumers left in that market were as we said those who sent very few messages. The total cost to such users was very low. Each defendant company made, so far as appears, an independent judgment that PPU usage per customer was on average so low that the customer would not balk at, if he would even notice, an occasional increase of a few cents per message. Suppose a grandparent living in Florida sends one text message a week to his grandchild in Illinois at a cost of 5 cents a message. That adds up to roughly 4 messages a month, for a total of 20 cents. The text messaging service now doubles the price, to 10 cents a message. The monthly charge is now 40 cents. Is the customer likely to balk? When in 2006 Sprint raised its PPU from 10 cents to 15 cents, it estimated that the average result would be an increase of 74 cents a month in the cost of the service for the vast majority of its PPU customers. Neither in our hypothetical example nor in Sprint's real-world analysis is a competing carrier likely to spend money advertising that its PPU price is 5 cents lower than what the competition is charging.

[23] Our earlier discussion of "sleepers" is relevant here. As heavy users of text messaging switched from PPU to bundles, the PPU market was left with the dwindling band of consumers whose use of text messaging was too limited to motivate them to switch to bundles or to complain about small increases in price per message. And they certainly weren't going to undergo the hassle of switching companies just because they would be paying a few dollars a year more for text messaging. This is no more than a plausible interpretation of the motive for and character of the price increases of which the plaintiffs complain, but the burden of establishing a prima facie case of explicit collusion was on the plaintiffs, and as the district judge found in his excellent opinion they failed to carry the burden.

[24] Granted, the defendants overstate their case in some respects. They point out that each company conducted independent evaluations of the profitability of raising their PPUs, but one would expect such "independent" evaluations even if the firms were expressly colluding, as the "independent" evaluations would disguise what they were doing. The firms contend unnecessarily that the evaluations showed that the contemplated price increases would be profitable even if none of the other three carriers raised its PPU. That is overkill because it is not a violation of antitrust law for a firm to raise its price, counting on its competitors to do likewise (but without any communication with them on the subject) and fearing the consequences if they do not. In fact AT & T held back on raising its PPU for several months, fearing that Sprint's increase would have a bad effect on public opinion, and raised its own price only when the bad effect did not materialize.

[25] The plaintiffs point out that the existence of express collusion can sometimes be inferred from circumstantial evidence, and they claim that they produced such evidence, along with Hurditch's emails, which they term direct evidence of such collusion—which, as we know, they are not. Circumstantial evidence of such collusion might be a decline in the market shares of the leading firms in a market, for their agreeing among themselves to charge a high fixed price might have caused fringe firms and new entrants to increase output and thus take sales from the leading firms. Circumstantial evidence might be inflexibility of the market leaders' market shares over time, suggesting a possible agreement among them not to alter prices, since such an alteration would tend to cause market shares to change. Or one might see a surge in nonprice competition, a form of competition outside the scope of the cartel agreement and therefore a possible substitute for price competition. Other evidence of express collusion might be a high elasticity of demand (meaning that a small change in price would cause a substantial

change in quantity demanded), for this might indicate that the sellers had agreed not to cut prices even though it would be to the advantage of each individual seller to do so until the market price fell to a level at which the added quantity sold did not offset the price decrease.

[26] The problem is that these phenomena are consistent with tacit as well as express collusion; their absence would tend to negate both, but their presence would not point unerringly to express collusion. And anyway these aren't the types of circumstantial evidence on which the plaintiffs rely. Rather they argue that had any one of the four carriers not raised its price, the others would have experienced costly consumer "churn" (the trade's term for losing customers to a competitor), and therefore all four dared raise their prices only because they had agreed to act in concert. For that would minimize churn—PPU customers would have no place to turn for a lower price. There is, however, a six-fold weakness to this suggested evidence of express collusion:

[27] First, a rational profit-maximizing seller does not care about the number of customers it has but about its total revenues relative to its total costs. If the seller loses a third of its customers because it has doubled its price, it's ahead of the game because twice two-thirds is greater than one (4/3 > 3/3).

[28] Second, in any case of tacit collusion the colluders risk churn, because no one would have committed to adhere to the collusive price. And yet tacit collusion appears to be common, each tacit colluder reckoning that in all likelihood the others will see the advantages of hanging together rather than hanging separately.

[29] Third, the four defendants in this case did not move in lockstep. For months on end there were price differences in their services. For example, during most of the entire period at issue (2005 to 2008) T–Mobile's PPU was 5 cents below Sprint's. To eliminate all risk of churn the defendants would have had to agree to raise their prices simultaneously, and they did not.

[30] Fourth, while there was some churn, this does not imply that each defendant had decided to raise its price so high as to drive away droves of customers had the other defendants not followed suit. T–Mobile, for example, appears not to have gained a significant number of customers from charging less for PPU service than Sprint. (As one internal T–Mobile email puts it, "we should seriously consider raising our pay per message rate. [F]or having the lowest messaging rates on the planet, we are not necessarily receiving a more favorable share of the market. I'm thinking we can move to 10c[ents] with little erosive concerns.") One reason is that, as noted earlier, while 5 cents can make a large percentage difference in this market, it is such a small absolute amount of money that it may make no difference to most consumers, especially when a nickel or a dime or 20 cents is multiplied by a very small number of monthly messages. More important, as a customer's monthly messaging increases, and also the price per message (as was happening during this period), the alternative of a text messaging bundle plan becomes more attractive. A company that stands to lose some PPU customers because of a price increase may be confident that they will not abandon the company for another but instead sign on to the company's text messaging bundle plan. Put differently, there is no evidence that PPU pricing is a major determinant of consumers' choice of carrier.

[31] Fifth, the period during which the carriers were raising their prices was also the period in which text messaging caught on with the consuming public and surged in volume. Many PPU customers would have found that they were text messaging more, and the more one text messages the more attractive the alternative of a bundle plan. The defendants wanted their PPU customers to switch to bundles; as an internal T–Mobile email in the plaintiffs' appendix explains, "the average cost to serve an 'Unlimited SMS' [i.e., a bundled short-message service at a fixed price regardless of the number of messages, "short message" referring to a simple text message, rather than a message having voice or video content] customer paying $9.99 [per month] is $1.90 per month and [we make] a profit of $8.09 per sub[scriber]."

[32] And sixth, if the carriers were going to agree to fix prices, they wouldn't have fixed their PPU prices; why risk suit or prosecution for fixing such prices when the PPU market was generating such a slight—and shrinking—part of the carriers' overall revenues? The possible gains would be more than offset by the inevitable legal risks. Furthermore, since an agreement to fix prices in the PPU market would have left the carriers free to cut prices on the bulk of their business (for they are not accused of fixing bundle prices), the slight gains from fixing PPU prices would be negated by increased competition in the carriers' other markets. [. . .]

[33] It remains to consider the claim that the trade association of which the defendants were members, The Wireless Association (it has a confusing acronym—CTIA, reflecting the original name of the association, which was Cellular Telephone Industries Association), and a component of the association called the Wireless Internet Caucus of CTIA, were forums in which officers of the defendants met and conspired to raise PPU prices. Officers of some of the defendants attended meetings both of the association and of its caucus, but representatives of companies not alleged to be part of the conspiracy frequently were present at these meetings, and one of the plaintiffs' expert witnesses admitted that in the presence of non-conspirators "the probability of collusion would go away." Still, opportunities for senior leaders of the defendants to meet privately in these officers' retreats abounded. And an executive of one of the defendants (AT & T) told the president of the association that "we all try not to surprise each other" and "if any of us are about to do something major we all tend to give the group a heads up"—"plus we all learn valuable info from each other." This evidence would be more compelling if the immediate sequel to any of these meetings had been a simultaneous or near-simultaneous price increase by the defendants. Instead there were substantial lags. And as there is no evidence of what information was exchanged at these meetings, there is no basis for an inference that they were using the meetings to plot prices increases.

[34] This and other circumstantial evidence that the plaintiffs cite are almost an afterthought. They have staked almost their all on Hurditch's emails—the name "Hurditch" recurs more than 160 times in the plaintiffs' opening and reply briefs. It's a mystery to us that the plaintiffs have placed such weight on those emails, thereby wasting space in their briefs that might have been better used. The plaintiffs greatly exaggerate the significance of the emails, but apart from the emails the circumstantial evidence that they cite provides insufficient support for the charge of express collusion.

[35] It is of course difficult to prove illegal collusion without witnesses to an agreement. And there are no such witnesses in this case. We can, moreover, without suspecting illegal collusion, expect competing firms to keep close track of each other's pricing and other market behavior and often to find it in their self-interest to imitate that behavior rather than try to undermine it—the latter being a risky strategy, prone to invite retaliation. The plaintiffs have presented circumstantial evidence consistent with an inference of collusion, but that evidence is equally consistent with independent parallel behavior.

[36] We hope this opinion will help lawyers understand the risks of invoking "collusion" without being precise about what they mean. Tacit collusion, also known as conscious parallelism, does not violate section 1 of the Sherman Act. Collusion is illegal only when based on agreement. Agreement can be proved by circumstantial evidence, and the plaintiffs were permitted to conduct and did conduct full pretrial discovery of such evidence. Yet their search failed to find sufficient evidence of express collusion to make a prima facie case. The district court had therefore no alternative to granting summary judgment in favor of the defendants.

* * *

NOTES

1) Are "agreements" invariably more stable or more harmful than parallel practices? What is the point of the "agreement" requirement?
2) *Monsanto* can be read to emphasize three different key elements in the definition of an agreement: first, "evidence that tends to exclude the possibility that the [parties] were acting independently" (paragraph 14); second, "conscious commitment to a common scheme" (paragraph 14); and, third, "evidence . . . that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer" (footnote 9). Are these three elements equally important? Do *Matushita* and *Twombly* suggest a definition of agreement that is consistent with, or different from, this view?
3) Does tacit collusion of the kind described in Chapter II—in which parties monitor each other and set their conduct accordingly—meet the *Monsanto* standard for an agreement?
4) In *Monsanto*, at paragraph 9, the Court emphasized that a manufacturer can have, and announce, a unilateral policy of selling only to dealers that comply with its stated resale prices, *without* the result being considered joint action. And at paragraph 11, the Court added that "the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are

not making independent pricing decisions." Given this understanding why exactly were Monsanto's actions not unilateral?

5) Look back at paragraphs 15 and 16 of the *Monsanto* extract. How, if at all, does the evidence described here support the inference of agreement rather than unilateral conduct?

6) The allegations in *Matsushita* were unusual—the plaintiff alleged that the defendants conspired to set prices *below* cost, whereas most price-fixing conspiracies seek to raise prices. Predatory pricing conspiracies, which involve agreements to depress prices, are less obviously harmful to consumers (at least absent the likely prospect of later monopolization and recoupment) than conspiracies to raise prices, which raises the prospect that perhaps *Matsushita*'s demanding standard of proof might have been reserved for unusual (and thus perhaps less plausible) conspiracies like the one alleged in that case. And yet many courts have applied the demanding *Matsushita* standard to standard price-raising conspiracies as well, requiring plaintiff to produce evidence which "tends to exclude the possibility" of unilateral conduct.[264] A few courts, however, have taken a more subtle approach, interpreting the *Matsushita* standard to require a court to assess the inherent economic plausibility of the plaintiff's theory of harm, with a less demanding proof requirement for theories that are easier to believe. The Second Circuit has articulated that view concisely:

> *Matsushita*, then, stands for the proposition that substantive "antitrust law limits the range of permissible inferences" that may be drawn from ambiguous evidence. It further holds that the range of inferences that may be draw from such evidence depends on the plausibility of the plaintiff's theory. Thus, where a plaintiff's theory of recovery is implausible, it takes "strong direct or circumstantial evidence" to satisfy Matsushita's "tends to exclude" standard. By contrast, broader inferences are permitted, and the "tends to exclude" standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive. [C]f. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 468 (1992) ("Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.").[265]

Which view of *Matsushita*—unitary standard for proving agreement or sliding scale depending on the plausibility of the allegations—do you think is most useful? Most consistent with the *Matsushita* opinion itself? Most administrable by courts? Does *Twombly*'s treatment of *Matsushita* illuminate this issue at all?

7) Is the economic plausibility of a theory of harm a question of law or fact? When is it appropriate for determination on summary judgment, as the Court did in *Matsushita* itself? How does a court know what is, and is not, economically plausible?[266]

8) Do you agree with the following statement: "At bottom, *Twombly* applies a long-held principle in antitrust law to the pleading stage: parallel conduct, standing alone, does not establish the required agreement because it is equally consistent with lawful conduct."[267]

9) Is *Twombly* consistent with the "notice pleading" standard adopted by the Federal Rules of Civil Procedure? (A notice pleading standard does not require a plaintiff to plead facts supporting its claims, but rather only factual allegations sufficient to put the defendant on notice of the nature of those claims.) Can you think of reasons why the Court may have believed that notice pleading is the wrong standard for antitrust claims alleging agreements?

10) What exactly is the nature of the disagreement between the majority and the dissent in *Twombly*? Is it about the pleading standard that applies? Or do the majority and dissent agree on the pleading standard but disagree regarding whether Twombly has satisfied it?

11) Twombly's complaint alleged that the ILECs had *agreed not to compete.* The Court held that the complaint failed because it did not allege facts that, if taken as true, sufficiently supported an inference that the ILECs were acting pursuant to an agreement, rather than engaging in parallel but independent conduct that made sense for each of them individually. Why do you think the Court took the route of arguably raising pleading

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[264] *See*, *e.g.*, Blomkest Fertilizer, Inc. v. Potash Corp. of Sasketchewan, Inc., 203 F.3d 1028, 1032 (8th Cir. 2000) (joining majority of circuits applying *Matsushita* broadly in both horizontal and vertical price-fixing cases).

[265] In re Publication Paper Antitrust Litig., 690 F.3d 51, 63 (2d Cir. 2012).

[266] *See generally* Herbert Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005) Ch. 4.

[267] SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 424 (4th Cir. 2015), *as amended on reh'g in part* (Oct. 29, 2015).

standards, rather than relying on courts' discretionary powers to manage litigation? For example, courts in antitrust cases could order narrow (and expedited) discovery on facts relevant to the existence of an agreement, and could grant a defendant's motion for summary judgment if such evidence is not forthcoming. Would it have been better to simply encourage lower courts to take that approach?

12) Calibrating the motion-to-dismiss standard for an antitrust case is a tricky business. Consider first the position of the plaintiff: at the motion to dismiss stage, the plaintiff has not yet had the opportunity to use discovery tools that would give access to documents and information in the possession, custody, or control of the defendant (and any co-conspirators). And, of course, agreements not to compete are generally not public: all that may be publicly visible is the conduct of the participants, which may be as consistent with parallelism as with agreement. But now consider the position of the defendant: antitrust discovery is incredibly expensive, and trading partners and rivals have real incentives to file speculative claims. Weighing these factors, does *Twombly* set the bar in the right place?

C. Evaluating Reasonableness: Per Se, Rule of Reason, and Intermediate Scrutiny

When an agreement exists, Section 1 analysis requires the application of one of three substantive legal standards to determine whether it unreasonably restrains competition. As noted above, these are:

(1) a standard of *per se*, or automatic, illegality for a narrow category of highly troubling agreements, such as price-fixing, bid-rigging, and market-allocation agreements;

(2) a "rule of reason"—the default standard for most agreements, including all vertical agreements and any horizontal agreement with a plausible procompetitive purpose or effect—which provides that an agreement is illegal if its harmful tendencies can be shown to outweigh its beneficial tendencies; and

(3) an intermediate standard of review (usually called "quick look") for a small set of agreements that are facially troubling but which could nevertheless be justified by sufficient evidence of competitive benefit.

In the rest of this chapter we will focus on understanding *how* each rule applies. When we turn to horizontal restraints in the next Chapter, we will take up the task of figuring out when a court may choose to apply one rather than the other.

The three standards are nowhere to be found on the face of Section 1, which just states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal[.]"[268] Instead, they were developed by courts.

In *Trans-Missouri Freight* in 1897—a case involving price-fixing among railroads—the Supreme Court took a strikingly literal approach to the meaning of the word "every" in Section 1, according to which every restraint of trade was automatically illegal:

> When . . . the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone with is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.[269]

Justice Edward Douglass White dissented in *Trans-Missouri Freight*, laying out what would later become the standard interpretation of Section 1: that it prohibits only *unreasonable* restraints of trade.[270] And nearly a decade and a half

[268] 15 U.S.C. § 1.

[269] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 328 (1897). *See also* N. Sec. Co. v. United States, 193 U.S. 197, 331 (1904).

[270] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 328–29 (1897) (White, J., dissenting).

later, the Court would adopt that view in an opinion written by then-Chief-Justice White in the iconic case of *Standard Oil* in 1911:[271]

> [Section 1] necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that *the standard of reason* which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, *was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.*[272]

As we shall see, the new focus on reasonableness—established in *Standard Oil* and confirmed in *American Tobacco*,[273] both in 1911—raised plenty of complexities. A foundational early effort to formulate a principled approach to reasonableness can be traced to an even earlier case: the opinion of (then-Sixth Circuit Judge) William Taft in *Addyston Pipe*.[274] Judge Taft separated restraints into two categories. First were those "where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices."[275] These restraints would be condemned in all cases. "[I]t would seem," Judge Taft wrote, "that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void."[276] The second category involved restraints Judge Taft labeled "ancillary" (meaning, broadly, "secondary to and supportive of"): *i.e.*, restraints supporting a primary, and legitimate, purpose.[277] For example, consider a joint venture agreement between a car-maker and a battery company that provided that the car-maker would not work with another battery company on an electric car project during the life of the joint venture. Such a restraint might be necessary to permit the underlying, socially valuable joint venture to move forward: if, for example, the battery company was worried about the car-maker taking valuable knowledge about battery technology it had gained through the joint venture and giving that information to a rival battery company. Ancillary restraints, Taft argued, should be permitted if they were "reasonable"—*i.e.*, when they were crucial to the viability of a legitimate arrangement and no broader than necessary to facilitate that arrangement.[278]

In one important passage, Taft pointed out that it had long been understood that sometimes a "restraint" was necessary if a procompetitive purpose (such as the sale of a business) was to be achieved at all:

> After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced. It was of importance, as an incentive to industry and honest dealing in trade, that, after a man had built up a business with an extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell. It was equally for the good of the public and trade, when partners dissolved, and one took the business, or they divided the business, that each partner might bind himself not to do anything in trade thereafter which would derogate from his grant of the interest conveyed to his former partner. Again, when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged. Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller

[271] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[272] Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911) (emphasis added).

[273] Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911); United States v. American Tobacco Co., 221 U.S. 106, 181 (1911) (re-affirming *Standard Oil* and noting that "it remains only to determine whether they establish that the acts, contracts, agreements, combinations, etc., which were assailed, were of such an unusual and wrongful character as to [render them illegal]").

[274] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified and affirmed*, 175 U.S. 211 (1896).

[275] *Id.* at 282-83.

[276] *Id.* at 283.

[277] *Id.* at 282.

[278] *Id.* at 290–91.

> should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property. Again, it was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employers. [279]

Taft's core idea—that courts should distinguish among restraints by reference to whether they were related to a procompetitive purpose, carefully analyzing those that *were* so related, and automatically condemning those that were *not*—was immensely influential. But this has turned out to be easier to state than to do! Distinguishing among those categories, and figuring out what "careful analysis" should look like for agreements that are not automatically illegal, has challenged courts, scholars, and businesses for many decades.

1. Per Se Illegality

The rule of *per se* or automatic illegality applies to a small number of horizontal agreements that have been established, by judicial experience, to be always or almost always harmful to competition. Classic examples include agreements to fix prices, limit output, divide markets, or rig bids.

The Court expressed this point clearly in *Trenton Potteries* in 1927. That case involved a challenge to an alleged scheme to fix prices by suppliers of "sanitary pottery" for use in bathrooms and lavatories. The trial court had instructed the jurors that they could find the agreement illegal regardless of whether the prices actually fixed were unreasonably high. The Supreme Court agreed, distinguishing its own earlier rule-of-reason decision in *Chicago Board of Trade* and emphasizing the distinctively anticompetitive character of price-fixing agreements.

United States v. Trenton Potteries Co.

273 U.S. 392 (1927)

Justice Stone.

[1] Respondents, 20 individuals and 23 corporations, were convicted in the District Court for Southern New York of violating the Sherman Anti-Trust Law. The indictment was in two counts. The first charged a combination to fix and maintain uniform prices for the sale of sanitary pottery, in restraint of interstate commerce; the second, a combination to restrain interstate commerce by limiting sales of pottery to a special group known to respondents as "legitimate jobbers."

[2] Respondents, engaged in the manufacture or distribution of 82 per cent of the vitreous pottery fixtures produced in the United States for use in bathrooms and lavatories, were members of a trade organization known as the Sanitary Potters' Association. Twelve of the corporate respondents had their factories and chief places of business in New Jersey, one was located in California, and the others were situated in Illinois, Michigan, West Virginia, Indiana, Ohio, and Pennsylvania. Many of them sold and delivered their product within the Southern district of New York, and some maintained sales offices and agents there.

[3] There is no contention here that the verdict was not supported by sufficient evidence that respondents, controlling some 82 per cent of the business of manufacturing and distributing in the United States vitreous pottery of the type described, combined to fix prices and to limit sales in interstate commerce to jobbers. [. . .]

[4] That only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this court in the *Standard Oil* and *Tobacco* Cases. But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable. Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary

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[279] *Id.* at 280–81.

of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least, in the light of its effect on competition, for, whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition. . . .

[5] The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of to-morrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies. [. . .]

[6] Cases in both the federal and state courts[1] have generally proceeded on a like assumption, and in the second circuit the view maintained below that the reasonableness or unreasonableness of the prices fixed must be submitted to the jury has apparently been abandoned. [. . .]

[7] Whether the prices actually agreed upon were reasonable or unreasonable was immaterial in the circumstances charged in the indictment and necessarily found by the verdict.

* * *

Despite the clarity of this language, *Trenton Potteries* did not quite settle the question. In subsequent cases, the Court appeared to take a more indulgent approach to practices that looked an awful lot like naked price fixing. For example, in the infamous 1933 *Appalachian Coals* case, the Court upheld the legality of an "exclusive selling arrangement," including fixed prices, among coal producers representing 73% of all output in Appalachia.[280] The *per se* illegality of price-fixing cartels would not be confirmed beyond all doubt until *Socony-Vacuum* in 1940.

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[1] The illegality of such agreements has commonly been assumed without consideration of the reasonableness of the price levels established. Loder v. Jayne (C. C.) 142 F. 1010; Crafe v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 P. 581, 31 Am. St. Rep. 242; Johnson v. People. 72 Colo. 218, 210 P. 843; People v. Amanna, 203 App. Div. 548, 196 N. Y. S. 606. See Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 521, 43 A. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; Beechley v. Mulville, 102 Iowa, 602, 608, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479; People v. Milk Exchange, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609 (purchase prices). In many of these cases price-fixing was accompanied by other factors contributing to the illegality. Upon the precise question, there has been diversity of view. People v. Sheldon, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690; State v. Eastern Coal Co., 29 R. I. 254, 256, 265, 70 A. 1, 132 Am. St. Rep. 817, 17 Ann. Cas. 96; Pope, Legal Aspect of Monopoly, 20 Harvard Law Rev. 167, 178; Watkins, Change in Trust Policy, 35 Harvard Law Rev. 815, 821-823 (reasonableness of prices immaterial). Contra: Cade & Sons v. Daly (1910) 1 Ir. Ch. 306; Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629; Skrainka v. Scharringhausen, 8 Mo. App. 522; Dueber Watch Case Mfg. Co. v. Howard Watch Co. (C. C.) 55 F. 851.

[280] *See* Appalachian Coals v. United States, 288 U.S. 344, 360–61 (1933) ("The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. . . . The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal."). The decision is almost universally abhorred. But for a supportive take, *see* Sheldon Kimmel, *How and Why the Per Se Rule Against Price-Fixing Went Wrong*, 19 Sup. Ct. Econ. Rev. 245 (2011).

CASENOTE: United States v. Socony-Vacuum Oil Co.

310 U.S. 150 (1940)

The story of *Socony-Vacuum* is an intricate one.[281] The defendants in that case were major oil refiners operating in the U.S. Midwest. These major refiners were vertically integrated—each owning oil wells, refineries, storage facilities, and gas stations. Starting in the mid-1920s, the U.S. petroleum industry experienced a period of "overproduction," resulting in sharply falling oil and gasoline prices. Some states responded by setting production caps, but these attempts failed as a number of companies continued to produce both oil and gasoline in excess of the amount permitted under the caps—so-called "hot oil" from which illegal "hot gasoline" was refined.

Smaller independent refiners who complied with the production caps suffered the most from the production of hot oil. The smaller independent refiners lacked substantial storage capacity, and so were forced to sell the gasoline they produced at a "distress" price reduced by competition from hot gasoline. Under authority granted by the National Industrial Recovery Act of 1933 ("NIRA"), the President promulgated a "code of fair competition" for the petroleum industry which forbade shipments of hot oil. Oil and gasoline prices rose as a result. But the Supreme Court soon held that the industry codes promulgated under NIRA represented an unconstitutional delegation of legislative authority.[282] So the problem returned.

In the aftermath of the Court's decision, a group of oil refiners took matters into their own hands and devised a strategy to raise prices. They agreed that certain of the major refiners would purchase gasoline directly from the independents at what they jointly "recommended" as "fair market" prices, thereby removing a substantial quantity of low-priced gasoline from the market. A committee produced a monthly list pairing each major refiner with a "dancing partner"—*i.e.*, an independent from which it would purchase excess gasoline that month.

The federal government charged the oil refiners with violating Section 1, alleging that they had conspired through the "dancing partners" arrangement to fix the spot market price for gasoline, and thereby to raise the price at which defendants sold gasoline. The result was higher prices for gasoline. The trial court instructed the jury that an agreement made for the purpose of raising prices could result in civil liability under Section 1, without regard to whether the price was reasonable or whether the agreement was likely to be effective in raising prices. However, the court instructed the jury that *criminal* liability under Section 1 required them to find beyond a reasonable doubt that the rise in gasoline retail prices was caused by the agreement and not solely by some other factor or factors. The jury convicted. But the Court of Appeals reversed, holding that the jury should not have been instructed that the agreement was illegal per se. Instead, the appellate court concluded, liability depended on showing that the agreement had in fact unreasonably restrained trade. The court remanded for a new trial to determine the competitive effects of the agreement. The government appealed to the Supreme Court—where it prevailed.

Today, Justice Douglas's opinion for the Supreme Court is a classic authority for the automatic or *per se* illegality of price-fixing and other naked restraints on competition. And indeed much of the opinion sets out that view. "[F]or over forty years," the Court stated, "this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."

The Court specifically rejected the idea that courts should inquire into whether fixed prices were actually reasonable. "Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended." Indeed, "[t]hose who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not

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[281] Dan Crane, characteristically, tells it well. Daniel Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals* in Eleanor M. Fox & Daniel A. Crane (eds.) ANTITRUST STORIES (2007).

[282] Panama Ref. Co. v. Ryan, 293 U.S. 388, 405 (1935).

be subject to continuous administrative supervision and readjustment in light of changed conditions." Congress had taken this whole issue out of the judiciary's hands: "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress."

"Price fixing" for this purpose simply meant agreeing on price or on some scheme to replace or distort price competition. "[P]rices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial."

So far, so clear, right? Price-fixing is always illegal, end of story. And certainly: that is the proposition for which *Socony* is cited today, and it has been confirmed by countless cases since as one of antitrust's most important commandments. But a modern reader of the *Socony* opinion itself may be surprised to find much language that suggests a narrower rule condemning price-fixing only when the participants hold a degree of market power. For example, at some points the Court's opinion implies that an effect of some kind on prices is required: "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, *to the extent that they raised, lowered, or stabilized prices* they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference." (Emphasis added.) And: "So far as cause and effect are concerned it is sufficient in this type of case if the buying programs of the combination *resulted in a price rise and market stability which but for them would not have happened.*" (Emphasis added.)

At another point, the Court was even more explicit: "Under the Sherman Act a combination 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. Where the machinery for price-fixing is an agreement on the prices to be charged or paid for the commodity in the interstate or foreign channels of trade, the power to fix prices exists if the combination has control of a substantial part of the commerce in that commodity. Where the means for price-fixing are purchases or sales of the commodity in a market operation or, as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist though the combination does not control a substantial part of the commodity. In such a case that power may be established if as a result of market conditions, the resources available to the combinations, the timing and the strategic placement of orders and the like, effective means are at hand to accomplish the desired objective.. But there may be effective influence over the market though the group in question does not control it. . . . Proof that a combination was formed for the purpose of fixing prices *and that it caused them to be fixed or contributed to that result* is proof of the completion of a price-fixing conspiracy under s 1 of the Act. The indictment in this case charged that this combination had that purpose and effect. And there was abundant evidence to support it. Hence the existence of power on the part of members of the combination to fix prices was but a conclusion from the finding that the buying programs caused or contributed to the rise and stability of prices."

The closest thing the Court offers to a resolution of this tension is tucked away in footnote 59 of the opinion. The Court noted there that an actual impact on price in the Midwest was necessary to establish jurisdiction in the district court. But this did not mean "that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under s 1 of the Sherman Act. . . . [I]t is well established that a person may be guilty of conspiring, although incapable of committing the objective offense. And it is likewise well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. . . . In view of these considerations a conspiracy to fix prices violates s 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. . . . Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an

inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy."

So the modern reading of *Socony*—as an authority for Section 1's flat *per se* ban on price-fixing and other naked restraints, regardless of power or effects—probably remains the best way to make sense of this convoluted opinion!

NOTES

1) Does it make sense to apply a *per se* rule without regard to the parties' market share or market power?
2) Think for a moment about the context of the *Socony* litigation. Under the auspices of the NIRA, the federal government had, in substance, tried to bring about the same disciplining of prices that the defendants, following the Supreme Court's invalidation of the federal government's industry codes, later sought to achieve through their private "dancing partner" arrangement. Does it make sense to condemn as unlawful the parties' cooperative achievement of the same ends—higher prices—that the government had attempted to pursue?
3) "*Socony-Vacuum* cannot stand for the proposition that price-fixing cartels are per se unlawful, as the case involved neither agreements on sales nor the fixing of any actual prices." Do you agree?
4) What, if anything, does *Socony-Vacuum* add to *Trenton Potteries*?

2. The Rule of Reason

The rule of reason is the default, and most common, analytical standard under Section 1. It applies to all vertical agreements, even those relating to price,[283] and to the vast majority of horizontal agreements also. And remarkably—even after more than a century of rule of reason litigation—there is still some confusion about what exactly rule-of-reason analysis entails, with multiple formulations in common use, and real controversy regarding their application.

Happily, however, there is significant consensus about the fundamentals. A series of basic steps have traditionally been at the core of rule of reason analysis.[284] At step one, a plaintiff must discharge an affirmative burden to show that the challenged restraint has an "anticompetitive effect." This centrally means that the plaintiff must show that the restraint in question tends to harm competition. There are two main ways to make this showing: "directly," by proof that the restraint has caused or likely will cause some outcome consistent with competitive harm (such as increased prices, reduced output, lower quality, reduced innovation, and so on), or "indirectly," by *both* a showing that the participants hold market power in a defined antitrust market protected by barriers to entry *and* a showing that the restraint is of a kind that, by its nature and context, is liable to harm competition.[285] Courts often state that, in the absence of market power—however proved—restraints cannot cause competitive harm.[286]

If the plaintiff can discharge this burden, the analysis moves to step two. At step two, the burden flips to the defendant to show that, despite the restraint's *prima facie* anticompetitive effect, the restraint generates offsetting procompetitive benefits. Procompetitive benefits include things like lower prices, improved efficiency, higher quality, additional innovation, and so on. If the defendant can discharge this burden, which different courts have described in different terms, the analysis moves to step three.

At step three, the burden returns to the plaintiff to show that the restraint is harmful notwithstanding what the defendant has offered at step two. Depending on the formulation, this might involve showing that the harms

[283] *See* Chapter VI.

[284] Ohio v. American Express Co., 138 S.Ct. 2274, 2284 (2018).

[285] Ohio v. American Express Co., 138 S.Ct. 2274, 2284 (2018) (describing direct and indirect methods of proof). *See also*, *e.g.*, PLS.Com, LLC v. Nat'l Ass'n of Realtors, 32 F.4th 824, 834 (9th Cir. 2022) (same); MacDermid Printing Sols. LLC v. Cortron Corp., 833 F.3d 172, 184–87 (2d Cir. 2016) (analyzing direct and indirect evidence); Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90 (2d Cir. 1998) (articulating indirect standard).

[286] *See*, *e.g.*, Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 452 (7th Cir. 2020) ("A firm's market power is important because, without it, a firm will have little to no ability to distort or harm competition, no matter how great its desire to do so, even when engaging in conduct that in different circumstances might be perceived as anticompetitive."); Kaufman v. Time Warner, 836 F.3d 137, 143 (2d Cir. 2016) ("[W]ithout market power, there is little risk of anticompetitive harm from the seller's tie-in."); Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1340 (11th Cir. 2010) (noting that "a showing of market power is necessary, but not sufficient, to establish potential harm to competition").

outweigh the benefits, through a "balancing" analysis, or that the claimed benefits could be achieved by means that would be less harmful to competition, or both (resulting in what is sometimes described as a *four*-step process).[287]

This all sounds simple enough: plaintiff must show harm, then defendant must show benefit, and finally plaintiff must discharge the ultimate burden of persuading the factfinder that the agreement should be condemned overall. But there are many nuances, open questions, and puzzles in the law of the rule of reason. Some of the most important include:

- At step one, how can a plaintiff show an affirmative case of harm to competition?
    - *Must plaintiffs quantify effects on outcomes of the competitive process?* Some courts seem to expect or even require that a plaintiff establish harm to competition by showing actual measurable impacts on outcomes of competition, like higher prices or reduced output.[288] But, in principle, it seems clear that plaintiffs ought to be able to discharge the burden by showing strong reasons of theory to expect that a restraint will tend to cause harm, combined with evidence that the theory is a good fit for the litigated facts, even if the particular ways in which that harm may be expressed are not yet clear or cannot be measured with precision. This is the central logic of the "indirect proof" avenue. In markets where it is difficult to measure price and other outcomes of competition (like quality or output), requiring quantified impact on outcomes may cause courts to deny meritorious claims. On the other hand, inferring harm too readily from ambiguous evidence may deter or punish beneficial competition. Cases where the theory of harm is that prices would, but for the challenged conduct, have *fallen*—for example, because the challenged agreement deterred or prevented entry—are doubly tricky: when should courts be willing to infer harm from the *absence* of a change in prices?
    - *How far can evidence of a price increase get a plaintiff?* One might think that a price increase is the clearest of all kinds of evidence of harm. Many courts have said so.[289] But some courts have suggested that an increase in nominal price is not enough even to discharge a prima facie burden, and that a plaintiff must—at least to some extent—affirmatively disprove that the price increase is not a function of procompetitive effects like increased quality or demand.[290] It is not

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[287] *See*, *e.g.*, Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1310 (10th Cir. 2017); Apani Sw., Inc. v. Coca-Cola Enterprises, Inc., 300 F.3d 620, 627 (5th Cir. 2002); Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc., 779 F.2d 592, 603 (11th Cir. 1986).

[288] *See*, *e.g.*, MacDermid Printing Sols. LLC v. Cortron Corp., 833 F.3d 172, 183 (2d Cir. 2016).

[289] *See*, *e.g.*, In re Suboxone Antitrust Litig., No. 13-MD-2445, 2022 WL 3588024, at *20 (E.D. Pa. Aug. 22, 2022) ("Plaintiffs have presented evidence that this conduct resulted in the market paying artificially high prices for Suboxone tablets."); FTC v. Shkreli, No. 20-CV-00706, 2022 WL 135026, at *42 (S.D.N.Y. Jan. 14, 2022) ("Under § 1, the Plaintiffs may show the existence of anticompetitive effects from restraints on trade through direct evidence of increased prices in the relevant market, which they have done."); In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 401 (S.D.N.Y. 2011) (price increase in digital music constituted antitrust injury in a case challenging alleged price-fixing).

[290] *See*, *e.g.*, Ohio v. American Express Co., 138 S.Ct. 2274, 2288–89 (2018) (evidence of increased prices to merchants did not discharge plaintiffs' obligation to show anticompetitive effect in platform market); 1-800 Contacts, Inc. v. Fed. Trade Comm'n, 1 F.4th 102, 118 (2d Cir. 2021) ("When an antitrust plaintiff advances an antitrust claim based on direct evidence in the form of increased prices, the question is whether it can show an actual anticompetitive change in prices after the restraint was implemented. . . . The government could not make that showing because it did not conduct an empirical analysis of the Challenged Agreements' effect on the price of contact lenses in the online market for contacts. The evidence offered by the government is theoretical and anecdotal; it is not 'direct.'"); Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1339 (11th Cir. 2010) ("Higher prices alone are not the "epitome" of anticompetitive harm (as Jacobs claims). . . . By 'anticompetitive,' the law means that a given practice both harms allocative efficiency *and* could raise the prices of goods above competitive levels or diminish their quality. . . . Here, beyond the bald statement that consumers lost hundreds of millions of dollars, there is nothing establishing the competitive level above which [the defendant's] allegedly anticompetitive conduct artificially raised prices."); OJ Com. LLC v. KidKraft LP, No. 19-60341-CIV, 2021 WL 1348412, at *4 (S.D. Fla. Mar. 31, 2021) (granting summary judgment for defendants under Sections 1 and 2 for, among other things, failure to show harm to competition, and stating: "Sure, Plaintiffs assert that KidKraft did in fact raise the price of its wooden play kitchens in 2017 and in 2018. However, higher prices alone are not the epitome of anticompetitive harm. Rather, consumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act.") (internal quotation marks and brackets omitted); *see also* E.W. French & Sons, Inc. v. Gen. Portland Inc., 885 F.2d 1392, 1404 (9th Cir. 1989) (Farris, J., concurring) ("The ultimate issue in a rule of reason case is whether a challenged practice will produce adverse effects on price or output. . . . The only direct way to answer that question is to introduce evidence of actual price increases or reductions in output after the challenged practice. But even if a plaintiff is lucky enough to gather such evidence, he will face the momentous task of proving that the observed price or output effects were not attributable to any one of an infinite number of independent causes:

obvious how this kind of prove-the-negative can effectively be done, or when it is enough to simply point to an increase in nominal prices.

- At step two, how can a defendant show offsetting benefits?
  - *Must the defendant merely "assert" a benefit or must it do more?* It is not clear just what a defendant must do at step two of the rule of reason: is it enough for a defendant to simply assert a benefit? Identify one that is theoretically plausible in principle and could reasonably be imputed to the challenged practice? Show that a claimed benefit has *some* kind of factual grounding in the actual purpose or actual effect of the measure, without needing to prove the magnitude of actual benefit? Or show that the restraint *actually* promoted the benefit and it was sufficient in magnitude to offset the harms? Some Section 1 cases suggest that the benefit must be in some sense "sufficient": what does this mean?[291] Other cases do not allude to such a test.[292]
  - *What kind of benefits count?* Certainly a core set of procompetitive benefits are beyond dispute: lower prices, higher quality, greater output, faster or more valuable innovation, greater choice and variety, and so on.[293] But the outer bounds of this zone of "procompetitive justification" are not quite clear. Defendants often argue (often with some basis!) that some challenged restraint or other is designed to protect the benefit of their investments from "free riding," and ultimately to safeguard their incentive to innovate and compete by protecting their profits from the activity. But *any* restraint that a rational defendant chooses to impose will likely have the effect of increasing its profits, and thus of increasing its incentives to invest in its competitive activities. To put it another way, *all* antitrust violations are profitable! But the "procompetitive justification" criterion is surely more demanding than this, even if its boundaries are not fully clear.[294] So when is profit-protection, or "incentivizing investment," a cognizable benefit?
  - *What about "out of market" benefits?* It is not entirely clear whether benefits must be in the same market as the harms in order to be cognizable under the rule of reason.[295] Merger law, at least, generally supports the proposition that harms in one market can only be offset by benefits in the

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exhaustion of raw materials, increases in labor costs, increases in the price of substitute goods, tax hikes, etc. Situations will arise where a plaintiff is able to meet this burden. . . . But doubtless those occasions will be rare.").

[291] *See, e.g.*, In re Se. Milk Antitrust Litig., 739 F.3d 262, 272 (6th Cir. 2014) ("[T]he burden then shifts to the defendant to produce evidence that the restraint in question has procompetitive effects that are sufficient to justify the otherwise anticompetitive injuries.") (cleaned up); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1024 (10th Cir. 1998) ("[T]he NCAA did not establish evidence of sufficient procompetitive benefits[.]"); United States v. Brown Univ. in Providence in State of R.I., 5 F.3d 658, 669 (3d Cir. 1993) (under the Section 1 rule of reason "the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective"); Paschall v. Kansas City Star Co., 727 F.2d 692, 702 (8th Cir. 1984) ("The optimum monopoly price theory is useful in ascertaining whether such procompetitive effects are sufficient to counteract the anticompetitive effects of removing potential competition from the market so that in the end there are no unreasonable anticompetitive effects.").

[292] *See, e.g.*, In re Loestrin 24 Fe Antitrust Litig., 261 F. Supp. 3d 307, 329 (D.R.I. 2017).

[293] *See, e.g.*, Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007) (procompetitive benefits included facilitation of investment in services and "more options" for consumers); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 102 (1984) (increased "consumer choice" procompetitive); Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977) (procompetitive benefits included more efficient distribution and the avoidance of free-riding that imperiled dealer investment); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1023 (10th Cir. 1998) (noting that "increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice have been accepted by courts as justifications for otherwise anticompetitive agreements"); In re Dealer Mgmt. Sys. Antitrust Litig., 362 F. Supp. 3d 477, 493 (N.D. Ill. 2019) (procompetitive benefits include "increasing allocative efficiency" and "preventing free-riding").

[294] *See, e.g.*, Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 479 (7th Cir. 2020) ("Any claimed benefits from [the challenged] conduct must be procompetitive and not simply the result of eliminating competition."); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) ("Microsoft's only explanation for its exclusive dealing is that it wants to keep developers focused upon its APIs—which is to say, it wants to preserve its power in the operating system market. That is not an unlawful end, but neither is it a procompetitive justification for the specific means here in question, namely exclusive dealing contracts[.]"); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1023 (10th Cir. 1998) (noting that "mere profitability" is not without more procompetitive); see also, e.g., United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967) ("[E]very restrictive practice is designed to augment the profit and competitive position of its participants."). *But see, e.g.*, Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1219 (9th Cir. 1997) ("Kodak may assert that its desire to profit from its intellectual property rights justifies its conduct, and the jury should presume that this justification is legitimately procompetitive.").

[295] *See generally, e.g.*, Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: Rejecting Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers*, 90 U. Chi. L. Rev. 273 (2023); Steven C. Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving On from* Ohio v. American Express Co., 84 Antitrust L.J. 883 (2022); Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is The Law, and What Should It Be?* 43 J. Corp. L. 119 (2017); Daniel A. Crane, *Balancing Effects Across Markets*, 80 Antitrust L.J. 391 (2015).

same market.[296] But the position under Section 1 is not so clear. There is some language in the Court's decision in *Topco* (a case discussed more fully in Chapter V) that is sometimes cited for the proposition that out-of-market benefits are not cognizable in conduct cases.[297] On the other hand, in two recent cases that we will meet later in this Chapter—*Alston* and *AmEx*—the Court appeared to implicitly accept that benefits to one group could justify harms to another.[298] But neither case actually held that "out of market" benefits are cognizable under Section 1: in *Alston* the issue was not raised by the parties, and in *AmEx* the Court deviated from regular market definition principles such that the benefits and harms were included in the same antitrust market. So the question remains open.[299]

- At step three, how can a plaintiff discharge its overall burden?
    - *Can courts ever "balance"?* Courts often say that the rule of reason involves balancing the anticompetitive effects of a restraint against its procompetitive benefits. But this may be very hard in practice. Suppose that the evidence shows that a restraint will have four effects: (1) it is highly likely to increase short term prices for all consumers; (2) it is moderately likely to increase product quality that some but not all consumers value; (3) there is some chance that it will promote game-changing innovation; and (4) it is somewhat likely to lead to a reduction in prices over the long term. How is a court supposed to "balance" these factors (including short term against long term, static effects against dynamic effects, price against quality, some consumers against others)?[300] And if courts cannot really balance in any meaningfully rigorous way—or when they cannot—what should they do instead? (As we note below, in recent cases the Court has not mentioned balancing at all.)
    - *What is the "less restrictive alternative" test?* It is all very well to say, as courts often do, that a plaintiff can discharge its burden at the third stage by showing that the defendant's claimed benefits could be achieved with a less restrictive alternative ("LRA").[301] This principle is the subject of a robust literature.[302] But what exactly does it involve? Must a plaintiff show that such an alternative *would in fact* be adopted if the challenged restraint were prohibited?[303] If the parties would not in fact adopt the less restrictive alternative, why is it relevant? If multiple such alternatives exist, must a plaintiff investigate—with fact and expert discovery—the relative competitive impact, and the actual likelihood, of each possible alternative? Courts emphasize that it is not enough to identify a mere theoretical alternative: so how far can a plaintiff be reasonably expected to go? The Court in *Alston* said that "antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. . . . [C]ourts should not second-guess degrees of reasonable necessity so that the

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[296] The traditional citation is United States v. Philadelphia Nat. Bank, 374 U.S. 321, 371 (1963). *See infra* § VIII.D.1.

[297] United States v. Topco Associates, 405 U.S. 596, 611 (1972) (stating, in the context of interbrand v. intrabrand competition in supermarket "white label" goods: "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking.").

[298] Ohio v. American Express Co., 138 S.Ct. 2274 (2018); National Collegiate Athletic Association v. Alston, 141 S.Ct. 2141 (2021).

[299] *See, e.g.*, United States v. Topco Associates, 405 U.S. 596, 611 (1972); Paladin Assocs. Inc. v. Montana Power Co., 328 F.3d 1145, 1157 n.11 (9th Cir. 2003) (noting but not resolving the issue); Steven C. Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving On from Ohio v. American Express Co.*, 84 Antitrust L.J. 883 (2022); Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?* 43 J. Comp. L. 119 (2017); Jonathan B. Baker, THE ANTITRUST PARADIGM (2019) 191.

[300] For a very thoughtful discussion, *see* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 Vand. L. Rev. 1 (2016).

[301] *See, e.g.*, 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 114 (2d Cir. 2021); Impax Labs., Inc. v. FTC, 994 F.3d 484, 492 (5th Cir. 2021); Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1396 (9th Cir. 1984).

[302] *See, e.g.*, C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 1216 Colum. L. Rev. 927 (2016); Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 Am. U. L. Rev. 561 (2009); Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, B.Y.U. L. Rev. 1265, 1336–38 (1999).

[303] *Compare* Horizontal Merger Guidelines § 10 ("The Agencies credit only those efficiencies likely to be accomplished with the proposed merger *and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects.*") (emphasis added).

> lawfulness of conduct turns upon judgments of degrees of efficiency."[304] In saying this, how much latitude did the Court mean to give defendants?

Courts and commentators express the rule of reason in different ways. In its most recent formulations, for example, the Supreme Court has entirely omitted any reference to balancing in step three:

> [T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect. Should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.[305]

Lower courts have expressed the rule-of-reason framework in different ways. Consider the following formulations:

- The Second Circuit has held that at step one the plaintiff must show that "[the] defendant's challenged behavior can have an adverse effect on competition in the relevant market"; at step two the defendant must "demonstrate the procompetitive effects of the challenged restraint"; at step three the plaintiff must "show that these legitimate competitive benefits could have been achieved through less restrictive means."[306]
- The Third Circuit has held that at step one the plaintiff must show that "the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets" (noting that because direct proof is "often impossible," a showing of "market power" may also be sufficient); at step two the defendant must "show that the challenged conduct promotes a sufficiently pro-competitive objective"; at step three the plaintiff "must demonstrate that the restraint is not reasonably necessary to achieve the stated objective."[307]
- The Fifth Circuit has held that at step one the plaintiff must "show anticompetitive effects" (including by effects on outcomes like price or by elimination of "competition"); at step two the defendant must "demonstrate that the restraint produced procompetitive benefits"; at step three, the plaintiff may "demonstrate that any procompetitive effects could be achieved through less anticompetitive means"; and at step four "if the [plaintiff] fails to demonstrate a less restrictive alternative way to achieve the procompetitive benefits, the court must balance the anticompetitive and procompetitive effects of the restraint."[308]
- The Ninth Circuit has held that at step one, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market" (either directly or indirectly); at step two, the defendant must "show a procompetitive rationale for the restraint"; at step three, "the plaintiff [must] demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[309]
- The Tenth Circuit has held that at step one, the plaintiff must show "that an agreement had a substantially adverse effect on competition" (by showing that an elevated-scrutiny standard applies, that the agreement adversely affected competitive outcomes like price, or that the defendant held market power in a relevant antitrust market); at step two, the defendant must "come forward with evidence of the procompetitive virtues of the alleged wrongful conduct"; at step three, "the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner"; and "[u]ltimately, if these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable."[310]

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[304] National Collegiate Athletic Association v. Alston, 141 S.Ct. 2141, 2161 (2021).

[305] National Collegiate Athletic Association v. Alston, 141 S.Ct. 2141, 2160 (2021); *see also* Ohio v. American Express Co., 138 S.Ct. 2274, 2284 (2018).

[306] N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc., 883 F.3d 32, 42 (2d Cir. 2018)

[307] King Drug Co. of Florence v. Smithkline Beecham Corp., 791 F.3d 388, 412 (3d Cir. 2015).

[308] Impax Lab'ys, Inc. v. FTC, 994 F.3d 484, 492–93 (5th Cir. 2021).

[309] PLS.Com, LLC v. Nat'l Ass'n of Realtors, 32 F.4th 824, 834 (9th Cir. 2022).

[310] Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1310 (10th Cir. 2017).

As we have noted, some recent decisions show a tendency to minimize or downplay the analytical importance of balancing in rule of reason cases. A leading scholar of the rule of reason, Michael Carrier, has criticized this development, arguing that, among other things:

> [T]he omission of balancing is not consistent with courts' application of the rule of reason. Since the dawn of the modern rule of reason in 1977 in *Sylvania*, courts have uniformly explained that the final step of the antitrust analysis involves balancing anticompetitive and procompetitive effects. Even the courts that describe a three-stage analysis often follow that with a discussion of the "ultimate" balancing stage. To simply remove the balancing step is not justified based on history.
>
> [And] removal is not consistent with the policies underlying the rule of reason. Central to this framework is a court's consideration of a restraint's anticompetitive and procompetitive effects. It is hard to see how this can be done without, at some point, having the chance to directly consider the two.[311]

As noted above, the very concept of "balancing" is fraught with complexity in antitrust analysis: not least because it is very far from clear how to weigh a short-term effect against a long-term one, a static price effect against a dynamic innovation effect, or what underlying or metric courts actually use to figure out a "net" effect on competition.

Rebecca Haw Allensworth, The Commensurability Myth in Antitrust

69 Vand. L. Rev. 1 (2016)

At its heart, antitrust law believes it is exceptional. Unlike most areas of regulation where rules must trade off costs and benefits different in kind, antitrust claims to pursue one single goal: competition. Courts often endorse the idea that the values traded off in competition regulation-the procompetitive effects and the anticompetitive effects-are commensurate. For example, courts frequently characterize Sherman Act § 1 as condemning restraints on trade having a "net" anticompetitive effect, and condoning those whose effects sum to a neutral or procompetitive effect. This supposedly unitary goal of antitrust-to facilitate competition-allows the law to appear to avoid the murky, value-laden compromises struck by other areas of regulation.

But antitrust law is not exceptional. Even within the now-dominant paradigm that antitrust pursues only economic goals, value judgments are unavoidable. What are typically offered in antitrust cases as procompetitive and anticompetitive effects are rarely two sides of the same coin, and there is no such monolithic thing as "competition" that is furthered or impeded by competitor conduct. In fact, competition-whether defined as a process or as a set of outcomes associated with competitive markets-is multifaceted. Antitrust law often must trade off one kind of competition for another, or one salutary effect of competition (such as price, quality or innovation) for another. And in so doing, antitrust courts must make judgments between different and incommensurate values. [. . .]

The absence of attention to the fact that procompetitive and anticompetitive effects, as they are presented in an antitrust suit, are usually incommensurate, and the absence of debate about how to trade them off means that antitrust law is under-theorized. Rhetoric of commensurability in antitrust has made it unpopular for judges to acknowledge the use of value judgments in deciding antitrust cases.

This has pushed important debates about those values into the subtext of antitrust opinions rather than allowing for the full and open discussion that they merit. It has also led to a set of doctrines that courts use to avoid the appearance of judgment, which distort antitrust litigation usually in favor of defendants. These evasive maneuvers have made a mess out of questions such as when the burden of production shifts from plaintiff to defendant, which arguments require empirical proof or a rigorously defined market, and what kinds of procompetitive justifications are categorically illegitimate. [. . .]

Judges, just like consumers, can and do make judgments between these incommensurate values and so, in the philosophical sense, make them commensurate again. The commensurability myth is that those choices, because

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[311] Michael A. Carrier, *The Four-Step Rule of Reason*, ANTITRUST (Spring 2019), 50–54.

they aim to maximize a seemingly unitary goal, such as consumer welfare or competition, can be made without reliance on contested (at best) or idiosyncratic (at worst) value judgments.

* * *

In practice, balancing is seldom the critical stage in an antitrust litigation. The overwhelming majority of rule-of-reason claims are lost by the plaintiff at step one, with the court concluding that the plaintiff has failed to establish a *prima facie* anticompetitive effect. In the following extract, Carrier summarizes the findings of his empirical investigation of rule-of-reason litigation.

Michael A. Carrier, Rule of Reason: An Empirical Update for the 21st Century

16 Geo. Mason L. Rev. 827 (2009)

A decade ago [*i.e.*, in 1999, in Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. Rev. 1265 (1999)], I showed that the rule of reason is far less amorphous than commonly believed. After reviewing all 495 rule of reason cases from 1977 to 1999, I showed that courts actually followed a burden-shifting approach.

In the first stage, the plaintiff must show a significant anticompetitive effect. The plaintiff's failure to make such a showing led to the courts' dismissal of 84% of the cases. In the second stage, the defendant must demonstrate a legitimate procompetitive justification; its failure to do so led to invalidation of the restraint in 3% of the cases.

If the defendant satisfies this burden, the plaintiff can show that the restraint is not reasonably necessary or that the defendant's objectives could be achieved by less restrictive alternatives. At most, 1% of the cases were dismissed because the plaintiff made this showing. Only after the completion of these three stages does the court balance anticompetitive and procompetitive effects. Balancing occurred in 4% of the cases.

A decade has passed. This Article updates my 1999 study. It concludes that the burden-shifting trend has continued and, in fact, has increased. Courts dispose of 97% of cases at the first stage, on the grounds that there is no anticompetitive effect. They balance in only 2% of cases. [. . .]

This survey is based on a Westlaw search of all federal cases decided between February 2, 1999, and May 5, 2009. I located the cases by searching broadly for all rule of reason cases: "DA(aft 2/2/1999) & antitrust & (Rule +2 Reason)." [. . .]

My survey includes instances in which a court entered a final judgment in an antitrust dispute that it decided (at least in part) under the rule of reason. Nearly all of the included cases involve courts' grants of summary judgment and motions to dismiss. These observations apply only to the antitrust issues of a case; the continued vitality of non-antitrust claims does not affect the inclusion of the case in the survey.

The survey does not include cases that have not reached an ultimate determination, such as denials of summary judgment or motions to dismiss. It also does not cover grants or denials of preliminary injunctions unaccompanied by final findings.

* * *

One of the most famous rule-of-reason cases in the history of antitrust is the 1918 decision in *Chicago Board of Trade*, in which Justice Brandeis wrote the opinion for the Court. This was the first Supreme Court case in which the rule of reason—which had in principle been introduced seven years earlier in *Standard Oil*—actually saved a restraint from condemnation by the Court. As you read the case, ask how well it maps onto the modern analysis described above. What factors is the Court applying to distinguish between "procompetitive" and "anticompetitive" restraints? And how much help is the Court's guidance, really?

Board of Trade of City of Chicago v. United States

246 U.S. 231 (1918)

Justice Brandeis.

[1] Chicago is the leading grain market in the world. . . . The standard forms of trading are: (a) Spot sales; that is, sales of grain already in Chicago in railroad cars or elevators for immediate delivery by order on carrier or transfer of warehouse receipt. (b) Future sales; that is, agreements for delivery later in the current or in some future month. (c) Sales "to arrive"; that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. On every business day sessions of the Board are held at which all bids and sales are publicly made. Spot sales and future sales are made at the regular sessions of the Board from 9:30 a.m. to 1:15 p.m., except on Saturdays, when the session closes at 12 [p.]m. Special sessions, termed the "call," are held immediately after the close of the regular session, at which sales "to arrive" are made. These sessions are not limited as to duration, but last usually about half an hour. At all these sessions transactions are between members only; but they may trade either for themselves or on behalf of others. Members may also trade privately with one another at any place, either during the sessions or after, and they may trade with nonmembers at any time except on the premises occupied by the Board.

[2] Purchases of grain "to arrive" are made largely from country dealers and farmers throughout the whole territory tributary to Chicago. . . . The purchases are sometimes the result of bids to individual country dealers made by telegraph or telephone either during the sessions or after; but most purchases are made by the sending out from Chicago by the afternoon mails to hundreds of country dealers, offers to buy at the prices named, any number of carloads, subject to acceptance before 9:30 a.m. on the next business day.

[3] In 1906 the Board adopted what is known as the "call" rule. By it members were prohibited from purchasing or offering to purchase, during the period between the close of the call and the opening of the session on the next business day, any wheat, corn, oats or rye "to arrive" at a price other than the closing bid at the call. The call was over, with rare exceptions, by 2 o'clock. The change effected was this: Before the adoption of the rule, members fixed their bids throughout the day at such prices as they respectively saw fit; after the adoption of the rule, the bids had to be fixed at the day's closing bid on the call until the opening of the next session.

[4] In 1913 the United States filed . . . this suit against the Board and its executive officers and directors, to enjoin the enforcement of the call rule, alleging it to be in violation of the [Sherman Act]. The defendants admitted the adoption and enforcement of the call rule, and averred that its purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago. On motion of the government the allegations concerning the purpose of establishing the regulation were stricken from the record . . . and a decree was entered which declared that defendants became parties to a combination or conspiracy to restrain interstate and foreign trade and commerce by adopting, acting upon and enforcing the call rule; and enjoined them from acting upon the same or from adopting or acting upon any similar rule. . . .

[5] The government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to any one. The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. 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. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law.

[6] First. The nature of the rule: The restriction was upon the period of price-making. It required members to desist from further price-making after the close of the call until 9:30 a.m. the next business day; but there was no restriction upon the sending out of bids after close of the call. Thus it required members who desired to buy grain "to arrive" to make up their minds before the close of the call how much they were willing to pay during the interval before the next session of the Board. The rule made it to their interest to attend the call; and if they did not fill their wants by purchases there, to make the final bid high enough to enable them to purchase from country dealers.

[7] Second. The scope of the rule: It is restricted in operation to grain "to arrive." It applies only to a small part of the grain shipped from day to day to Chicago, and to an even smaller part of the day's sales; members were left free to purchase grain already in Chicago from any one at any price throughout the day. It applies only during a small part of the business day; members were left free to purchase during the sessions of the Board grain "to arrive," at any price, from members anywhere and from nonmembers anywhere except on the premises of the Board. It applied only to grain shipped to Chicago; members were left free to purchase at any price throughout the day from either members or non-members, grain "to arrive" at any other market. Country dealers and farmers had available in practically every part of the territory called tributary to Chicago some other market for grain "to arrive." . . .

[8] Third. The effects of the rule: As it applies to only a small part of the grain shipped to Chicago and to that only during a part of the business day and does not apply at all to grain shipped to other markets, the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago. But within the narrow limits of its operation the rule helped to improve market conditions thus:

> (a) It created a public market for grain "to arrive." Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.
>
> (b) It brought into the regular market hours of the Board sessions, more of the trading in grain "to arrive."
>
> (c) It brought buyers and sellers into more direct relations; because on the call they gathered together for a free and open interchange of bids and offers.
>
> (d) It distributed the business in grain "to arrive" among a far larger number of Chicago receivers and commission merchants than had been the case there before.
>
> (e) It increased the number of country dealers engaging in this branch of the business; supplied them more regularly with bids from Chicago; and also increased the number of bids received by them from competing markets.
>
> (f) It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way the rule made it possible for them to pay more to farmers without raising the price to consumers.
>
> (g) It enabled country dealers to sell some grain to arrive which they would otherwise have been obliged either to ship to Chicago commission merchants or to sell for "future delivery."
>
> (h) It enabled those grain merchants of Chicago who sell to millers and exporters, to trade on a smaller margin and by paying more for grain or selling it for less, to make the Chicago market more attractive for both shippers and buyers of grain.

> (i) Incidentally it facilitated trading "to arrive" by enabling those engaged in these transactions to fulfill their contracts by tendering grain arriving at Chicago on any railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer . . . .

[9] Every Board of Trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity. The decree of the District Court is reversed with directions to dismiss the bill.

* * *

An important limitation on rule-of-reason analysis is the proposition that only "procompetitive" justifications may be advanced in defense of a restraint. Other "good reasons" unrelated to the promotion of competition are not cognizable. This principle was of central importance in *Professional Engineers*, when the Court declined an invitation to welcome professional ethical concerns into the realm of admissible justifications.

National Society of Professional Engineers v. United States

435 U.S. 679 (1978)

Justice Stevens.

[1] This is a civil antitrust case brought by the United States to nullify an association's canon of ethics prohibiting competitive bidding by its members. The question is whether the canon may be justified under the Sherman Act, because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety. The District Court rejected this justification without making any findings on the likelihood that competition would produce the dire consequences foreseen by the association. The Court of Appeals affirmed. We granted certiorari to decide whether the District Court should have considered the factual basis for the proffered justification before rejecting it. Because we are satisfied that the asserted defense rests on a fundamental misunderstanding of the Rule of Reason frequently applied in antitrust litigation, we affirm. . . .

[2] The National Society of Professional Engineers (Society) was organized in 1935 to deal with the nontechnical aspects of engineering practice, including the promotion of the professional, social, and economic interests of its members. Its present membership of 69,000 resides throughout the United States and in some foreign countries. Approximately 12,000 members are consulting engineers who offer their services to governmental, industrial, and private clients. Some Society members are principals or chief executive officers of some of the largest engineering firms in the country.

[3] The charges of a consulting engineer may be computed in different ways. He may charge the client a percentage of the cost of the project, may set his fee at his actual cost plus overhead plus a reasonable profit, may charge fixed rates per hour for different types of work, may perform an assignment for a specific sum, or he may combine one or more of these approaches. Suggested fee schedules for particular types of services in certain areas have been promulgated from time to time by various local societies. This case does not, however, involve any claim that the National Society has tried to fix specific fees, or even a specific method of calculating fees. It involves a charge that the members of the Society have unlawfully agreed to refuse to negotiate or even to discuss the question of fees until after a prospective client has selected the engineer for a particular project. Evidence of this agreement is found in § 11(c) of the Society's Code of Ethics, adopted in July 1964.

[4] That section, which remained in effect at the time of trial, provided: "Section 11 — The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding . . . . "c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering

organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professions."

[5] The District Court found that the Society's Board of Ethical Review has uniformly interpreted the "ethical rules against competitive bidding for engineering services as prohibiting the submission of any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services." If the client requires that such information be provided, then § 11(c) imposes an obligation upon the engineering firm to withdraw from consideration for that job. The Society's Code of Ethics thus "prohibits engineers from both soliciting and submitting such price information," and seeks to preserve the profession's "traditional" method of selecting professional engineers. Under the traditional method, the client initially selects an engineer on the basis of background and reputation, not price.

[6] In addition to § 11(c) of the Society's Code of Ethics, the Society's Board of Directors has adopted various "Professional Policy" statements. Policy statement 10-F was issued to "make it clear beyond all doubt" that the Society opposed competitive bidding for all engineering projects. This policy statement was replaced in 1972 by Policy 10-G which permits price quotations for certain types of engineering work—in particular, research and development projects.

[7] Although the Society argues that it has never "enforced" its ban on competitive bidding, the District Court specifically found that the record supports a finding that NSPE and its members actively pursue a course of policing adherence to the competitive bid ban through direct and indirect communication with members and prospective clients. This finding has not been challenged as clearly erroneous.

[8] Having been selected, the engineer may then, in accordance with the Society's canons of ethics, negotiate a satisfactory fee arrangement with the client. If the negotiations are unsuccessful, then the client may withdraw his selection and approach a new engineer.

[9] In 1972 the Government filed its complaint against the Society alleging that members had agreed to abide by canons of ethics prohibiting the submission of competitive bids for engineering services and that, in consequence, price competition among the members had been suppressed and customers had been deprived of the benefits of free and open competition. The complaint prayed for an injunction terminating the unlawful agreement.

[10] In its answer the Society admitted the essential facts alleged by the Government and pleaded a series of affirmative defenses, only one of which remains in issue. In that defense, the Society averred that the standard set out in the Code of Ethics was reasonable because competition among professional engineers was contrary to the public interest. It was averred that it would be cheaper and easier for an engineer to design and specify inefficient and unnecessarily expensive structures and methods of construction. Accordingly, competitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering. Moreover, the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare. For these reasons, the Society claimed that its Code of Ethics was not an unreasonable restraint of interstate trade or commerce. [. . .]

[11] The District Court made detailed findings about the engineering profession, the Society, its members' participation in interstate commerce, the history of the ban on competitive bidding, and certain incidents in which the ban appears to have been violated or enforced. The District Court did not, however, make any finding on the question whether, or to what extent, competition had led to inferior engineering work which, in turn, had adversely affected the public health, safety, or welfare. That inquiry was considered unnecessary because the court was convinced that the ethical prohibition against competitive bidding was "on its face a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act."

[12] Although it modified the injunction entered by the District Court, the Court of Appeals affirmed its conclusion that the agreement was unlawful on its face and therefore "illegal without regard to claimed or possible benefits." [. . .]

[13]. . . [P]etitioner argues that its attempt to preserve the profession's traditional method of setting fees for engineering services is a reasonable method of forestalling the public harm which might be produced by unrestrained competitive bidding. To evaluate this argument it is necessary to identify the contours of the Rule of Reason and to discuss its application to the kind of justification asserted by petitioner. [. . .]

[14] One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that "every" contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively. [. . .]

[15] Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions. [. . .]

[16] Price is the central nervous system of the economy, and an agreement that interferes with the setting of price by free market forces is illegal on its face. In this case we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer. While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban impedes the ordinary give and take of the market place, and substantially deprives the customer of the ability to utilize and compare prices in selecting engineering services. On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.

[17] The Society's affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its agreement. The Society argues that the restraint is justified because bidding on engineering services is inherently imprecise, would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health. The logic of this argument rests on the assumption that the agreement will tend to maintain the price level; if it had no such effect, it would not serve its intended purpose. The Society nonetheless invokes the Rule of Reason, arguing that its restraint on price competition ultimately inures to the public benefit by preventing the production of inferior work and by insuring ethical behavior. [T]his Court has never accepted such an argument. [. . .]

[18] It may be, as petitioner argues, that competition tends to force prices down and that an inexpensive item may be inferior to one that is more costly. There is some risk, therefore, that competition will cause some suppliers to market a defective product. Similarly, competitive bidding for engineering projects may be inherently imprecise and incapable of taking into account all the variables which will be involved in the actual performance of the project. Based on these considerations, a purchaser might conclude that his interest in quality—which may embrace the safety of the end product—outweighs the advantages of achieving cost savings by pitting one competitor against another. Or an individual vendor might independently refrain from price negotiation until he has satisfied himself that he fully understands the scope of his customers' needs. These decisions might be reasonable; indeed, petitioner has provided ample documentation for that thesis. But these are not reasons that satisfy the Rule; nor are such individual decisions subject to antitrust attack. [. . .]

[19] The Sherman Act does not require competitive bidding; it prohibits unreasonable restraints on competition. Petitioner's ban on competitive bidding prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace. It is this restraint that must be justified under the Rule of Reason, and petitioner's attempt to do so on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act. [. . .]

[20] The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The heart of our national economic policy long has been faith in the value of competition. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

[21] The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers. [. . .]

[22] In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable. [. . .]

* * *

The Supreme Court's two most recent applications of the rule of reason have concerned very different practices. In *American Express* (2018) the Court considered a rule, adopted by the American Express credit card system, that prevented merchants from "steering" consumers to other credit cards (*e.g.*, encouraging them to use cards that charge merchants lower fees). In that case, very controversially, the Court held that the government plaintiffs had failed to discharge their burden at step one of the rule of reason, despite a lengthy trial record that established that the antisteering rules had driven merchant fees up. *AmEx* sharply presented the question of what constitutes a market-wide anticompetitive effect, and what factors courts may consider when evaluating the sufficiency of a plaintiff's showing. For context, you might find it helpful to look back at the discussion of AmEx's market-definition holding in Chapter III.[312] And in *Alston* (2021) the Court condemned some of the NCAA's limitations on certain forms of compensation to student athletes. By contrast with *AmEx*, anticompetitive effect was relatively straightforward in *Alston* (although the case concerned competition qua *purchasers of labor*, so rather than supracompetitive prices the evidence of harm focused on infracompetitive wages): the *Alston* decision helpfully ventilated the concept of a procompetitive justification.

CASENOTE: Ohio v. American Express Co.

138 S.Ct. 2274 (2018)

As you will remember from Chapter III, *AmEx* dealt with the imposition by American Express of "antisteering" rules that prevented merchants from nudging customers to other credit cards, even if they charged lower merchant fees. As we saw, the Court held that a single market should be defined to include both sides of the credit-card platform: services to merchants *and* those to cardholders. But *AmEx* is also notable for its application of the rule of reason. In the district court, the plaintiffs had won after a lengthy trial. By the time the appeal reached the Supreme Court, the plaintiffs had opted to proceed only on their direct-evidence case, relying on evidence that the antisteering rules had led to an increase in merchant fees.

[312] *See supra* § III.C.4.

The Court set out the rule of reason in terms that omitted any reference to step-three balancing of anticompetitive and procompetitive effects. And it held that plaintiffs had failed at step one: they had not shown *prima facie* harm. "[T]he plaintiffs' argument about merchant fees wrongly focuses on only one side of the two-sided credit-card market. . . . [T]he product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone."

So, what would have been enough? Well, the Court explained, "[t]o demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market." But, on this record, the plaintiffs had "failed to offer any reliable measure of Amex's transaction price or profit margins."

The Court preferred alternative, procompetitive explanations for the higher prices: "Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. . . . Amex uses its higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants." And the Court was moved by evidence that "[t]he output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%. Where output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand."

Finally, in an apparent evaluation of "indirect" evidence of competitive harm, the Court stated that "there is nothing inherently anticompetitive about Amex's antisteering provisions. These agreements actually stem negative externalities in the credit-card market and promote interbrand competition. When merchants steer cardholders away from Amex at the point of sale, it undermines the cardholder's expectation of "welcome acceptance"—the promise of a frictionless transaction."

There are at least two ways to read *AmEx*'s application of the rule of reason. One is a narrow, almost traditional one: a plaintiff cannot discharge its obligation at step one by simply pointing to a nominal increase in price paid by a subset of customers in the relevant market. Step one requires a showing of *market-wide* effects. Thus, for example, at step one a plaintiff cannot succeed by showing only that customers wearing blue hats paid more: for that tells us nothing about whether the challenged practice is harmful overall. (Remember that merchants were only a subset of customers in the relevant market, given the inclusion of cardholders as well.)

The other reading is much more radical. On this view, the Court indicated that plaintiffs can be required, after producing evidence of harm in the form of a demonstrated price increase, to *disprove the possibility of a benign or procompetitive explanation for the price increase*—as part of their affirmative case! This appears to violate the principle that redeeming benefits (such as the procompetitive effects of improved service or more valuable rewards, or the stimulation of demand) must be proved by a defendant, not disproved by a plaintiff at step one.

Time will tell which reading of *AmEx* becomes the authoritative one.

Justice Breyer's dissent charted a very different course. In articulating the core rule-of-reason framework, he gave lukewarm endorsement to balancing, noting that a plaintiff may "perhaps" prevail at step three by showing "that the legitimate objective does not outweigh the harm that competition will suffer, *i.e.*, that the agreement 'on balance' remains unreasonable." He pointed out that market definition is normally unnecessary when a plaintiff has offered direct evidence of anticompetitive effects, such as increased prices. And he protested that the majority had analyzed American Express's claimed justifications at step one of the rule of the reason, rather than step two, and moreover completely ignored an extensive district court record concluding that no such justifications had been proved at trial!

National Collegiate Athletic Association v. Alston

141 S.Ct. 2141 (2021)

Justice Gorsuch.

[1] In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces "yield the best allocation" of the Nation's resources. The plaintiffs before us brought this lawsuit alleging that the National Collegiate Athletic Association (NCAA) and certain of its member institutions violated this policy by agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams. After amassing a vast record and conducting an exhaustive trial, the district court . . . refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court struck down NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships. Before us, the student-athletes do not challenge the district court's judgment. But the NCAA does. In essence, it seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints. [. . .]

[2] The plaintiffs are current and former student-athletes in men's Division I . . . football and men's and women's Division I basketball. They filed a class action against the NCAA and 11 Division I conferences (for simplicity's sake, we refer to the defendants collectively as the NCAA). The student-athletes challenged the "current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services." Specifically, they alleged that the NCAA's rules violate § 1 of the Sherman Act, which prohibits contracts, combinations, or conspiracies in restraint of trade or commerce. [. . .]

[3] . . . This Court has long recognized that in view of the common law and the law in this country when the Sherman Act was passed, the phrase "restraint of trade" is best read to mean "undue restraint." Determining whether a restraint is undue for purposes of the Sherman Act presumptively calls for what we have described as a rule of reason analysis. That manner of analysis generally requires a court to conduct a fact-specific assessment of market power and market structure to assess a challenged restraint's actual effect on competition. Always, the goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

[4] In applying the rule of reason, the district court began by observing that the NCAA enjoys "near complete dominance of, and exercises monopsony power in, the relevant market"—which it defined as the market for "athletic services in men's and women's Division I basketball and . . . football, wherein each class member participates in his or her sport-specific market." The "most talented athletes are concentrated" in the "markets for Division I basketball and . . . football." There are no "viable substitutes," as the "NCAA's Division I essentially *is* the relevant market for elite college football and basketball." In short, the NCAA and its member schools have the "power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance."

[5] The district court then proceeded to find that the NCAA's compensation limits "produce significant anticompetitive effects in the relevant market." Though member schools compete fiercely in recruiting student-athletes, the NCAA uses its monopsony power to "cap artificially the compensation offered to recruits." In a market without the challenged restraints, the district court found, "competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result. "Student-athletes would receive offers that would more closely match the value of their athletic services." . . .

[6] The district court next considered the NCAA's procompetitive justifications for its restraints. The NCAA suggested that its restrictions help increase output in college sports and maintain a competitive balance among teams. But the district court rejected those justifications, and the NCAA does not pursue them here. The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports. Admittedly, this asserted benefit accrues to consumers in the NCAA's seller-side consumer market rather than to student-athletes whose

compensation the NCAA fixes in its buyer-side labor market. But, the NCAA argued, the district court needed to assess its restraints in the labor market in light of their procompetitive benefits in the consumer market—and the district court agreed to do so.

[7] Turning to that task, the court observed that the NCAA's conception of amateurism has changed steadily over the years. The court noted that the NCAA "nowhere defines the nature of the amateurism they claim consumers insist upon." [. . .]

[8] Nor did the district court find much evidence to support the NCAA's contention that its compensation restrictions play a role in consumer demand. As the court put it, the evidence failed "to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand . . . ." At the same time, however, the district court did find that one particular aspect of the NCAA's compensation limits "may have some effect in preserving consumer demand." Specifically, the court found that rules aimed at ensuring "student-athletes do not receive unlimited payments unrelated to education" could play some role in product differentiation with professional sports and thus help sustain consumer demand for college athletics.

[9] The court next required the student-athletes to show that "substantially less restrictive alternative rules" existed that "would achieve the same procompetitive effect as the challenged set of rules." . . . The court rejected the student-athletes' challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education. These may be price-fixing agreements, but the court found them to be reasonable in light of the possibility that "professional-level cash payments could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand."

[10] The court reached a different conclusion for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships. On no account, the court found, could such education-related benefits be "confused with a professional athlete's salary." If anything, they "emphasize that the recipients are students." Enjoining the NCAA's restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports. [. . .]

[11] . . . [The Ninth Circuit] affirmed in full, explaining its view that the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports.

[12] Unsatisfied with this result, the NCAA asks us to reverse to the extent the lower courts sided with the student-athletes. . . .

[13] . . . [S]ome of the issues most frequently debated in antitrust litigation are uncontested. The parties do not challenge the district court's definition of the relevant market. They do not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor. Nor does the NCAA dispute that its member schools compete fiercely for student-athletes but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.

[14] Other significant matters are taken as given here too. No one disputes that the NCAA's restrictions *in fact* decrease the compensation that student-athletes receive compared to what a competitive market would yield. No one questions either that decreases in compensation also depress participation by student-athletes in the relevant labor market—so that price and quantity are both suppressed.

[15] Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market. Some *amici* argue that "competition in input markets is incommensurable with competition in output markets," and that a court should not "trade off" sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury. But the parties before us do not pursue this line. [. . .]

[16] While the NCAA devotes most of its energy to resisting the rule of reason in its usual form, the league lodges some objections to the district court's application of it as well.

[17] When describing the rule of reason, this Court has sometimes spoken of a three-step, burden-shifting framework as a means for distinguishing between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. [Ohio v. American Express Co., 585 U. S. __, 138 S.Ct. 2274, 2284 (2018)]. As we have described it, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect. Should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. [. . .]

[18] In the proceedings below, the district court followed circuit precedent to apply a multistep framework closely akin to *American Express*'s. As its first step, the district court required the student-athletes to show that the challenged restraints produce significant anticompetitive effects in the relevant market. . . . As we have seen, based on a voluminous record, the district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes' labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. Perhaps even more notably, the NCAA did not meaningfully dispute this conclusion.

[19] [T]he district court proceeded to the second step, asking whether the NCAA could muster a procompetitive rationale for its restraints. This is where the NCAA claims error first crept in. On its account, the district court examined the challenged rules at different levels of generality. At the first step of its inquiry, the court asked whether the NCAA's entire package of compensation restrictions has substantial anticompetitive effects *collectively*. Yet, at the second step, the NCAA says the district court required it to show that each of its distinct rules limiting student-athlete compensation has procompetitive benefits *individually*. The NCAA says this mismatch had the result of effectively—and erroneously—requiring it to prove that each rule is the least restrictive means of achieving the procompetitive purpose of differentiating college sports and preserving demand for them.

[20] We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess degrees of reasonable necessity so that the lawfulness of conduct turns upon judgments of degrees of efficiency. [. . .]

[21] While we agree with the NCAA's legal premise, we cannot say the same for its factual one. Yes, at the first step of its inquiry, the district court held that the student-athletes had met their burden of showing the NCAA's restraints collectively bear an anticompetitive effect. And, given that, yes, at step two the NCAA had to show only that those same rules collectively yield a procompetitive benefit. The trouble for the NCAA, though, is not the level of generality. It is the fact that the district court found unpersuasive much of its proffered evidence. Recall that the court found the NCAA failed to establish that the challenged compensation rules have any direct connection to consumer demand.

[22] To be sure, there is a wrinkle here. While finding the NCAA had failed to establish that its rules collectively sustain consumer demand, the court did find that some of those rules may have procompetitive effects to the extent they prohibit compensation unrelated to education, akin to salaries seen in professional sports leagues. The court then proceeded to what corresponds to the third step of the *American Express* framework, where it required the student-athletes to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules. And there, of course, the district court held that the student-athletes partially succeeded—they were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits.

[23] Even acknowledging this wrinkle, we see nothing about the district court's analysis that offends the legal principles the NCAA invokes. The court's judgment ultimately turned on the key question at the third step: whether the student-athletes could prove that substantially less restrictive alternative rules existed to achieve the same procompetitive benefits the NCAA had proven at the second step. Of course, deficiencies in the NCAA's

proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, however framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits.

[24] Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints patently and inexplicably stricter than is necessary to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act. That demanding standard hardly presages a future filled with judicial micromanagement of legitimate business decisions. [. . .]

[25] Finally, the NCAA attacks as indefensible the lower courts' holding that substantially less restrictive alternatives exist capable of delivering the same procompetitive benefits as its current rules. The NCAA claims, too, that the district court's injunction threatens to micromanage its business.

[26] Once more, we broadly agree with the legal principles the NCAA invokes. As we have discussed, antitrust courts must give wide berth to business judgments before finding liability. Similar considerations apply when it comes to the remedy. Judges must be sensitive to the possibility that the continuing supervision of a highly detailed decree could wind up impairing rather than enhancing competition. . . .

[27] Once again, though, we think the district court honored these principles. The court enjoined only restraints on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like. The court did so, moreover, only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules.

[28] Even with respect to education-related benefits, the district court extended the NCAA considerable leeway. As we have seen, the court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court's injunction to reflect that definition. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. The court said that the NCAA and its members could continue fixing education-related cash awards, too—so long as those limits are never lower than the limit on awards for athletic performance. And the court emphasized that its injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still. [. . .]

Affirmed.

Justice Kavanaugh, concurring.

[29] [T]his case involves only a narrow subset of the NCAA's compensation rules—namely, the rules restricting the *education-related* benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools. The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.

[30] I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws. Three points warrant emphasis.

[31] *First*, the Court does not address the legality of the NCAA's remaining compensation rules. As the Court says, the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined.

[32] *Second*, although the Court does not weigh in on the ultimate legality of the NCAA's remaining compensation rules, the Court's decision establishes how any such rules should be analyzed going forward. After today's decision, the NCAA's remaining compensation rules should receive ordinary "rule of reason" scrutiny under the antitrust laws. . . . And the Court stresses that the NCAA is not otherwise entitled to an exemption from the antitrust laws. . . .

[33] *Third*, there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification.

[34] The NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules.

[35] The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid.

[36] In my view, that argument is circular and unpersuasive. . . . The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood.

[37] Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.

[38] The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. [. . .]

[39] . . . [T]raditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.

NOTES

1) Did the Court apply the same rule of reason in *Chicago Board of Trade*, *AmEx* and *Alston*?
2) The Court in *Chicago Board of Trade* says the legality of the restraint in that case must be judged according to whether it encourages or impedes competition. Why is the restraint at issue in this case analyzed differently than the restraint in *Socony-Vacuum*? What is the difference between the two restraints that leads the Supreme Court to treat the restraint in *Socony-Vacuum* as per se illegal, while inquiring more carefully into the competitive effects of the restraint in *Chicago Board of Trade*? Is the Court right to analyze the two restraints so differently?
3) Isn't the restraint at issue in *Chicago Board of Trade* nakedly anticompetitive: specifically, isn't it best understood as an agreement to refrain from price competition during long periods of the day? If not, why not?

4) In *Chicago Board of Trade*, do you find the Court's account of the procompetitive effects of the restraint to be convincing? What do you think motivated the Board to impose the "call" rule?
5) The Court in *Chicago Board of Trade* mentioned that rules or practices of a broadly similar kind were "common." Assuming that that statement was correct, should it matter? Should courts consider whether a particular practice is common as a factor in favor of its legality?
6) Why did the Court in *Professional Engineers* apply the rule of reason rather than the per se rule? Was the restraint not a form of price-fixing, if the only purported justification was not cognizable?
7) On the other hand: why was the purpose of the restraint in *Professional Engineers* not a procompetitive one? Could it have been characterized as such?
8) In *AmEx*, the Court emphasized that credit card utilization was generally increasing. Why and how does this matter to an assessment of the effects of the challenged antisteering rules?
9) The *AmEx* opinion can be understood to have three striking features: first, its approach to market definition (specifically: including in the same market services that are not substitutes for one another); second, its approach to the plaintiff's affirmative burden in showing *prima facie* harm (specifically: holding that an increase in nominal price to merchants was not sufficient to establish harm to competition[313]); and, third, its implicit holding that (possible) benefits to cardholders in that case justified harms to merchants, despite the norm that harms to one group must be justified by reference to benefits to the same group.
10) Do you agree with Justice Kavanaugh's suggestion in *Alston* that the remainder of the NCAA's compensation rules are likely to fail once subjected to rule of reason analysis? Do you agree with him that the NCAA's purported justification that those rules help define the product that college sports offer—*i.e.*, amateur athletic competition—is "circular and unpersuasive"?
11) Can "amateurism" be a procompetitive justification?
12) Both *AmEx* and *Alston* seem to implicitly accept the idea that procompetitive benefits are relevant, and can be redeeming, even if the benefits accrue to different persons from those who are harmed (merchants v. cardholders; athletes v. consumers). Do you agree with that approach? What are its advantages and disadvantages?[314]

3. Intermediate Scrutiny

Finally, a small number of agreements are not quite familiar and nakedly harmful enough to warrant *per se* condemnation, but are facially suspicious enough to warrant so-called "quick look" analysis. Such agreements trigger what amounts to a defeasible presumption of anticompetitive effect. The Supreme Court has indicated that this approach applies only to agreements that are so obviously harmful that even "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" such that "the great likelihood of anticompetitive effects can easily be ascertained."[315]

These agreements are not *per se* illegal—a defendant can still introduce evidence of justification—but they allow the plaintiff to discharge its own affirmative burden by pointing to the fact that the agreement is obviously harmful, rather than through a detailed showing of anticompetitive effects of the kind required at step one of the rule of reason. (However, as you may remember from earlier, a plaintiff who fears that a court may disagree with its proposed choice of standard may feel compelled to develop such a full-court-press showing anyway.[316])

There is plenty of debate about how intermediate scrutiny does and should work, and courts and commentators express a wide variety of views about how the nature of an agreement should affect the standard against which it is measured under Section 1. In particular, it is not quite clear that the intermediate scrutiny standard is very different in kind from the rule of reason. After all, the regular rule of reason includes plenty of room to consider

[313] In fact, despite the Supreme Court's description of the record, the district court below had found—in factual findings that the Supreme Court did not purport to disturb—that the antisteering rules had caused overall harm to consumers as well as merchants, and that the claimed procompetitive justifications were pretextual. *See* United States v. Am. Express Co., 88 F. Supp. 3d. 143, 150, 208, 215, 225–38 (E.D.N.Y. 2015).

[314] *See supra* notes 295 to 299 and accompanying text (out of market benefits under Section 1).

[315] California Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (collecting cases).

[316] *See supra* note 244 and accompanying text.

the facially anticompetitive nature of an agreement: indeed, some courts have indicated that the rule of reason can sometimes be applied in a "twinkling of an eye," which sounds very much like a "quick look" review.[317] Likewise, the FTC considers some kinds of agreement to be "inherently suspect,"[318] which amounts to a synonym for quick look analysis.[319] As you see the quick-look standard in action, ask yourself whether and how it differs from standard rule-of-reason analysis.

A landmark precedent in quick-look review is the Supreme Court's 1984 opinion in *Board of Regents of the University of Oklahoma*, a major antitrust lawsuit brought against the National Collegiate Athletic Association ("NCAA").

Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. (It has also made considerable contributions over the years to antitrust doctrine.[320]) At issue in the *Board of Regents* litigation was the NCAA's plan for television broadcasts of the football games played by its "Division I" schools. The NCAA licensed to each of two television networks, ABC and CBS, the right to telecast 14 live games (or "exposures") per year. Each network was authorized by the agreement to negotiate directly with NCAA member schools for the right to televise their games. Each network agreed to pay a "minimum aggregate compensation" to NCAA members totaling approximately $132 million over four years, but the agreement did not establish a formula determining compensation for any particular telecast. Instead, the NCAA set a recommended fee for each telecast. The fee was higher for national telecasts, as opposed to regional telecasts or telecasts involving teams outside of Division I, but the fee did not vary with the size of the viewing audience. The networks did not compete for games they both wished to televise, but rather took turns choosing games so that over time they would share in the most desirable telecasts. The bidding network submitted the sole bid to the schools involved in a particular exposure at the price the NCAA had recommended.

The NCAA plan also regulated how the networks selected which games they would telecast. During each 2-year period covered by the plan, the networks were required to telecast games involving at least 82 different schools. No school could appear more than six times, or more than four times nationally, with the appearances to be divided equally between ABC and CBS.

The NCAA stated that its objective was to "reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives."

Finally, and crucially: the NCAA required member schools to televise football games *only* in accordance with the plan. Independent television deals were prohibited.

The member schools of the College Football Association (CFA)—a group of NCAA member schools with major football programs—received a contract offer from NBC that provided for appearances and revenue in excess of what the NCAA plan permitted. The NCAA responded by threatening to punish any CFA member that televised games under the NBC contract. That punishment, the NCAA stated, would extend to the school's entire sports program: not just its football activities. In 1981, CFA members filed an antitrust lawsuit challenging the NCAA's plan. As we will see, the Supreme Court concluded that the plan violated Section 1.

[317] NCAA v. Alston, 141 S. Ct. 2141, 2155 (2021); NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 110 n.39 (1984).

[318] *See* In The Matter Of Polygram Holding, Inc., 136 F.T.C. 310 (F.T.C. 2003).

[319] *See* 1-800 Contacts, Inc. v. FTC, 1 F.4th 102 (2d Cir. 2021); N. Tex. Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008).

[320] *See*, *e.g.*, NCAA v. Alston, 141 S. Ct. 2141 (2021); NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984); O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).

NCAA v. Board of Regents of the University of Oklahoma

468 U.S. 85 (1984)

Justice Stevens.

[1] There can be no doubt that the challenged practices of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.

[2] It is also undeniable that these practices share characteristics of restraints we have previously held unreasonable. The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes. As the District Court found, the policies of the NCAA with respect to television rights are ultimately controlled by the vote of member institutions. By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law. Because it places a ceiling on the number of games member institutions may televise, the horizontal agreement places an artificial limit on the quantity of televised football that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade. Moreover, the District Court found that the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, thereby constituting horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade.

[3] Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal per se" approach because the probability that these practices are anticompetitive is so high; a per se rule is applied when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a per se rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement,[21] on the fact that the NCAA is organized as a nonprofit entity,[22] or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics.[23] Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

[4] . . . What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend

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[21] While judicial inexperience with a particular arrangement counsels against extending the reach of per se rules, the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the per se rule without inquiry into the special characteristics of a particular industry.

[22] There is no doubt that the sweeping language of § 1 applies to nonprofit entities, and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct. Moreover, the economic significance of the NCAA's nonprofit character is questionable at best. Since the District Court found that the NCAA and its member institutions are in fact organized to maximize revenues, it is unclear why petitioner is less likely to restrict output in order to raise revenues above those that could be realized in a competitive market than would be a for-profit entity. Petitioner does not rely on its nonprofit character as a basis for reversal.

[23] While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.

class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

[5] [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979)] squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive. Similarly, as we indicated in [*Sylvania*], a restraint in a limited aspect of a market may actually enhance marketwide competition. Respondents concede that the great majority of the NCAA's regulations enhance competition among member institutions. Thus, despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.

[6] Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both per se rules and the Rule of Reason are employed to form a judgment about the competitive significance of the restraint. A conclusion that a restraint of trade is unreasonable may be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

[7] Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition. . . .[26]

[8] Because it restrains price and output, the NCAA's television plan has a significant potential for anticompetitive effects. The findings of the District Court indicate that this potential has been realized. The District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights. Moreover, the court found that by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market. And, of course, since as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA's television controls.

[9] The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This latter point is perhaps the most significant, since Congress designed the Sherman Act as a consumer welfare prescription. A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit. At the same time, the television plan eliminates competitors from the market, since only those broadcasters able to bid on television rights covering the entire NCAA can compete. Thus, as the District Court found, many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan.

[10] Petitioner argues, however, that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power—no ability to alter the interaction of supply and demand in the market. We must reject this argument for two reasons, one legal, one factual.

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[26] Indeed, there is often no bright line separating per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a "per se" rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis.

[11] As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. Petitioner does not quarrel with the District Court's finding that price and output are not responsive to demand. Thus the plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference. We have never required proof of market power in such a case. This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.

[12] As a factual matter, it is evident that petitioner does possess market power. The District Court employed the correct test for determining whether college football broadcasts constitute a separate market—whether there are other products that are reasonably substitutable for televised NCAA football games. . . . It found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience. These findings amply support its conclusion that the NCAA possesses market power. Indeed, the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics is vivid evidence of the uniqueness of this product. . . . It inexorably follows that if college football broadcasts be defined as a separate market—and we are convinced they are—then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts. . . .

[13] Thus, the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market. We turn now to the NCAA's proffered justifications.

[14] Relying on [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979)], petitioner argues that its television plan constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. While joint ventures have no immunity from the antitrust laws, as *Broadcast Music* indicates, a joint selling arrangement may make possible a new product by reaping otherwise unattainable efficiencies. The essential contribution made by the NCAA's arrangement is to define the number of games that may be televised, to establish the price for each exposure, and to define the basic terms of each contract between the network and a home team. The NCAA does not, however, act as a selling agent for any school or for any conference of schools. The selection of individual games, and the negotiation of particular agreements, are matters left to the networks and the individual schools. Thus, the effect of the network plan is not to eliminate individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations. Unlike *Broadcast Music*'s blanket license covering broadcast rights to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a non-competitive market.

[15] The District Court did not find that the NCAA's television plan produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights; to the contrary it concluded that NCAA football could be marketed just as effectively without the television plan. There is therefore no predicate in the findings for petitioner's efficiency justification. Indeed, petitioner's argument is refuted by the District Court's finding concerning price and output. If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games. The District Court's contrary findings accordingly undermine petitioner's position. In light of these findings, it cannot be said that the agreement on price is necessary to market the product at all. In *Broadcast Music*, the availability of a package product that no individual could offer enhanced the total volume of music that was sold. Unlike this case, there was no limit of any kind placed on the volume that might be sold in the entire market and each individual remained free to sell his own music without restraint. Here production has been limited, not enhanced. No individual school is free to televise its own games without restraint. The NCAA's efficiency justification is not supported by the record.

[16] Neither is the NCAA's television plan necessary to enable the NCAA to penetrate the market through an attractive package sale. Since broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its

nonexistent competitors. This is borne out by the District Court's finding that the NCAA's television plan reduces the volume of television rights sold.

[17] Throughout the history of its regulation of intercollegiate football telecasts, the NCAA has indicated its concern with protecting live attendance. This concern, it should be noted, is not with protecting live attendance at games which are shown on television; that type of interest is not at issue in this case. Rather, the concern is that fan interest in a televised game may adversely affect ticket sales for games that will not appear on television.

[18] Although . . . studies in the 1950's provided some support for the thesis that live attendance would suffer if unlimited television were permitted, the District Court found that there was no evidence to support that theory in today's market. Moreover . . . the television plan has evolved in a manner inconsistent with its original design to protect gate attendance. Under the current plan, games are shown on television during all hours that college football games are played. The plan simply does not protect live attendance by ensuring that games will not be shown on television at the same time as live events.

[19] There is, however, a more fundamental reason for rejecting this defense. The NCAA's argument that its television plan is necessary to protect live attendance is not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games. At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market. The television plan protects ticket sales by limiting output—just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act. The Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.

[20] Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case. We agree with the first part of the argument but not the second.

[21] Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

[22] The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any one league. The plan is nationwide in scope and there is no single league or tournament in which all college football teams complete. There is no evidence of any intent to equalize the strength of teams in Division I–A with those in Division II or Division III, and not even a colorable basis for giving colleges that have no football program at all a voice in the management of the revenues generated by the football programs at other schools. The interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors.

[23] The television plan is not even arguably tailored to serve such an interest. . . . The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. At the same time . . . the NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan, and which are "clearly sufficient" to preserve competitive balance to the extent it is within the NCAA's power to do so. . . . No other NCAA sport employs a similar plan, and in

particular the court found that in the most closely analogous sport, college basketball, competitive balance has been maintained without resort to a restrictive television plan.

[24] Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court's unambiguous and well-supported finding that many more games would be televised in a free market than under the NCAA plan. The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product. The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose. [. . .]

Affirmed.

* * *

The FTC has its own version of an abbreviated quick look analysis, known as the "inherently suspect" standard.[321] A seminal statement of that standard is found in the FTC's *PolyGram* litigation, which involved an agreement among music distributors to refrain from advertising products that competed with an album that they were distributing jointly.

The FTC's "Inherently Suspect" Standard and the PolyGram Litigation

In the Matter of PolyGram Holding, Inc., 136 F.T.C. 310 (2003); PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005)

The FTC has its own version of an abbreviated quick look analysis, which it calls the "inherently suspect" standard. A seminal statement of that standard is found in *PolyGram*. That case involved a joint venture between two music distributors: PolyGram and Warner. Each had previously distributed one album by the "Three Tenors" (Luciano Pavarotti, Plácido Domingo, and José Carreras) at a previous World Cup: PolyGram distributed the album for World Cup 1990 in Italy and Warner did so for World Cup 1994 in the United States. The two distributors subsequently cooperated to jointly distribute a third album for World Cup 1998. When they did so, the distributors also agreed that each of them would restrict promotion of their own Three Tenors albums.

The FTC challenged this agreement, and the Commission held—in a unanimous opinion by Chairman Muris—that no detailed proof of anticompetitive effects was necessary because the agreement was "inherently suspect." In a close echo of the Supreme Court's quick-look framework, the Commission stated: "A plaintiff may avoid full rule of reason analysis, including the pleading and proof of market power, if it demonstrates that the conduct at issue is inherently suspect owing to its likely tendency to suppress competition. Such conduct ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation."

If this showing is made, the Commission explained, then "the defendant can avoid summary condemnation only by advancing a legitimate justification for those practices. Such justifications may consist of plausible reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question; or they may consist of reasons why the practices are likely to have beneficial effects for consumers." Only if the defendant can point to "cognizable" (*i.e.*, procompetitive) justifications which are "plausible" (*i.e.*, "cannot be rejected without extensive factual inquiry") must a plaintiff take the longer road by making a more detailed showing of harm.

After losing before the Commission, PolyGram appealed to the D.C. Circuit. Writing for the Court of Appeals, Chief Judge Douglas Ginsburg—a prominent antitrust expert—upheld the Commission's decision. Identifying the FTC's "inherently suspect" standard with the Supreme Court's quick-look framework, the court confirmed that

[321] *See, e.g.*, North Texas Specialty Physicians v. FTC, 528 F.3d 346, 360–61 (5th Cir. 2008) ("The 'inherently suspect' paradigm . . . is a "quick-look" rule-of-reason analysis.").

liability without proof of "actual anticompetitive effect" was appropriate for "restraints that judicial experience and economic learning have shown to be likely to harm consumers." In other words, if, "based on economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful." This analysis, the court held, was appropriate in cases involving a "close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare."

Applying that rule, Chief Judge Ginsburg agreed that the agreement between PolyGram and Warner was indeed inherently suspect and thus could be condemned without detailed proof of harm. The mere fact of some procompetitive cooperation was not a license to eliminate existing rivalry. After all, he explained: even if General Motors entered a joint venture with a rival to produce an SUV, "an agreement to restrain prices and advertising on existing SUVs" would not for that reason be lawful. "And it simply does not matter whether the new SUV would have been profitable absent the restraint; if the only way a new product can profitably be introduced is to restrain the legitimate competition of older products, then one must seriously wonder whether consumers are genuinely benefitted by the new product."

NOTES

1) Does quick-look analysis involve a different standard from rule-of-reason analysis, or is it just a particular application of the rule of reason in which anticompetitive effect can be inferred from the nature and context of the restraint?
2) Is the FTC's inherently-suspect standard in *Polygram*, as understood by the D.C. Circuit, the same standard as the one applied by the Supreme Court in *Board of Regents*?
3) In *Board of Regents*, at paragraphs 11 and 13 of the extract, the Court described the core principle in intermediate-scrutiny cases. Why did the Court call the restraint "naked," given that the joint enterprise of football competition was (presumably) a legitimate and procompetitive one? What feature, or features, of the joint practice triggered the elevated scrutiny in this case? Can you imagine a variation that would deserve full rule-of-reason analysis?
4) The Court in *Board of Regents* described the defendant's justification burden as a "heavy" one. Does the Court's treatment of justifications seem more skeptical, or more demanding, than in the standard rule of reason cases you read above?
5) What lessons does *Board of Regents* teach about what counts as a "procompetitive" justification? Could you give a coherent case for including in that category the goals that the Court considers and rejects?
6) The majority in *Board of Regents* acknowledges that the NCAA's television plan fixes prices and restricts output (i.e., it limits the number of televised games). Isn't that tantamount to admitting that the television plan is equivalent to price fixing? If so, why did the Court not simply apply per se analysis?
7) In footnote 26 of *Board of Regents*, the Court says that "there is often no bright line separating *per se* from Rule of Reason analysis." Is that right? Should it be?
8) Why did the Court go out of its way in footnote 23 of *Board of Regents* to say that, "as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity"? What other businesses, if any, should enjoy this presumption and what is its legal effect?

D. Some Further Reading

Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 Vand. L. Rev. 1 (2016)

Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 Wash. & Lee L. Rev. 49 (2007)

Rocco J. De Grasse, Maricopa County *and the Problem of Per Se Characterization in Horizontal Price Fixing Cases*, 18 Val. U. L. Rev. 1007 (1984)

Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81 (2018)

Sheldon Kimmel, *How and Why the Per Se Rule Against Price- Fixing Went Wrong*, 19 Sup. Ct. Econ. Rev. 1 (2011)

William E. Kovacic, *The Future Adaptation of the Per Se Rule of Illegality in U.S. Antitrust Law*, Col. Bus. L. Rev. 33 (2021)

Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 Geo. L.J. 835 (2016)

Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 U.C.L.A. L. Rev. 4 (2020)

Donald F. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962)