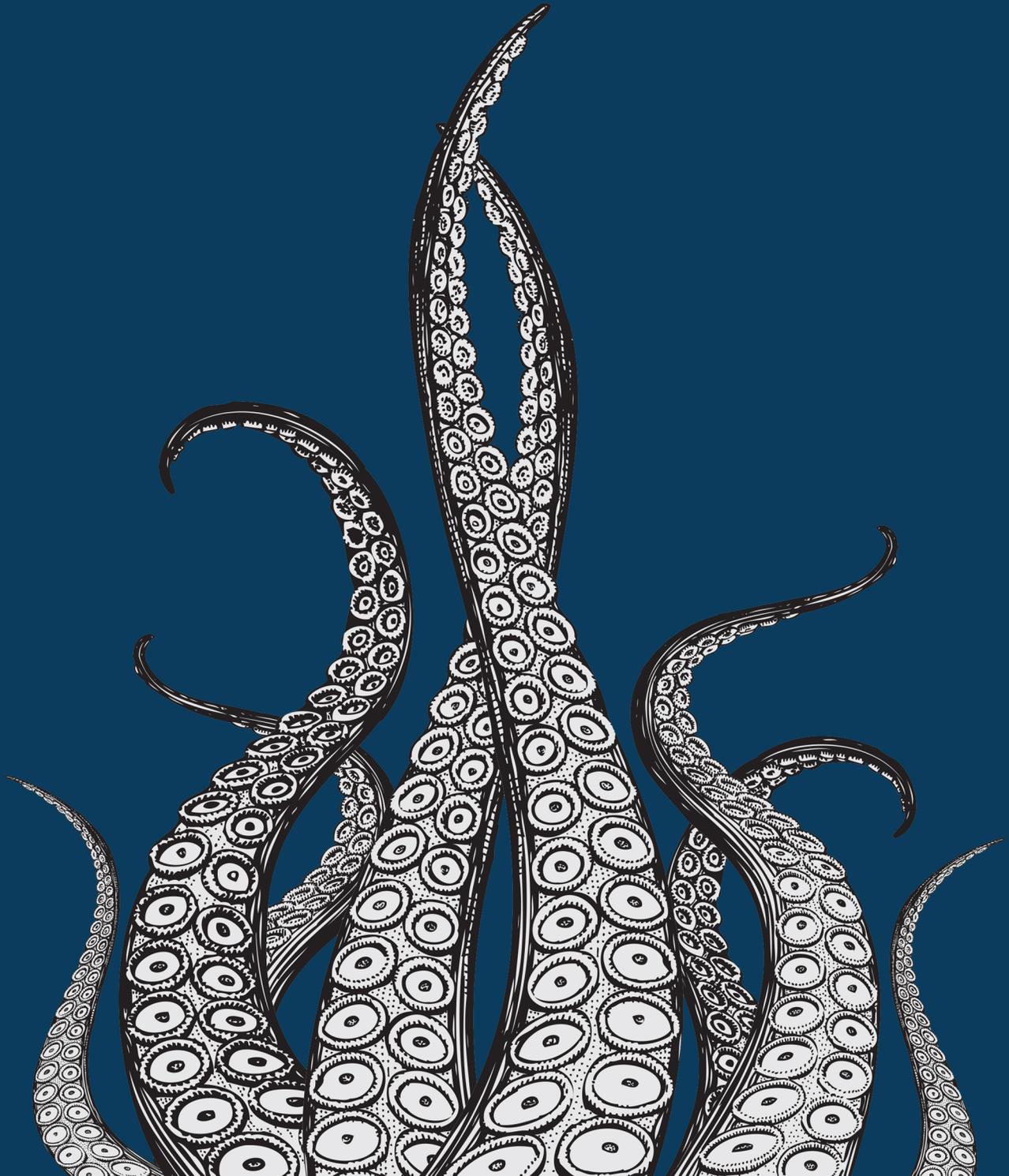




Decoding Antitrust Law: A Primer for Advocates



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A central principle of our free market economy is competition—it motivates businesses to create newer and better products and to keep prices low in order to attract customers from competitors. Antitrust law protects competition by preventing and stopping anticompetitive behavior. This area of law has developed over many decades to protect competition and promote an environment in which people are free to start new businesses that can grow and succeed.

Antitrust is a powerful legal tool, but just one of many legal and regulatory approaches that promote competition, innovation, diversity, choice, and fair pricing. People often see businesses behaving in ways they don't like, but we cannot assume this must be an antitrust violation. Many business activities that appear to be anticompetitive, harmful, or even monopolistic are not violations of antitrust law. For example, competition from Amazon may put a local retailer out of business. If this result is just because Amazon offered cheaper prices because the large scale of its operations made it cheaper to make and distribute the product, this would not violate the antitrust laws. If we think this behavior is harmful to the survival of local small businesses, we need to advocate for new laws that protect or promote local businesses, not an antitrust investigation. On the other hand, if Amazon signed a deal with the two major suppliers of widgets (a favorite product for antitrust examples) that dominate the widget market to sell their widgets only on Amazon, and that put a local retailer out of business, that's more likely to be an antitrust violation.

The goal of this primer is to help consumers educate themselves about antitrust law and to explain how they can best help to keep companies accountable for anticompetitive behavior. We will begin with a short history of antitrust law before taking a deeper dive into the nuts and bolts of the law itself and illustrating some of its limitations. The primer concludes by outlining steps that concerned consumers can take to help ensure that antitrust law is being aggressively enforced, as well as how we can promote competition through other policy tools.

A Brief History of Federal Antitrust

Before we delve into the substance of antitrust law, it may be helpful to take a quick look back at the history and development of federal antitrust law to provide some context to the current debates.

Formative Years

The United States has a history of strong antitrust enforcement. The story begins in the late 1800s when the great trusts like U.S. Steel and Standard Oil had consolidated their industries into monopolies. These companies' complete control over their respective industries led to higher prices and limited product choice for consumers. To address this kind of industry consolidation and its negative effects, Congress passed the Sherman Antitrust Act in 1890. The

Sherman Act targeted both collusive behavior, companies working together anticompetitively, and anticompetitive behavior by individual corporations.

The Sherman Act was written very broadly, prohibiting, “[e]very contract, combination... or conspiracy, in restraint of trade...” In the landmark case of *Standard Oil*, the Supreme Court held that the law calls for the “exercise of judgment” on a case-by-case basis in order to determine whether a certain act or contract is an *unreasonable* restraint on trade and thus violates the statute—creating a balancing test of procompetitive and anticompetitive effects. This standard enables the courts to use their judgment and allows the antitrust laws to grow and change with economic learning.

Congress passed both the Clayton Act and the FTC Act in 1914. Both the Clayton Act and the FTC Act significantly increased the government’s ability to police mergers and anticompetitive harms. The *Clayton Act* was implemented to target anticompetitive business practices that the Sherman Act did not specifically prohibit. The Clayton Act targeted mergers, price discrimination, tying products, and exclusive dealing arrangements.¹

The *FTC Act* established a new agency, the Federal Trade Commission (“FTC”), to protect consumers. The statute gave the FTC authority to investigate and punish companies that engage in unfair methods of competition and deceptive practices. The FTC’s competition authority encompasses Sherman Act and Clayton Act violations. Section 5 of the FTC Act granted the FTC broader authority to address anticompetitive behavior that does not neatly fit within the jurisdiction of the Sherman and Clayton Acts, but today the FTC *generally limits* exercise of that “Section 5 authority” to address competition concerns that otherwise fit within the body of law specifically developed under the Sherman Act or the Clayton Act.

Today, antitrust cases under the Sherman Act and the Clayton Act can be brought by the FTC, the Department of Justice, state Attorneys General, as well as private companies and individuals.

The Height of Antitrust in the 1960s

An important development in antitrust law came in the early 1960s with the case of *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). The case involved a proposed merger between Philadelphia’s second and third largest banks. This merger was problematic because it would have given one bank over a third of the market and would have placed the four largest banks in control of 75 percent of the market.² In a landmark antitrust decision, the Supreme

¹ Price discrimination is charging different prices to different customers. These practices are no longer considered illegal under the antitrust laws. Tying products is requiring buyers to purchase two different products together when the buyers may prefer to buy them separately. This usually occurs if a seller has tight control over a particular product. It’s sometimes used to leverage a monopoly in one product into increased sales in another. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). Mergers and exclusive dealing arrangements will be addressed in more detail in the Law and Applications section.

² In antitrust cases, it is necessary to define the relevant market of competitors and the extent to which different companies should be included as part of the competition. For example, in a banking case, to what extent should credit unions be treated as competitors in the relevant market? Including more or fewer companies in the market can

Court established the “Philadelphia National Bank Presumption,” a presumption that mergers significantly increasing market concentration in a properly defined market are illegal unless proven otherwise.

This period also saw the height of merger and antitrust enforcement. Mergers and anticompetitive behaviors were blocked and the Supreme Court, led by Chief Justice Earl Warren, set strong precedents for antitrust law.

Antitrust’s Steady Retreat

The enforcement of the antitrust laws came under aggressive attack in the second half of the 20th century. A group of influential scholars, such as Aaron Director and Robert Bork, many of whom were associated with the University of Chicago, developed a substantial and influential body of work that sought to demonstrate that certain business practices generally considered to be anticompetitive under traditional antitrust could, in fact, be efficient and procompetitive. The Chicago School had a significant influence on antitrust law and policy, particularly in the courts. As a result, the last thirty years have seen a significant narrowing of antitrust, including a reduction in enforcement agency activity, in favor of a hands-off approach.

Selected Case Summaries Illustrating Some Retreats

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

In *Brooke Group*, the Supreme Court severely curtailed predatory pricing, previously a fairly clear violation of antitrust law. Predatory pricing is a strategy that larger companies can use to run smaller companies out of business, offering very low prices that a smaller company cannot meet to drive the smaller companies out of the market. Once the smaller companies are defunct or no longer able to affect enough of the market to compete effectively against the large company, the larger company will presumably not only be able to raise its prices and recoup its losses but also increase its overall profitability. In *Brooke Group*, the violation was limited to only those instances in which the larger firm sells below its cost in the present with the reasonable expectation to recoup its losses later on. This is much more difficult to prove because of the assumption the court made that if a company raised its prices on a product enough to recoup its losses, it would likely attract other companies into the market, referred to as “new entrants,” to compete the prices back down and make predation unprofitable. Data is mixed about the accuracy of this assumption, but it remains the law of the land.³

determine whether a merger is potentially anticompetitive or not. There is additional discussion of market definition issues in the Law and Application portion of this booklet.

³ C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048, 2062 (2018), available at <https://www.yalelawjournal.org/feature/beyond-brooke-group>.

[*Verizon v. Trinko*](#), 540 U.S. 398 (2004) & [*Credit Suisse Securities \(USA\) LLC v. Billing*](#), 551 U.S. 264 (2007).

The *Trinko* and *Credit Suisse* cases addressed the longstanding discussion about the different roles of antitrust and regulation. Antitrust and regulation are seen as two different strategies for addressing corporate power, although for many years they were allowed to interact in proscribed ways. The *Trinko* and *Credit Suisse* decisions held that antitrust conduct enforcement would no longer be applied in industries where Congress clearly intended for a regulatory agency to closely regulate. (The cases only affected anticompetitive conduct cases, not merger enforcement, so antitrust merger analysis would still apply to companies in the affected industries proposing to consolidate.) In practice, this greatly expanded the industries and conduct that escaped antitrust scrutiny. This includes telecommunications, at issue in the *Trinko* case, where Congress had explicitly stated in the law that antitrust would still apply. Interpretations of the *Trinko* case may vary in different courts, but the enforcement agencies have understandably been skittish to expend limited resources bringing cases that risk being thrown out due to *Trinko* concerns.

[*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*](#), 551 U.S. 877 (2007).

In *Leegin Creative Leather Products v. PSKS*, the Supreme Court overruled [*Dr. Miles Medical Co. v. John D. Park & Sons Co.*](#), 220 U.S. 373 (1911), a longstanding case. *Dr. Miles* had ruled that it is “*per se*” illegal, that is, always illegal under *any* circumstances, under Section 1 of the Sherman Act for a manufacturer to set minimum prices for retailers selling their goods—a practice known as resale price maintenance. The Court explained that vertical price restraints like resale price maintenance should not be considered illegal *per se* because there are instances when vertical restraints benefit competition. For example, a manufacturer can encourage a retailer to spend more money on advertising or hiring specialized staff to sell the manufacturer’s product if they know they will get a good profit margin on selling the product. Instead, the Court said that the “rule of reason” standard would apply, requiring courts to decide in each case whether the procompetitive effects a specific vertical price restraint outweigh the anticompetitive harms. This means that a party wanting to bring a resale price maintenance lawsuit can’t win its case by simply proving that a manufacturer imposed a minimum price on sellers of the product. Rather the party must show that any benefits from the resale price maintenance (such as hiring additional expert staff to help customers learn about the product) did not outweigh the anticompetitive harms (such as preventing price competition between retailers of the same product). This makes litigation over resale price maintenance much more expensive and time consuming, meaning resale price maintenance plans are rarely challenged in court anymore.

[*Ohio v. American Express*](#), 138 S. Ct. 2274 (2018).

The *American Express* decision dealt with two-sided markets. In general, two-sided markets can be thought of as a service connecting people or companies, such as newspapers connecting readers with advertisers, or here, credit card issuers contracting with merchants so that merchants can accept credit card purchases by retail customers. Since credit card issuers take a percentage of the value of each sale as their fee for allowing the merchant to accept the card, merchants,

who typically accept several credit cards, might to try to steer a customer to use the credit card that would charge the merchant the lowest rate. This court decision allowed American Express to prohibit a retailer from “steering” or encouraging the customer to use a credit card whose fees to the merchant were lower than the fees charged by American Express. Under conventional antitrust analysis, the actions of American Express would seem to be anticompetitive to the merchants, even though it might benefit consumers by giving them more rewards points for using their card. But the court created a new standard for these two-sided markets that appears to allow anticompetitive behavior towards one “side” of the market (the retailer) as long as the other “side” of the market (the cardholder) realizes benefits. Many fear that this could allow anticompetitive behavior by digital platforms like Google, Facebook, and Amazon, since they also manage two-sided markets. It is quite possible that that the logic of the decision will be narrowly applied as this new standard works its way through the system and this may mitigate the impacts of the decision on enforcement.⁴

As a result of the trend illustrated by these cases, many within the consumer advocacy community have expressed concerns that antitrust law is losing its effectiveness as a tool in the regulatory toolkit.

The Current State of Antitrust

Enforcement Agencies

Efforts to revitalize antitrust began in the Obama administration and have gained traction, rising to the political prominence antitrust enjoys today. After the antitrust doldrums of the Bush administration, the Obama administration’s merger enforcement efforts in key industries such as wireless service (AT&T/T-mobile), health insurance (Aetna/Humana, Anthem/Cigna, BlueCross/PHP, Humana/Arcadian), and finance (NASDAQ/NYSE) were an important start. It addressed anticompetitive conduct in wages and hiring, dismantling a series of “no-poach” agreements between Silicon Valley whereby the companies agreed not to recruit each other’s employees. It imposed non-discrimination conditions on harmful vertical deals (NBC/Comcast, Google/ITA, and Ticketmaster/LiveNation), although advocates had pushed for these deals to be blocked. The agencies also brought several enforcement actions against anticompetitive conduct in healthcare industries, including a multi-suit strategy against [reverse payment settlements](#)

⁴ For example, Chairman Simons of the FTC has said he takes a narrow interpretation of the case, only applying it when the two sides directly interact in the relevant transaction. In a hearing before a House of Representatives Committee, he stated, “I think the Am Ex case is extremely narrow. I think, really, the basic crux of it is limited to situations where there’s a multi-sided platform that effectively involves a transaction where the platform is providing a service to both sides at the same time in the same way, basically. So I think, generally, that’s going to apply to very few situations.” Congresswoman Clarke went on to ask, “Does the American Express decision potentially preclude effective FTC enforcement against anti-competitive conduct against edge providers?” Mr. Simons responded, “It might depend on the very specific facts. But, in general, I would think not.” Joseph Simons, Chairman, Fed. Trade Comm’n, Testimony before the House Energy & Commerce Committee (July 18, 2018), available at <https://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/20180718-%20DCCP%20Oversight%20of%20the%20Federal%20Trade%20Commission.pdf>.

between drug companies, culminating in a Supreme Court decision that declared such settlements could be illegal. They also blocked a number of hospital mergers, which proliferated during this time.

Today, advocates like Public Knowledge and others push for even more antitrust enforcement. We believe that the enforcement agencies sometimes take too narrow a view of potential competition, underestimate barriers to entry, and miss important gatekeeper power granted by vertical mergers. However, even with increased enforcement and broader understanding of the harms of consolidation, there is only so much the antitrust agencies can do under current law.

Advocates and lawmakers now support improvements in our laws to promote competition. Antitrust was an issue in the 2016 presidential campaign and appears to be playing a role in the upcoming 2020 presidential campaign as well.

The Courts

The courts are becoming increasingly conservative and increasingly take a narrow view of antitrust. Unfortunately, during the Obama administration, Republicans in the Senate made a high priority of blocking judicial appointments. As a result, lower courts throughout the country had a huge number of vacancies when President Trump took office. Now, President Trump and Republicans in the Senate have made a high priority of getting their judicial nominations approved. This has a real impact and will likely narrow the types of antitrust cases that can succeed. The most significant example is the new Supreme Court Justice, Brett Kavanaugh. Since Judge Kavanaugh joined the D.C. Circuit court in 2006, he has demonstrated a consistent skepticism towards government efforts to block mergers.

Recent court decisions reflect a continued evolution of the law towards permissiveness on antitrust. For example, the [recent D.C. Circuit decision to allow AT&T and Time Warner to merge](#) is not only likely to leave consumers facing higher prices and reduced choice of provider, but is also likely to lead to even more consumer-harming mergers.

All of these circumstances have created a tenuous state for antitrust law. This has convinced some policy advocates, including Public Knowledge, not to put all their eggs in the antitrust basket. We promote strong antitrust enforcement, and we believe it is time to move ahead with greater regulatory oversight of the telecommunications, media, and technology industries.

Continue to the next section for an explanation of how antitrust law functions today.

An Introduction to Antitrust Law and Its Applications

Now that you have the history, let's take a look at the law. The aim of this section is to provide a high-level introduction to certain topics in antitrust law and to see how they might be applied to a few hypothetical scenarios. This section should not be considered a comprehensive presentation or explanation of the law. In addition, this section does *not* provide legal advice. Think of it instead as a basic exploration of some of the major issues related to antitrust enforcement.

The Sherman Act

Sherman Act Section 1: The Law

- Section 1 of the Sherman Act deals with agreements between multiple companies, called “concerted” action.
- Section 1 states that, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal” – [15 U.S.C § 1](#)
- Courts have determined that this law prohibits only “unreasonable” contracts, combinations, or conspiracies in restraint of trade. This means courts use “the rule of reason” to determine violations on a case-by-case basis.
 - Rule of Reason
 - To win a case that is analyzed under the rule of reason, law enforcement must show that
 - the defendant possesses market power – i.e. the ability to profitably increase price or decrease output of their product, and
 - the challenged conduct’s harm is greater than any benefits to competition
 - *Per Se* Rule
 - Certain restraints on trade are considered illegal *per se* because the courts are very familiar with them and have determined that they have no significant procompetitive benefits.
 - These include agreements not to compete, such as price-fixing and market allocation, for example, by two competitors agreeing not to sell in each other’s neighborhood.

Sherman Act Section 1: Application – Price Fixing

Scenario 1

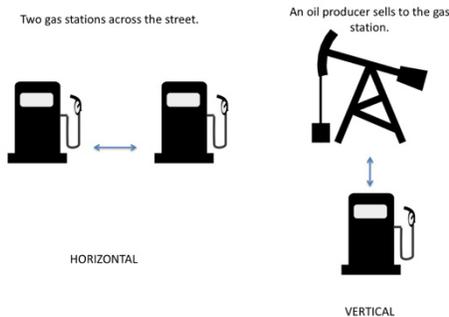
Amy owns a website. She wants to start making money by running ads on her website, so she has been shopping around for internet advertising platforms, checking out how each platform would serve ads to her site, and how much money she can expect to make. During her research, she discovered that the three biggest advertising platforms – Big Ad Co., Massive Ad Corp., and Giant Ad Inc. – all were offering the same contract terms and the same pricing scheme for paying her. Are these companies breaking the law?

Analysis

Section 1 of the Sherman Act makes it illegal for companies to agree or conspire to unreasonably restrain trade. Agreements don't need to be formal contracts or even to be put into operation for a violation to occur. Here, Big Ad, Massive Ad, and Giant Ad are behaving in a parallel way by offering the same terms and pricing scheme. Amy can tell that there *may* be an agreement between the companies, but she likely won't know for sure unless someone (maybe Amy, maybe the federal government or a state Attorney General) sues them in court. The key question will be whether the companies **actually agreed** to set their pricing and contract terms the same, which is hard to prove without their internal documents, which can be obtained in a lawsuit. Agreements between competitors to set prices are analyzed under the “*per se* rule.”

For a *per se* violation of Section 1 to occur, all five of the following elements must be met:

1. **Multiple companies involved.**⁵ *An agreement or conspiracy requires more than a single company. Antitrust laws are not designed to impact choices in corporate structure.*
2. **An agreement or conspiracy.** *These are often in the form of price-fixing, bid-rigging or market allocation agreements. No action on the agreement is necessary, the agreement itself is a violation.*
3. **Between competitors.** *The parties to the agreement must be “horizontal” to each other, i.e. competitors. Agreements on price between companies that have a “vertical” relationship, such as an agreement between a manufacturer and its retailers on what the retailers can charge, are generally evaluated under the rule of reason.*
4. **The company must have intended to join in the agreement or conspiracy.** *The company (or more accurately, the people at the company) do not need to know that joining the conspiracy is illegal, merely that they are joining the agreement.*



⁵ Throughout the Primer we'll refer to the entities involved as companies, but you should know that the law simply says “person.” This includes corporations, individuals, partnerships, etc. If you are working with an independent contractor or sole proprietorship, antitrust laws still apply to them as well.

5. **The agreement must substantially affect interstate commerce or the flow of interstate commerce.** *Today, most businesses are considered to be part of interstate commerce.*

If these companies did in fact intend to enter into a price-fixing agreement, they are likely to have engaged in a *per se* violation of the Sherman Act, Section 1.

Sherman Act Section 2: The Law

- While Section 1 focuses on concerted action among companies, Sherman Act Section 2 deals with monopoly behavior by one company. The existence of monopolies is *not* prohibited by antitrust law. However, a company cannot acquire or maintain their monopoly using illegal means. This is called “monopolization” under the law. It’s important to note that conduct prohibited by Section 2 is not illegal when the company does not have market power.⁶ This means small companies can safely behave in ways that a large company cannot.
- Section 2 states, “every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.” – [15 U.S.C. §2](#)
- However, the Supreme Court has limited unlawful conduct under Section 2, beginning with [Standard Oil](#) and in [United States v. Grinnell Corp.](#), 384 U.S. 563, 570-71 (1966) to be, “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”
- To prevail in a Section 2 case, law enforcement or a private plaintiff must prove:
 - Monopoly power (although a firm need not have 100% of the market to have monopoly power), and
 - A bad act done to acquire or maintain that power

Sherman Act Section 2: Application – Exclusive Dealing

Scenario 2

Amy is still looking for advertising for her website. This time, the ad companies have different prices. Amy wants to place some ads through Big Ad and some through Giant Ad. When she goes to sign up with Big Ad, they tell her she must sign an exclusive deal with them, promising that she will source all her ads through them. Is Big Ad breaking the law?

⁶ Technically, if a company **attempts** to gain a monopoly by illegal means and has a “dangerous probability of success” [cite] that can also be a violation of Section 2, even though the company does not have monopoly power.

Analysis

Exclusive dealing will be analyzed under the rule of reason since, while there are exclusive dealing arrangements that can be legal, they also can be illegal. This is because exclusive dealing can have procompetitive impacts, such as encouraging retailers to invest in promotional efforts and service that may otherwise be unprofitable. But exclusive dealing can also have anticompetitive impacts, such as preventing a new entrant to the market from getting any customers, creating an unnecessary “barrier to entry” and preventing competition against an incumbent firm.

For a rule of reason case to succeed, the plaintiff (the person or government agency bringing the case) must show that:

1. **The defendant possesses market power in a clearly defined market.** Defining a market is an important part of antitrust law. It comes up again and again, including in the merger context. The central question of defining an antitrust market is identifying which products or services actually compete with each other. A rule of thumb to identify a market is the Hypothetical Monopolist Test, which asks if a hypothetical monopolist of the whole market would be able to profitably impose a small, but significant, non-transitory⁷ increase in price (SSNIP), or if instead that hypothetical monopolist would lose so many customers to other products that the SSNIP would not be profitable. This tests how likely consumers are to switch to a product outside the market. If they are very likely to switch, then that other product probably is in the market. But if customers are not very likely to switch, then that other product probably is not in the market. Courts also apply some other tests to define a market. A classic way to define markets was articulated in the *Brown Shoe* case. It specified factors the court should consider in defining a market, including industry recognition of a certain market, distinct customers, distinct characteristics or uses, and unique production facilities.⁸ Market power can be determined indirectly, by showing the target of the lawsuit has a high market share in a defined market, or can be shown directly by evidence of effective monopolization, such as imposing anticompetitive contract terms.
2. **The challenged conduct’s competitive harm outweighs any benefits to competition.** The rule of reason requires a fact-intensive analysis that would depend on a substantial investigation into the nature of the online advertising market. Often parties will hire expert economists to show with data that the conduct at issue has procompetitive or anticompetitive effects, and try to quantify those effects.

⁷ “Non-transitory” simply means the price increase is not short-lived, it’s in place for a significant amount of time. The actual duration a price increase must be in place is not specified.

⁸ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (markets may “be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors”).

If Amy or a law enforcement agency met their burden of showing that both of the elements above were met, then Big Ad's exclusive dealing would be held to be a Section 1 violation.

The Clayton Act

Clayton Act: The Law

- The Clayton Act aims to expand antitrust enforcement, including against anticompetitive mergers.
- The Act allows private parties to sue for triple damages (called “treble damages”) when they are harmed by illegal conduct and to get an injunction to stop the conduct in the future
- [Section 7](#) of the Clayton act lays out the substantive standard for merger review. The Act prohibits mergers or acquisitions that “may substantially lessen competition or tend to create a monopoly.”
- Mergers are evaluated under an “incipiency” standard. In other words, Section 7 prohibits mergers or acquisitions that *may* substantially lessen competition or that would tend to create a monopoly, not requiring certainty of competitive harm but instead a prediction that is well-grounded.

Merger Review

- According to the Hart-Scott-Rodino (HSR) Act, enacted in 1976, parties proposing any merger, acquisition, or other consolidation between companies over a certain size threshold must file a pre-merger notification with the federal government. The parties cannot proceed with the transaction until the relevant reviewing agency, usually the Department of Justice or the FTC, has had a certain number of days to review the merger. The relevant agency can sue to prevent the transaction or try to negotiate with the parties to the transaction to impose conditions on the transaction that will mitigate potential anticompetitive effects.
- The [Horizontal Merger Guidelines](#) (HMGs)⁹ provide specifics as to how law enforcers will analyze horizontal mergers, those between two companies who are direct competitors. Although the HMGs are not laws and do not have the force of law, they are nevertheless highly influential and can affect how courts review merger challenges.
- When analyzing a merger, agencies will:

⁹ Vertical mergers are also reviewed for potential harm to competition. The Vertical Merger Guidelines (VMGs) provide assistance to law enforcers and the courts during reviews and challenges to vertical mergers, although they are widely agreed to be very out of date.

- Define the relevant market(s)
 - Analyze how the merger is likely to affect concentration in that market(s)
 - Determine if the merger is likely to result in anticompetitive “unilateral” effects (similar, but not limited to, the monopolization conduct discussed in Section 2 of the Sherman Act) or “coordinated” effects (similar, but not limited to, the collusive conduct discussed in Section 1 of the Sherman Act)¹⁰
 - Analyze the potential for competition from existing companies in the market or potential new companies that may enter the market to offset anticompetitive effects
 - Analyze potential merger-specific efficiencies that would improve competition.
- Often, the agencies will work out a settlement with the merging parties, including conditions placed on the merger in exchange for the agency’s decision not to sue to block the merger. Conditions should fully replace the competition being lost in the merger. Conditions often include:
 - Divestitures, or selling off part of the business. Divestitures are an appropriate remedy when only a small part of the business may substantially lessen competition after the merger. Examples:
 - If two large grocery store chains merged, they might agree to divest stores in the fifteen geographic markets where both of the merging parties have a store.
 - If two hospitals merged and they both provided very different services but both had an orthopedic surgery practice serving the same region, they might divest one of the orthopedic surgery practices to a third competitor.
 - The agencies would examine the buyer of the divested business as well to make sure that they can really compete with the merged firm.
 - Behavioral conditions, or rules that the new merged firm must follow. This can include limits on communication and working together between parts of the business, duties to deal fairly with certain competitors or customers, or other rules. They can also be difficult to write in a way that fully replaces the lost competition.
 - It’s important for advocates to keep in mind the limitations of merger conditions, in particular behavioral conditions. They can be difficult to enforce, and often only affect the market for a limited time. If the conditions are not enforced, or once they are no longer in affect or relevant, the merged entity can have free rein over the market.

¹⁰ Importantly, coordinated effects of a merger can include conduct that would not be illegal under Section 1 of the Sherman Act, such as when competitors happen to arrive at the same prices or happen to compete in geographic regions that don’t overlap, but there is no evidence of agreement. Antitrust economists recognize that mergers can increase the chances of legal coordinated effects like this, which still harm consumers, but cannot be blocked with a Sherman Act Section 1 case. This is described in detail on pages 7-8.

Clayton Act Section 7: Application - Horizontal Merger

Scenario 3

Old Telecom Corp. is the second-largest wireless provider in the United States. It serves all 50 states. New Telecom Inc. is America's fourth-largest wireless provider. It serves 48 states. Old Telecom now seeks to acquire New Telecom for cash and stock worth approximately \$40 billion. If this transaction is allowed, the new company would be America's largest wireless carrier. Is the proposed merger a violation of antitrust law?

Analysis

Clayton Act Section 7 prohibits mergers or acquisitions that:

1. **May substantially lessen competition.** *This means increased prices, reduced market output, reduced quality, reduced innovation, OR reduced product diversity. Proving just one of these may happen is sufficient, as long as the effect it is substantial.*
2. **In any line of commerce.** *This means within the relevant market, as discussed above.*
3. **In any part of the country.** *This means within the geographic market – either an area in which customers are based or the area in which sellers operate out of. Determining the geographic market is similar to determining the product market, but this time the focus is on geography. How far are patients willing to go for hospital care? Does Hospital A really compete with Hospital B which is in the next town over? This is different for a different product, as customers may drive farther for a hospital than for a grocery store.*

Recall that in order to determine whether these elements are met, law enforcement will typically take the following steps:

- Define the relevant market(s)
- Analyze how the merger may affect concentration in the market(s)
- Determine if the merger may result in anticompetitive unilateral or coordinated effects
- Analyze the potential for new market entrants to offset anticompetitive effects
- Analyze potential merger-specific efficiencies

Here, the reviewing agency would seek to define the relevant product market and geographic market. The relevant product market would likely be defined as mobile wireless telecommunications services. Law enforcers would attempt to show that fixed – i.e. wireline – telecommunications services were not a reasonable substitute market for wireless, and therefore represented a different product market. Because the merger would have nationwide competitive effects across local markets due to nationwide market forces, law enforcement would probably define the relevant geographic market to be the United States.

The reviewing agency would use something called the Herfindahl-Hirschman Index (“HHI”) to measure concentration in the relevant market. Markets in which the HHI is between 1,500 –

2,500 points are considered to be moderately concentrated, and markets in which the HHI exceeds 2,500 points are considered highly concentrated. If law enforcers could show that the merger would increase the HHI by more than 200 points in highly concentrated markets, the transaction would be presumed likely to enhance market power.

Law enforcement agencies would also investigate whether the merger would generate potential competitive harms. Among the potential harms that they might investigate are:

- Enhanced risks of anticompetitive coordination,
- Decreased overall competition through elimination of head-to-head competition between Old Telecom and New Telecom,
- Reduced innovation and product variety, and
- Reduced nationwide competition resulting in higher prices, diminished investment, and less product variety and innovation than would exist without the merger.

Mergers in industries that are already somewhat consolidated will often enhance the risk of coordination. Anticompetitive coordination is easier when there are fewer market participants. Coordination, whether legal or illegal, is easily thwarted by a “maverick” company that benefits from disrupting the status quo. A market with only three companies, for example, can easily find an equilibrium on price where all three parties benefit from refusing to undercut each other’s prices. A market with five companies faces a higher risk that one of the companies lowers prices to gain market share, creating competition on pricing.

Telecommunications providers must overcome significant barriers to enter into the national wireless service market such as acquiring nationwide electromagnetic spectrum resources and building out a national network. It is therefore highly unlikely that a new market entrant would emerge to replace the competition that would be lost if this merger were allowed.

Finally, Old and New Telecom would attempt to show that efficiencies would be created as a result of their mergers. These efficiencies must benefit upstream or downstream participants in the industry, such as consumers, workers, or other businesses that may supply inputs or purchase products from the merging parties. For example, Old and New Telecom might argue that they could provide better wireless service as a result of the merger. Efficiencies must be merger-specific, meaning that the efficiency could not happen except for the merger. The efficiencies would need to be sufficient to overcome the acquisition’s anticompetitive effects.

Without all of the facts and figures related to this merger, it is difficult to predict with certainty whether it would violate Clayton Act Section 7. That said, given the nature of the telecommunications industry and the fact that this merger would bring the national wireless services market from four competitors down to three, it is likely that that the proposed transaction between Old Telecom and New Telecom may substantially lessen competition in the relevant market. If the antitrust enforcement agencies made that determination, they would examine potential divestitures and behavioral remedies (rules like serving unprofitable rural communities) that might resolve the concerns. If no such remedies exist, they would sue to block the merger.

Clayton Act Section 7: Application - Vertical Merger

Scenario 4

Bombast Cable is the largest cable provider in the country. It also has a large ownership stake in Yolo, an online television platform. There are three other major cable providers in the U.S., as well as several smaller competitors, but competition between cable providers for individual household customers is sparse because their coverage areas don't overlap much. Galactic Content owns the fourth largest television broadcast network, Nice Big Content, several popular cable channels, and a movie studio. Three other large competitors to Galactic, Mega Content, Large Content, and Specialized Content, have similar holdings. Bombast Cable proposes to acquire Galactic Content.

Negotiations between Bombast Cable and Specialized Content over carriage of Specialized Content's channels to Bombast subscribers have been fierce, sometimes leading to "black outs" where Bombast cable subscribers can't watch Specialized Content's channels for several days.

Online television like Yolo has the potential to diminish customer interest in cable programming, but most customers will only consider online TV a replacement for cable if they have a reliable high-speed internet connection to provide high quality video over the internet. Cable is the major source of high-speed internet for most U.S. consumers.

Analysis

Very broadly, the focus of vertical merger review is on whether the vertically integrated firm is likely to exclude competitors or collude with competitors. If it is, the agencies would have a good case for blocking the merger. Here, it's clear that a merged entity of Bombast Cable and Nice Big Content would have the incentive and ability to make things harder for Specialized Content and the other competitors. If Galactic is an effective substitute for Specialized, Bombast Cable will now have the upper hand in those previously fierce negotiations. If Bombast refuses to work with Specialized, or simply refuses to pay them enough, are the other cable competitors sufficient to keep Specialized Content in business? Instead of having an incentive to negotiate fairly with the cable channels owned by Galactic's competitors, Bombast Cable might prefer Galactic's success and give it better prices and placement than its competitors. Galactic Content may also have an incentive to withhold its channels from other online television platforms, so that Yolo can offer a more competitive service.

The antitrust enforcers would look at internal documents from Bombast and Galactic, as well as their competitors, aiming to understand the market and the likelihood of anticompetitive outcomes from the merger. They would consider the types of divestitures and behavioral remedies that could replace the lost competition. Behavioral remedies might include rules like treating Specialized Content and competitors equally with their own Nice Big Content channels, or refraining from participating in the management of Yolo. Or, if no remedies would be effective, they would sue to block the merger.

What Can I Do?

If you believe you have discovered or experienced the effects of an antitrust violation, you can report it to the FTC or the DOJ through their respective websites. You can also contact your [State's Attorney General](#) with potential violations that have a big local impact.

If the problem you've identified is not an antitrust violation, it may be that a new law or regulation is needed to address your concern. We can help you make a plan for outreach to the relevant policymakers. Contact [Public Knowledge](#) and our coalition partners, the [Institute for Local Self Reliance](#) and [Demand Progress](#), at antitrust@publicknowledge.org.

Public Knowledge and other organizations are advocating for improvements to clarify and expand antitrust law. Senator Amy Klobuchar (D-MN) has [introduced two bills](#) that would be an important first step towards that goal. They would shift the burden of proof to the merging parties in especially large mergers, and they would provide more resources and capabilities to encourage stronger enforcement of the antitrust laws. Contact your [Congressional Representative](#) and [Senators](#) and ask them to support the Consolidation Prevention and Competition Promotion Act and the Merger Enforcement Improvement Act.

We are also advocating for pro-competition legislation that focuses on promoting competition in particular industries. As you have learned in reading this Primer, antitrust law is about preserving competition. However, in some especially important industries where competition is not the norm, advocates like Public Knowledge believe that we need to affirmatively promote competition. Join us in our congressional outreach to promote competition through legislation in areas where antitrust may not be an appropriate or sufficient tool. If you have an idea for a solution, we'd love to hear about it. [Send us an email](#) and start a conversation!

Contacting elected officials directly can also be very effective. This can take the form of in person meetings scheduled in advance, office visits, or phone call or letter writing campaigns. Reach out to us for help planning your actions! For example, many elected representatives will send a substantive response to almost every email they receive. Usually a staff person drafts the letter rather than the Senator herself, but educating the Senator's staff on your concern is still a valuable contribution. That staff person may be in a good position to do something about your problem. Research your problem online to see if any other advocacy groups have taken up your cause. If you find a group that should be interested in your issue but isn't working on it yet, reach out to them as well!

If in your line of work you come across what you think is an antitrust violation, speak to your company's legal representative if it has one. This representative should begin the process of reporting the matter to the DOJ or FTC.

States may have additional competition laws on the books that go further than the federal laws addressed in this guide. You may want to research the laws in your state to see if you have more options there.