

- I. Introduction
 - a. Enforcement
 - i. Private plaintiffs
 - ii. Department of Justice
 - iii. Federal Trade Commission – FTC Act
 - iv. State Attorneys General – state ‘baby FTC’ Acts
 - b. Jurisdiction
 - i. Interstate or foreign commerce
 - ii. Activity has some sort of interstate effect
 - iii. Plaintiff has burden of proving jurisdiction
 - c. Monopoly
 - i. Illegality comes from using monopoly power to harm consumers
 - ii. Concerns
 - 1. Increased price
 - 2. Reduced output
 - iii. Harms of Monopoly
 - 1. Deadweight loss
 - a. Consumers able to purchase at competitive price unable to buy at monopoly price
 - b. Consumers migrate to less valuable substitutes
 - c. Wealth transfer from consumers to producers
 - 2. Loss of innovation
 - 3. Rent-seeking (expenditure to get and maintain monopoly)
 - d. Anti-Competitive Theories
 - i. Coordinated Effects
 - 1. ‘Competitors’ collude to create anti-competitive effect
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 - b. Mergers
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 - d. Dividing market/monopoly profits
 - e. Enforcement
 - 5. Other factors affecting collusion
 - a. Random price fluctuation
 - b. Random output fluctuation
 - ii. Unilateral Effects
 - 1. Single firm exercises market power to detriment of consumers

- II. Horizontal Mergers
 - a. Clayton Act §7 (p. 858)
 - b. Old Cases
 - i. Early hostility to mergers: *Northern Securities v. United States* (p. 678); *United States v. Union Pacific Railroad* (p. 678)
 - ii. *Brown Shoe* (p. 687): post-merger market share ranging from 20% to 57% was too high in a highly fragmented industry
 - 1. Focused on post-merger market concentration
 - 2. Fragmentation may not help consumers – hard to get efficiencies, reduced economies of scale
 - iii. *Philadelphia National Bank v. United States* (p. 694)
 - 1. Merger creating a company with 30% market share “threaten[s] undue concentration” and is illegal
 - 2. Merger would have resulted in a “significant increase in concentration” (over 33%)
 - iv. *Von’s Grocery* (p. 702): trends toward concentration sufficient to enjoin
 - v. *United States v. General Dynamics* (p. 703):
 - 1. Mitigating factors may permit merger even if concentration is high
 - a. Fundamental changes in market (e.g. to long-term requirements contracts)
 - b. Evidence of past production was not a guaranteed indicator of future ability to compete; reserves were a better indicator
 - c. Modern Practice: DOJ Merger Guidelines
 - i. Elements
 - 1. Market Definition
 - a. Product or group of products produced or sold over a certain geographic area
 - b. Hypothetical profit-maximizing firm likely would impose at least a small but significant non-transitory price increase
 - i. Firm maximizes profit
 - ii. Not subject to price regulation
 - iii. Firm is the only present and future seller – no entry
 - iv. Is it likely to impose a small but significant non-transitory increase in price?
 - c. “Small but significant” means 5%
 - 2. Would such a small but significant non-transitory price increase be profitable under the current market definition?
 - a. Begin with narrowly-defined product market: each product sold by the merging firms, considered apart from other products
 - b. Would it be profitable for a hypothetical profit-maximizing firm to increase price?
 - i. Balance increased margins against reduced volume
 - ii. Consider elasticity and cross-elasticity of demand
 - iii. Consider buyer reaction:

1. Evidence of buyers switching in response to price changes or other competitive variables
2. Evidence of sellers making business decisions based on the prospect of switching by buyers in response to price changes or other competitive variables
3. Influence of downstream competition on buyers
4. Timing and other costs of product switching
- c. If the price increase would be profitable, market is defined
- d. If not, include substitutes in market definition and repeat
3. Geographic Definition
 - a. Same process as market definition, but now substitutes are geographic areas instead of products
4. If price discrimination would be profitable, also consider additional product markets consisting of particular uses by buyers where hypothetical profit-maximizing firm would profitably impose a separate significant and non-transitory price increase
5. Calculating Market Shares
 - a. Only consider:
 - i. Current participants
 - ii. Future participants whose entry would likely occur in response to a price increase within one year and would not require significant sunk entry and exit costs
 - b. Concentration - Herfindahl-Hirschman Index (HHI)
 - i. <1000:
 1. Unconcentrated
 2. Mergers generally do not have any anti-competitive effects
 - ii. 1000-1800:
 1. Moderately concentrated
 2. Post-merger increase of less than 100 is unlikely to have anti-competitive effects
 3. Post-merger increase of more than 100 potentially raises significant concerns
 - iii. >1800:
 1. Highly concentrated
 2. Post-merger increase of more than 50 potentially raises significant concerns
 3. Post-merger increase of more than 100 presumed likely to create or enhance market power or facilitate its exercise
6. Defences
 - a. Post-Merger Efficiencies
 - i. Must be verifiable and specific to the merger
 - ii. Must not arise from anti-competitive reductions in output

- iii. In more concentrated markets, greater efficiencies are needed to justify merger (*Heinz*)
 - iv. Almost never sufficient to justify merger to monopoly or near monopoly (*Heinz*)
 - v. Defendant has burden of showing efficiencies (*Heinz*)
 - b. Failing Company
 - i. Imminent failure of one of the merging firms would cause that firm's assets to exit the relevant market
 - ii. Acquired firm's current market share overstates its future competitive significance (*Arch Coal*)
 - iii. Financial difficulties alone relevant only where they indicate that market shares will decline sufficiently in future to bring merger below the threshold of presumptive illegality (*Arch Coal*)
- d. Applications
 - i. *FTC v. Staples*
 - 1. Proving price effects
 - a. Proving price effects in coordinated effects cases difficult
 - b. Generally need to use demand curve analysis
 - c. Here direct proof was available (proof of higher prices where there was no competition)
 - 2. Counterintuitive market definition
 - a. Smaller office supply stores and large-scale general retailers not included
 - b. Same product at different prices at different outlet locations suggested those retailers not close substitutes
 - ii. *FTC v Heinz: Efficiencies*
 - 1. Marginal cost reductions are more likely to reduce short-run prices and therefore carry more weight than fixed cost reductions
 - 2. A merger reducing a 3-player market to a 2-player market is presumed to have collusive effect
 - iii. *FTC v. Arch Coal: Coordinated Effects*
 - 1. Coordinated effects: what must be shown to prove anti-competitive effect of merger
 - a. Easier to reach anti-competitive agreement
 - b. Easier to monitoring compliance
 - c. Easier to punish deviations
 - 2. Evidence
 - a. Structural - HHI
 - b. Stigler-Posner checklist
 - i. Number of competitors – dominant factor
 - ii. Barriers to entry
 - iii. Product homogeneity
 - iv. Elasticity of demand
 - 1. Inelastic: decrease in demand less than increase in price – collusive price increases profitable

- 2. Elastic: decrease in demand greater than increase in price – price increases not profitable
- v. Geographic proximity
- vi. Competitor information

III. Horizontal Restraints and Joint Ventures

- a. Two Rules:
 - i. Per Se Illegality: *Socony Vacuum* (p. 134)
 - 1. Combination formed for the purpose and effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce
 - ii. Rule of Reason: *Chicago Board of Trade* (p. 126)
 - 1. Consider whether the restraint “merely regulates” competition, or if it “may suppress” competition
 - 2. Factors:
 - a. Condition of business before and after the restraint
 - b. Nature of the restraint
 - c. Effect of restraint, actual or probable
 - d. History of the restraint
 - e. Evil believed to exist
 - f. Reason for adopting the proposed remedy
 - g. Purpose sought to be attained
 - iii. Ancillary Restraints: *Addyston Pipe* (p. 121)
 - 1. Restraints ancillary to the agreement and necessary to protect the purpose of the contract are lawful unless:
 - a. They exceed the necessity presented by the contract; or
 - b. The object of the contract is anti-competitive
- b. Refining the Per Se Rule
 - i. *Topco* (p. 145): horizontal market division among brand distributors ruled per se illegal; Court refused to consider efficiency justifications
 - ii. *BMI* (p. 149): cost savings or efficiency justifications can save what is otherwise a per se illegal price fix
 - 1. *Maricopa* (p. 159): efficiencies must be large and unattainable in any other manner
 - 2. Proof of per se elements creates presumption against efficiencies
 - a. Defendant may rebut presumption by showing that sizable efficiencies makes price agreement necessary
 - b. Presumption must be rebutted by summary judgement stage
 - 3. *Professional Engineers* (p. 166):
 - a. Agreement not to compete on price held per se illegal
 - b. Arguments against competition itself will not be sufficient
 - c. Consider not just subject matter of restraint (e.g. price-fixing or output restriction), but also effect of restraint
 - iii. Analytical Framework for Price Fixing
 - 1. Does the situation fall within the scope of the per se rule?
 - a. Is there an agreement between competitors?; and

- b. Does the agreement regard price, output, or other cartel variations?
 - c. If so, formulate best pro-consumer justifications for agreement
 - i. Eliminate justifications amounting to complaints that defendants might be making about competitive process (*Professional Engineers*)
 - d. Is the agreement necessary to achieve the justification?
 - i. If so, apply the rule of reason
 - ii. Otherwise, the per se rule applies
- iv. *NCAA* (p. 173): restrictions on competition and output saved from per se analysis by justification that product would not exist without restraint
 - 1. Considerable inquiry into market conditions may be required before determining whether to apply per se rule
 - 2. Some arrangements that are not per se illegal do not require full-blown rule of reason analysis – use “quick look” analysis instead
 - 3. “Quick Look” Rule of Reason
 - a. Falls between the per se rule and the normal rule of reason
 - b. If an observer with rudimentary understanding of economics can conclude arrangement has anti-competitive effects, the arrangement is illegal
 - c. If anti-competitive effects are not obvious, plaintiff must come forth with evidence to refute pro-competitive justifications
 - d. *California Dental Association* (p. 181):
 - i. Factors making anti-competitive effects non-obvious:
 - 1. Inability for consumers to determine accurate pricing or relative quality
 - 2. Restrictions not facially designed to restrict prices
 - 3. Possibility of cheating
 - 4. Confusion as to whether output is being restricted
 - ii. Need to look to the circumstances, details, and logic of the restraint to determine its “principal tendency”
 - 4. If pro-competitive justifications are plausible, the full rule of reason analysis applies
- c. Joint Ventures
 - i. Issues
 - 1. Integration may raise concerns of increased market power resulting in substantial lessening of competition
 - 2. Restraint that is part of the venture may be anti-competitive
 - ii. DOJ Guidelines
 - 1. Agreements that always or almost always tend to raise price or reduce output will be challenged under per se rule
 - 2. Restraints reasonably related to and reasonably necessary for pro-

- competitive results (ancillary restraints) will not be challenged
 - 3. Reasonable necessity of restraint may depend on whether it deters free-riding or reduces ability of venture to achieve efficiencies
 - 4. Merger guidelines approach to finding pro-competitive benefits
 - 5. Safe Harbours:
 - a. Joint venture has less than 20% market share
 - b. Innovation zones – where three or more other independent controlled research efforts exist
- iii. The Three Tenors
 - 1. Restraint to prevent partners from free-riding on joint venture marketing to increase sales of records not covered by venture
 - 2. Restraint was not ancillary because it did not reasonably relate to the venture, and was therefore illegal:
 - a. Restraint covered albums excluded from venture
 - b. Restraint came about after the joint venture was formed

IV. Tacit Collusion

- a. Game Theory – tacit collusion possible, not necessarily probable
- b. War of Obsolete Dicta
 - i. *Interstate Circuit* (p. 216):
 - 1. Dicta supports existence of tacit collusion theory, but court found actual agreement
 - 2. Factors
 - a. Actions were a radical departure
 - b. Defendant was aware of others' solicitation
 - c. Defendant invited to engage in conspiracy
 - d. Profit motive for concerted action
 - e. Actual participation and unanimity of action
 - f. Conduct represented interdependent action
 - 3. Distributors could control competitors' prices by forcing a minimum price – cartel theory
 - ii. *Theatre Enterprises* (p. 220):
 - 1. Conscious parallelism alone is insufficient to show tacit collusion
 - 2. Defendants had reasonable explanation for their actions
 - iii. *American Tobacco* (p. 222): simultaneous price increases in spite of lower production costs is sufficient to infer conspiracy
 - iv. *Post-Matsushita* (p. 232): plaintiff must present evidence that tends to exclude possibility that defendants acted independently

V. Data Dissemination

- a. Theories
 - i. Anti-Competitive:
 - 1. Reduces transaction costs involved in collusion
 - 2. Provides a way to punish those who cheat
 - ii. Pro-Competitive:
 - 1. Reduces price variances (reduces price dispersion without

- increasing average prices)
 - 2. Reduces temporal price variants (need to worry about future prices)
- b. Competing Standards
 - i. *American Column & Lumber* (p. 244):
 - 1. Plan enjoined where data included detailed prospective price and volume information, and where failure to report resulted in sanctions including the withholding of other members' data
 - 2. Effect on prices is critical
 - a. Prices increased by almost 350% while plan was in effect
 - ii. *Maple Flooring* (p. 249): exchange of past price data in summary form held legal where the data was made freely available to consumers, and where no increase in price or significant pricing uniformity resulted
 - iii. *Container Corporation* (p. 253): scheme for exchange of recent pricing data held illegal where market was highly concentrated and where the scheme had a propensity to stabilize prices, even though prices were actually decreasing
- c. Possible Rules
 - i. Price and output information exchange illegal if sufficiently detailed to permit participants to identify and punish cheaters
 - ii. Data dissemination legal if association gives results to consumers
 - iii. Data dissemination legal if data does not concern output or future price information
 - iv. Data dissemination legal if it has no negative price impact; illegal if plaintiff can show negative price impact
 - v. Agreements to exchange price and output data illegal per se (unlikely)
 - vi. Balancing test – “bad factors” leading to illegality include:
 - 1. Future prices
 - 2. Disaggregated data
 - 3. Data not given to buyers
 - 4. Negative price effects
 - 5. Data designed to identify cheaters
 - 6. Market concentration
 - 7. Encouragement to raise price or reduce output
 - 8. Firms have market power
- d. Data exchange results in consumer harm only if it causes price to increase

VI. *Copperweld* Doctrine

- a. *Copperweld* (p. 233): parent and wholly-owned subsidiary are not “competitors” for the purposes of Sherman Act §1
- b. Factors: form over substance
 - i. Control
 - 1. Parent can shut down a subsidiary acting against parent's interests
 - ii. Unity of interest
 - 1. With full unity of interest, parent and subsidiary are not truly “competing”

2. The weaker the integration, the more likely it becomes that individual units will be competing
 - a. Factors:
 - i. Voting shares
 - ii. Corporate control
 - c. Types of Intra-Enterprise Agreements
 - i. Agreement to set price between parent and wholly-owned subsidiary
 - ii. Boycott
 - iii. Wholly-owned subsidiaries entering into agreements with one another
 - iv. Franchise agreements
 - v. Vertical integration (e.g. manufacturer and distributor)
 - d. Capable of application in many settings (vertical arrangements, joint ventures, tying, etc.)
 - e. Parent and subsidiary will be analysed together for purposes of Sherman §2, increasing likelihood of monopoly power

VII. Criminal Enforcement

- a. Maximum corporate fine: \$100 million
- b. Maximum personal fine: \$1 million
- c. Maximum prison sentence: 10 years

VIII. Concerted Refusal to Deal

- a. Economics of Boycotts
 - i. Pro-competitive effects: may reduce free-riding
 - ii. Anti-competitive effects: may be used to enforce anti-competitive practices (*Eastern States Retail Lumber* – p. 216)
- b. *Northwest Wholesale Stationers* (p. 289): boycott defined as a concerted refusal to deal on substantially equal terms
- c. Per Se Rule of Boycotts
 - i. *Klors* (p. 280): group boycott held to be per se illegal
 - ii. *Associated Press* (p. 284): future restraint on competition per se illegal
 - iii. *Northwest Wholesale Stationers* (p. 289):
 1. Per se rule applies if boycotting firms have:
 - a. Market power; or
 - b. Unique access to a business element necessary for effective competition
- d. If per se rule does not apply, apply ‘quick look’ or full-blown rule of reason
 - i. *Indiana Federation of Dentists* (p. 295): rule of reason applied because economic impact of concerted refusal to provide patient information to insurance companies was not immediately obvious, and because the boycott was not of suppliers or customers

IX. Monopoly Power

- a. Elements of Illegal Monopoly
 - i. Possession of monopoly power in relevant market
 - ii. Wilful acquisition or maintenance of that power, as distinguished from

- growth or development as a consequence of a superior product
 - b. *DuPont* (p. 509): monopoly power defined as the power to control market price or exclude competition
 - c. Monopoly power determined by control of sufficient share of market output to artificially restrict supply
 - d. What does not constitute monopoly power?
 - i. Price discrimination
 - ii. *Independent Ink*: patent rights
 - e. Measuring monopoly power
 - i. Directly: *Staples*
 - ii. Indirectly
 - 1. Effects on price or margins
 - 2. Concentration levels
 - 3. Entry conditions
 - 4. Inferences from conduct
 - iii. Structural Approach (Merger Guidelines)
 - 1. Define product market
 - 2. Define geographic market
 - 3. Calculate market shares, including:
 - a. Current participants
 - b. Likely entrants
 - iv. *Alcoa* (p. 504): 30-60-90 “Rule of Thumb”: 30% market share unlikely to be a monopoly; 60% sometimes; 90% almost always
 - f. *DuPont* (p. 509):
 - i. High elasticity of demand tends to disprove monopoly power
 - ii. Cellophane Fallacy: at monopoly price, there are more reasonable substitutes than at competitive price
 - iii. More substitution is expected as price increases
 - iv. Must analyze cross-elasticity of demand at competitive price

X. Vertical Integration and Duty to Deal

- a. Economic Theories
 - i. Anti-Competitive
 - 1. Leverage monopoly
 - 2. Raise rivals’ costs
 - 3. Price discrimination
 - 4. Eliminate successive monopoly
 - 5. Reduce transaction costs (hold-up)
 - 6. Evade regulation
 - ii. Pro-Competitive
 - 1. Efficiencies (more efficient to take task in-house)
- b. Duty to Deal
 - i. Monopolist does not generally have a duty to deal
 - ii. *Aspen* (p. 426): monopolist may be liable for unilateral termination of prior arrangement
 - iii. *Terminal Railroad* (p. 288): “Essential Facilities” Doctrine

1. Control of essential facility
 2. Inability to use facility
 3. Denial of use of facility
 4. Feasibility of providing the facility
- iv. *Trinko* (p. 437):
1. No antitrust liability for breach of statutory duty
 2. *Aspen* at or near the boundary for liability for refusal to deal
 3. Liability for refusal to deal requires:
 - a. Prior voluntary course of dealing; and
 - b. Anti-competitive motive
- c. Exclusive Dealing
- i. Understanding Exclusive Dealing
 1. Potential anti-competitive injury
 - a. Monopoly power
 - b. Economies of scale or scope
 - i. Denial of access stops rivals from reaching efficient scale and therefore increases their marginal costs
 - c. Ties up critical input for significant period of time using distribution contracts to prevent its access by rivals
 - d. Raises a barrier to entry at downstream level
 2. Business justifications
 - a. Dealer brand loyalty
 - b. Prevention of dealer free-riding on marketing
 - c. Quality assurance
 - d. Supply assurance
 - ii. Test for Prima Facie Monopoly Maintenance
 1. Monopoly power in relevant market
 2. Substantial foreclosure of market covered by restraint
 - a. Nature of the restraint and resource
 - b. Duration of agreement
 - i. Contracts terminable at will or of less than one year's duration presumptively lawful in some jurisdictions
 - c. Fact-intensive issue
 - d. What level of foreclosure is sufficient?
 - i. 30% is insufficient
 - ii. 40-50% frequently survives summary judgment
 3. What is the actual anti-competitive effect of the agreement?
 - iii. Clayton Act §3 (p. 852): exclusive dealing contracts are illegal if they may substantially lessen competition or tend to create monopoly
 - iv. *Standard Stations* (p. 656):
 1. 6.7% market foreclosure held to be a sufficiently "substantial share" of commerce for Clayton Act §3 liability
 2. Under current case law, more foreclosure is required – 30% at a minimum
 - v. *Barry Wright* (p. 665):
 1. Foreclosure alone is not enough – need anti-competitive effects

2. Legitimate business justifications may excuse agreements
- d. Slotting Contracts
 - i. Payments from manufacturers to retailers for shelf space
 - ii. Exclusive dealing analysis may still apply to contracts that do not require exclusivity
 - iii. Theories of Slotting Contracts
 1. Anti-Competitive:
 - a. Slotting deprives rivals of ability to achieve efficient scale by tying up shelf space required to reach critical mass
 2. Pro-Competitive
 - a. Compensate retailers for absorbing risk associated for new products
 - b. Competition for promotional inputs
 - iv. *Conwood*:
 1. Category manager's removal or exclusion of rival products for reasons other than efficiency may be anti-competitive
 2. Isolated tortious behaviour without a significant non-temporary effect on competition is not exclusionary conduct under Sherman Act § 2
 - a. Liability found for repeated bad acts and 10% foreclosure
 - v. *Gruma*: exclusive slotting contracts must result in a significant fraction of businesses being frozen out of the market to be actionable
- e. Tying
 - i. Defined as the sale of one (tying) product made contingent on the purchase of a different (tied) product
 - ii. Purposes of Tying
 1. Monopoly maintenance or leverage
 - a. Use of monopoly to maintain market power against competition from another market
 - b. Use of monopoly in one market to achieve market power in another market
 2. Assurance of quality
 - a. Protect goodwill associated with product or brand
 - b. Franchises
 - c. Ease introduction of new products
 3. Efficiencies in production and distribution
 4. Evasion of price controls
 - a. Can evade maximum price controls by requiring purchase of tied good
 - b. Can evade rate of return regulation by hiding profits in sale of package rather than single good
 5. Price discrimination
 - a. Increase profits by charging different prices depending on an individual buyer's willingness to pay
 - b. Most common explanation for tying
 - iii. Single Monopoly Profit Theorem

1. Consider two complementary goods
 2. If monopolist imposes a tie on the sale of the first good and prices the second good above a competitive level, the price of the first good must decrease to maintain monopoly “package price”
 3. Where two complementary goods form a single packaged product, tying firm gains from increased competition in tied good – lower tied price means monopolist can collect increased consumer surplus on package by increasing price of tying good
 4. What is the monopoly price for the package?
 - a. Increased price for tied good decreases price for tying good
 - b. If consumers willing to pay \$100 for machines and cards and price of cards is \$10, can set price of machines at \$90
- iv. Basic Requirements
1. Two separate products
 2. Market power in tying good
 3. Anti-competitive “forcing”
- v. *Independent Ink*: patents no longer automatically create market power
- vi. *Jefferson Parish* (p. 618):
1. Two separate products exist when there is sufficient demand for the tied product separate from the tying product to identify a market in which it is efficient to offer the tied product separately, even if products are functionally linked
 2. Tying of anaesthesiology to hospital services not illegal where defendant had no market power in the hospital services market and where there was no unreasonable impact on purchasers
- vii. *Eastman Kodak* (p. 638):
1. Aftermarket hold-up theory of tying
 - a. Market power in the tied good
 - b. Significant switching costs
 - c. Significant information costs or post-purchase changes
 - i. Post-purchase changes generally required to be unanticipated in subsequent decisions
 - d. Discriminatory pricing
 2. No summary judgement for defendant, although defendant did not have market power in the primary market
- f. Predatory Pricing
- i. Risks of predatory pricing
 1. Access to capital markets – need to be able to sustain losses for longer than competitors
 2. Barriers to entry – easy entry makes predatory pricing unfeasible
 3. Rivals’ counterstrategies
 - ii. *Brooke Group* (p. 455):
 1. Requirements for a predatory pricing claim:
 - a. Company with market power
 - b. Products priced below relevant measure of cost
 - i. Only consider marginal or incremental costs

- c. Dangerous probability of monopolizing market
 - i. Likelihood that scheme would cause rise in prices above a competitive level
 - d. Reasonable probability of recouping losses
 - i. Extent and duration of predation
 - ii. Relative financial strength of predator and rivals
 - iii. Relative incentives and will of predator and rivals
 - 2. Summary judgement for defendant if:
 - a. Market is highly diffuse and competitive
 - b. New entry is easy
 - c. Defendant lacks excess capacity to absorb rivals' market share and cannot quickly create or acquire new capacity
 - 3. Predatory pricing claims rarely successful because of high requirements – want to avoid chilling conduct that the antitrust laws were designed to protect (*Matsushita*)
 - iii. *Barry Wright* (p. 446):
 - 1. Customer received large discount, though prices still above cost
 - 2. No predatory pricing where prices are above cost
 - iv. Different ways of defining cost
 - 1. Marginal cost: useful but hard to measure
 - 2. Average variable cost: average of costs which vary by output
 - 3. Average total cost: average of all costs
 - 4. *AMR* (p. 471):
 - a. Measures other than average variable cost are permissible
 - b. Tests must consider only avoidable or incremental costs – compare these to incremental revenue
 - c. Short-run overall profit maximization – whether profit was sacrificed to compete more effectively – is not a valid test
 - v. Dual market theory
 - 1. Price below cost in one market
 - 2. Recoup losses in another
- g. Vertical Restraints
 - i. Definition: Contractual relationship between supplier and retailer or distributor restricting the conditions under which the retailer or distributor may sell or distribute the supplier's product
 - ii. Types of competition
 - 1. Inter-brand: Competition between brands
 - 2. Intra-brand: Competition for selling the same brand, for example between two different retailers
 - iii. Theories
 - 1. Pro-Competitive
 - a. Encourage promotional activity by preventing free-riding by discount retailers
 - b. Encourage investment in first sale
 - c. Encourage dealer quality
 - 2. Anti-Competitive

- a. Facilitates collusion between manufacturers by allowing them to fix retail prices amongst themselves
 - b. Involving retailers or distributors in a cartel to assist in policing
- iv. *Colgate* (p. 571):
 - 1. *Colgate Doctrine*: manufacturer may unilaterally refuse to deal with another party so long as there is no monopolistic purpose
 - a. Restricted to manufacturers selling directly to retailers
- v. *Monsanto* (p. 574):
 - 1. To establish Sherman Act § 1 liability for terminating:
 - a. Evidence must tend to exclude possibility that manufacturer and non-terminated distributors were acting independently
 - b. Termination was part of or pursuant to agreement on price
- vi. *Business Electronics* (p. 580):
 - 1. Narrow scope of per se rule for vertical restraints – only vertical restraints specifically relating to price are subject to per se rule
 - 2. Non-price restraints or restraints which merely affect price will be subject to rule of reason
- vii. Particular restraints
 - 1. *Dr. Miles* (p. 540): minimum price restraints and resale price minimums (RPMs) are subject to per se rule
 - 2. *Khan* (p. 546): rule of reason applies to maximum price restraints
 - 3. *Sylvania* (p. 558): Exclusive Territories
 - a. Non-price restraints, such as exclusive territory agreements, subject to rule of reason
 - b. No distinction between sale and non-sale transactions

XI. *Microsoft*

- a. Monopolization
 - i. Market power
 - 1. 95% of relevant market
 - 2. Market – Intel-compatible PCs
 - a. Not Apple – consumers would not switch
 - b. Not middleware – too speculative
 - ii. Wilful acquisition and maintenance
 - 1. Licensing restriction – foreclosed one of two most cost-effective means of distribution
- b. Exclusive Dealing
 - i. Probable effect must be to foreclose competition in substantial share of line of commerce
 - ii. Foreclosure deprived Netscape of ability to scale efficiently
 - iii. Amount of foreclosure required in §2 cases less than in §1 cases
- c. Tying
 - i. Must show:
 - 1. Two separate products
 - 2. Market power in tying good

- 3. Substantial volume of commerce in tied good
 - 4. Anti-competitive forcing
 - ii. DOJ lost here
- d. Attempted Monopolization
 - i. Must have engaged in predatory or anti-competitive conduct
 - ii. Requires specific intent to monopolize
 - iii. Must be a dangerous probability of achieving monopoly power
 - iv. Leverage-based theory was rejected

XII. Government Action

- a. *Noerr* (p. 303): no Sherman Act liability for mere attempts to influence passage or enforcement of laws, unless attempts are a “sham”
- b. *California Motor Transport* (p. 308): *Noerr-Pennington* doctrine applies to administrative and judicial proceedings
 - i. *PRE* (p. 311): sham litigation exception to *Noerr*
 - 1. Litigation must be objectively meritless
 - a. No reasonable litigant could realistically expect success on the merits
 - b. Claims supported by probable cause are immune
 - 2. Litigation must be an attempt to directly interfere with business interests of competitor
 - 3. If not immune, underlying antitrust claim must still be proved
 - ii. *Indian Head* (p. 322): Private standard-setting bodies do not receive immunity for non-political activities, including activities with a political impact
 - 1. Decision-makers were not disinterested or independent
 - iii. *Superior Court Trial Lawyers* (p. 330): restraint must be the consequence, not the means, for obtaining government action
 - 1. Boycott by public defenders to raise their rates was antitrust violation
- c. State Action
 - i. *Parker* (p. 94): states are not subject to federal antitrust review
 - ii. *Omni Outdoor Advertising* (p. 316):
 - 1. *Parker* does not apply to local governments unless:
 - a. Regulation is authorized by state statutes; and
 - b. Clear articulation of state policy to authorize anti-competitive conduct, explicitly or as a foreseeable result
 - iii. *Midcal* (p. 91):
 - 1. *Parker* immunizes vertical agreements fixing retail prices when:
 - a. Clearly articulated restraint on competition affirmatively expressed as state policy with the purpose of displacing the antitrust laws; and
 - b. Public officials supervise resulting private power