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Antitrust enforcement against oligopolies

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The antitrust laws prohibit agreements and other conduct that unreasonably restrain trade. In the 1980's, however, antitrust enforcement by the Department of Justice (DOJ) became much more lax. Court decisions likewise changed the analysis of many types of antitrust violations from the “*per se*” standard to the “rule of reason” standard, making the problems of proof of antitrust violations more difficult. Merger scrutiny was relaxed.¹ As a result, industries became far more concentrated over the last three decades. In response to economic and political pressures, the DOJ and FTC have started to use the antitrust laws much more aggressively lately, and with a focus on technology companies.

This article examines one particular form of corporate concentration that is likely to be under very sharp focus in government and private enforcement actions: the oligopoly. Understanding oligopolies and how the cases have dealt with oligopolistic conduct under the antitrust laws is thus of significant importance today. Accordingly, this article discusses the kinds of oligopolistic conduct that have given rise to antitrust liability and the kinds that have not, and with the unsurprising caveat that courts are not always consistent.

An oligopoly is a market form with limited competition in which a few producers control the majority of the market and typically produce or provide similar or homogenous products or services.² Oligopolies dominate many markets³ and oligopoly companies often compete in terms of image and quality rather than price. As the cases discussed herein reflect, oligopolies can be unhealthy for the economy where they fundamentally impede the competition that is crucial for a properly operating market economy. While oligopolies can be competitively benign, they can also set prices at levels higher than competitive prices or other favorable terms of sale than would not otherwise be achieved in a fully competitive market.

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1 See John Kwoka, *Reviving Merger Control: A Comprehensive Plan For Reforming Policy And Practice*, <https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf>

2 See <https://en.wikipedia.org/wiki/Oligopoly>.

3 In November 2018, the Open Market Institute, in its article “Monopoly by the Numbers,” gave a series of examples of the market share of the dominant two companies in various industries: (a) 90% in the home improvement store market; (b) 64% in the internet advertising market; (c) 69% in the office supplies market; (d) 89% in the drug store market; (e) close to 100% of independent travel search companies; (f) 60% of the mattress market; (g) 75% of the candy market; and (g) almost 100% of the smartphone market. In many markets, there is not even an oligopoly, as one company has a very high market share. As the Institute reported, one company has up to 80% of the market for appliances, another company has 86% of the market for basketball athletic shoes, one company has 74% of the market for e-books, and one Italian company dominates the market for eyeglasses.

The enforcement tool that will be used by the DOJ and FTC and in private actions is the Sherman Act, 15 U.S.C. §§ 1-7. The Sherman Act prevents agreements in restraint of trade and monopolization. The goals of the Sherman Act are broad. Indeed, as the Supreme Court stated in *Northern Pacific Railway Comp. v. United States*:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.⁴

Courts have applied the antitrust laws to changing markets, from the time of horse and buggies to the present digital age. Yet for over 100 years, those laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.

While it is axiomatic that antitrust law “protects competition, not competitors,” as the Supreme Court stated in *Brown Shoe v. United States*, drawing the antitrust liability line in markets with only a few major competitors is often difficult.⁵ Because competition requires competitors, the issue becomes at what threshold must competitors be protected to insure competitive markets and appropriate consumer prices and choices. The antitrust laws proscribe unlawful business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have reached different conclusions on the same fact patterns.

Unless it can be proven that a company or group of companies has impermissibly restrained trade, both oligopolies and monopolies are legal. Oligopolies that have been held to violate the antitrust laws are those where one or more of the members have colluded to control the market via anticompetitive practices, with collusion (*e.g.*, price fixing) being the usual violation.⁶ This is the classic agreement that constitutes a standard Sherman Act violation. Such conduct is in contrast with substantial market positions achieved because of superior products, services, or business practices, and/or uncontrollable developments, such as a key competitor leaving the market. In the middle is conduct without formal agreement by which the oligopoly members do nothing but individually conclude that it would not be profit-maximizing to lower prices. Those issues are discussed below.

1. The Antitrust Laws

The Sherman Act has two primary sections. Section 1 delineates and prohibits specific types of anticompetitive conduct, while Section 2 deals with results that are anticompetitive in nature. These

⁴ 356 U.S. 1, 4 (1958).

⁵ 370 U.S. 294, 317 (1962).

⁶ See *United States v. Apple, Inc.*, 952 F. Supp.2d 638, 645 (S.D.N.Y. 2013), where the DOJ brought antitrust claims in 2012 against Apple and six major publishers, including HarperCollins, Penguin, Simon & Schuster, and Macmillan. The DOJ alleged that the publishing industry openly colluded to raise eBook prices and end Amazon’s dominance, and that Apple played a central role in facilitating the scheme. *Id.*

sections supplement each other in an effort to prevent businesses from violating the spirit of the Act, while technically remaining within the letter of the law.

15 U.S.C. § 1: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. ...”

15 U.S.C. § 2: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. ...”

Private causes of action for violations of the antitrust laws are authorized by the Clayton Antitrust Act, 15 U.S.C. §§ 12-27, which also proscribes certain additional activities that had been discovered to fall outside the scope of the Sherman Act. For example, the Clayton Act added certain practices to the list of impermissible activities, like: (a) price discrimination between different purchasers, if such discrimination tends to create a monopoly; (b) certain exclusive dealing agreements; (c) certain tying arrangements;⁷ and (d) mergers and acquisitions that substantially reduce market competition. *See* 15 U.S.C. §§ 13-18.⁸

Section 1 claims require an agreement (express or implied) in the form of a contract, combination, or conspiracy that unreasonably restrains trade. The agreement, combination, or conspiracy can be horizontal, vertical, or both. In accordance with *Twombly's* pleading standard, the Section 1 complaint must lay out “who, did what, to whom, (or with whom), where, and when”⁹ while stating enough facts to “raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”¹⁰ In other words, while courts generally understand that the information that a plaintiff may need to show an agreement or conspiracy may not be available until discovery, a court will nonetheless closely examine the complaint at the motion to dismiss stage fully aware that a tenuous claim could actually hinder procompetitive conduct.

To have standing under the antitrust laws, plaintiffs must demonstrate “antitrust injury,” which is “injury of the type the anti-trust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Brunswick Corp v Pueblo Bowl-O-Mat, Inc.*, 429 US 477, 489 (1977). For a competitor challenging its rivals’ conduct, this requires a showing that its injury was caused by conduct that the antitrust laws were intended to remedy, i.e., an injury to competition and not just to itself. Thus, not every anticompetitive act is actionable under the antitrust laws.

7 *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006), abandoned the proposition announced *Standard Oil of California v. United States*, 337 U.S. 293, 305-3-6 (1949) that tying agreements “serve hardly any other purpose beyond the suppression of competition.” The Supreme Court ruled that that a tying arrangement is unlawful only if four elements are met: (1) there are two separate products or services, (2) the sale of one product or service (the tying product) is conditioned upon the purchase of another product (the tied product), (3) the seller possesses market power in the tying product market, and (4) the tie-in forecloses a substantial amount of the commerce in the tied product market.

8 While (a) – (c) are also covered by Section 1 of the Sherman Act, the Clayton Act arguably allows a lower burden (i.e., showing likelihood of lessening of competition rather than actual restriction of competition). In practice, however, the analysis is identical under Clayton Act sections and Sherman Act §1.

9 *Kendall v. Visa U.S.A.*, 518 F.3d 1042, 1048 (9th Cir. 2008).

10 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

2. Improper Oligopolistic Behavior under the Sherman Act

2.a. Sherman Act § 1

2.a.i. Express Agreements

The easiest kind of agreement to prove is, unsurprisingly, an express agreement. Express agreements come in the form of a contract, a document indicating the entities' discussions regarding collusion, a trade association resolution, a recorded phone call that shows two competitors entering into an agreement,¹¹ or testimony from a participant of the collusion. In *United States v. Apple, Inc.*, *supra*, n.3, executives of the defendant publishers met regularly over dinner to discuss their joint pricing strategy against Amazon.¹²

2.a.ii. Implied Agreements

Because of the obvious danger of express agreements that restrain trade, they are usually avoided. Modern technology also makes it simple to leave no trace of communications indicating an agreement even where there is one. As such, the Supreme Court has recognized that “unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators.”¹³ Consequently, indirect evidence is necessary to suggest the existence of a “conscious commitment to a common scheme” when no express agreement can be shown.¹⁴ At the pleading stage, this means that the plaintiff should allege sufficient facts that tend to plausibly demonstrate that the defendants' parallel actions are not the result of lawful interdependent behavior. This usually means pleading: 1) parallel conduct by the oligopolists; and 2) additional “plus factors.” There is a split in the circuits, however, as to whether pleading the plus factors is *required* to demonstrate a conspiracy in order to survive a motion to dismiss in view of the “plausibility” requirements of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The First and Second Circuits are more lenient towards antitrust conspiracy plaintiffs. The Third and Ninth Circuits are stricter, with the Sixth and Seventh Circuits sliding between those endpoints depending on the facts alleged.¹⁵ There is no circuit split at the summary judgment stage.

11 *Mayor and City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013).

12 *Apple*, 952 F. Supp.2d at 651.

13 *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939).

14 *Monsanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. 752, 764 (1984).

15 The First and Second Circuits do not require the pleading of plus factors at the motion to dismiss stage. See *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 46-47 (1st Cir. 2013) (“We are thus wary of placing too much significance on the presence or absence of ‘plus factors’ at the pleadings stage. While they are certainly helpful in guiding a court in its assessment of the plausibility of agreement in a § 1 case, other, more general allegations informing the context of an agreement may be sufficient.”); *Anderson News L.L.C. v. American Media, Inc.*, 680 F.3d 162, 189-90 (2d Cir. 2012). By contrast, the Third Circuit does. See *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 321-22 (3d Cir. 2010) (antitrust plaintiff must plead the “plus factors”). The Ninth Circuit likewise takes a strict view of plausibility, permitting the weighing of inferences on a motion to dismiss. See *name.space, Inc. v. Internet Corp. for Assigned Names and Numbers*, 795 F.3d 1124, 1131 (9th Cir. 2015). The Sixth and Seventh Circuits take a more flexible view of plausibility. See *Erie County, Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 868-69 (6th Cir. 2012) (“At the pleading stage, the plaintiff is not required to allege facts showing that an unlawful agreement is more likely than lawful parallel conduct.”); *In re Text Messaging Antitrust Litigation*, 630 F.3d 622, 629 (7th Cir. 2010) (“The complaint must establish a non-negligible probability that the claim is valid; but the probability need not be as great as such terms as ‘preponderance of the evidence’ connote”).

2.a.ii.(1) Parallel Conduct

Parallel conduct is necessary but not sufficient to establish a Section 1 violation.¹⁶ Parallel conduct can present itself in many ways, such as by, for example, simultaneously raising prices within certain time frames of another competitor,¹⁷ simultaneously changing output within certain time frames of another competitor, collective refusals to deal with a competitor within the oligopoly, or exclusivity arrangements.¹⁸ The latter two examples would be more common among those big tech firms that offer free services and sell no goods. Their revenue is generated by selling advertising space and often selling users' data to third parties. Such parallel conduct helps maintain the oligopoly positions within the market while preventing others from gaining market share or from entering the relevant market.

2.a.ii.(2) Plus Factors

Plus factors serve as proxies of direct evidence of an agreement. They are especially necessary in a cause of action against oligopolies that function in concentrated markets because parallel conduct is often consistent with the reality of lawful interdependence. In other words, detecting an illegal cartel is a lot like “diagnosing whether a disease is present.”¹⁹ Indeed, oligopolists realize that they must take into account the reaction of their competitors when making decisions that could affect the market. Similarly, a competitor often must react to its competitors to effectively compete within the market. The result is that each oligopolist may monitor the others' actions and act independently and in their own interests without violating Section 1. Accordingly, plus factors “ensure that courts punish concerted action – an actual agreement – instead of the unilateral, independent conduct of competitors.”²⁰

Although the list of plus factors is non-exhaustive,²¹ many courts look for these three: 1) motive to form an agreement or conspiracy; 2) actions against self-interest; and 3) traditional evidence suggesting a conspiracy or agreement. Courts place more emphasis on the third factor for complaints against concentrated oligopolies and look for any other evidence that would suggest a conspiracy beyond parallel conduct. Indeed, actions that do not make sense as a matter of independent action but only

16 See *Twombly*, 550 U.S. at 553-54, 556 (“Conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interest and their interdependence with respect to price and output decisions is not in itself unlawful”) (citing *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).

17 *In re Chocolate Confectionary Antitrust Litig.*, 999 F. Supp. 2d 777, 787 (M.D. Pa. 2014) (alleged “price increases [must be] reasonably proximate in time and value”), *aff'd*, 801 F.3d 383 (3d Cir. 2015).

18 Parallel conduct is considered necessary but not sufficient because, for example, an increase in the cost of raw materials would likely cause competitors to increase their prices without any collusion or conspiracy.

19 William E. Kovacic, Robert C. Marshall, Leslie M. Marx, Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 426 (2011).

20 *In re Chocolate Confectionary Antitrust Litigation*, 801 F.3d 383, 398 (3rd Cir. 2015).

21 Judge Richard Posner lists fourteen plus factors: 1) fixed relative market shares, 2) market-wide price discrimination, 3) exchanges of price information, 4) regional price variations, 5) identical bids for nonstandard products, 6) price output and capacity changes at the formation of the cartel, 7) industry-wide resale price maintenance, 8) declining market shares of leaders, 9) amplitude and fluctuation of price changes, 10) demand elastic at the market price, 11) level and pattern of profits, 12) market price inversely correlated with number of firms or elasticity of demand, 13) basing-point pricing, 14) exclusionary practices. Kovavic et al., *supra* note 13, at 415.

make sense if a conspiracy existed are, by definition, not consistent with lawful conscious parallelism. Plaintiffs generally plead and try to prove as many plus factors as possible. Notwithstanding precedent, due to the limitless ways in which a conspiracy can be inferred, courts still exercise discretion when considering the plaintiff's factual allegations and evidence and whether they plausibly suggest a conspiracy. Reasonable minds can differ and political views on antitrust enforcement can quickly divide the bench. If a plaintiff merely sets forth evidence, however, that is equally consistent with legal behavior as with unlawful conduct, this will not be a sufficient basis from which to infer concerted action.

2.a.ii.(2)(a) Motive to Form a Conspiracy

Evidence of a motive to conspire means that the relevant market is conducive to collusion “due to the presence of oligarchic sellers, diffuse buyers, prohibitive entry barriers, and standardized products.”²² Concentrated markets are, by nature, more conducive to collusion. Oligopolists are aware that if they increase prices together, there is no reasonable substitute for their product or service. That fact, when combined with high entry barriers due to well-established market dominance and high costs for market entrants, can create an inferred motive to form a conspiracy. In *United States v. Apple*, Apple and six major book publishers were found to share a common motive of eliminating Amazon's \$9.99 retail price for e-books.²³ Apple wanted to release the iPad for the first time and did not want to compete with Amazon, its biggest competitor in the e-book market.²⁴ Similarly, the book publishers feared Amazon's \$9.99 price point was going to undermine the hardcover book market and threaten the publishing industry business model.²⁵

2.a.ii.(2)(b) Actions against Self-Interest

A showing that the defendants acted “inconsistently with a competitive market”²⁶ can be made by demonstrating actions against self-interest. This factor can be demonstrated where there is a lack of evidence tending to show that the alleged anticompetitive conduct was due to costs or demand, or that there is no procompetitive justification.²⁷ The classic examples involve raising prices when demand is low, decreasing prices when demand is high, or exchanging customer information with a competitor. The theory is that these actions would not likely be rationally justified by procompetitive reasons and would support anticompetitive inferences. However, in concentrated markets, some conduct appearing to be against self-interest will often have procompetitive justifications. For example, a firm may lower its prices to compete with a competitor who has lowered its prices until it finds a way to decrease its costs or gain enough market share to raise them again. Courts recognize this “follow the leader” strategy as procompetitive in concentrated markets and not in violation of the Sherman Act.

22 In re Chocolate Confectionary Antitrust Litigation, 602 F. Supp.2d 538 (E.D. Pa. 2009).

23 925 F. Supp.2d 638, 691 (S.D.N.Y. 2013).

24 *Id.* Amazon was responsible for selling nearly 90% of all e-books. *Id.* at 649.

25 *Id.*

26 In re Chocolate Confectionary Antitrust Litigation, 801 F.3d 383 (3d Cir. 2015).

27 See *id.* at 399.

2.a.ii.(2)(c) Traditional Evidence Suggesting a Conspiracy or Agreement

Another plus factor consists of evidence that shows the defendants had opportunities to meet and conspire or form agreements. This factor can be shown in a variety of forms, including: trade show attendances²⁸ by individuals from each firm, interfirm communications, communication through public statements, internal communications discussing competitors, industry events in which individuals of each firm attended, or coordinated vacations with individuals at competitor firms.²⁹ In *Apple*, the court held that Apple violated Section 1 for facilitating a conspiracy with the “Big Six” book publishers to raise and fix prices of e-books.³⁰ The court considered evidence that Apple executives flew to New York more than three times from Cupertino over the course of under one month to meet with each of the publishers.³¹ It paid particular attention to one trip which was “unprecedented in length,” lasting nine days.³² The court also considered the high volume of phone calls and emails exchanged between Apple and the publishers over the relevant time period and found that such circumstantial evidence combined with the “substance” and “pattern” of the communications “overwhelming[ly]” indicated a meeting of the minds.³³

2.a.ii.(2)(d) Other Plus Factors

The three plus factors discussed above are not the only ones used to demonstrate a conspiracy. Courts are willing to look at all types of evidence and some courts favor certain factors.³⁴ For example, in *In re Auto. Parts Antitrust Litig.*, the plaintiff survived a motion to dismiss an MDL action directed to fixing price for wiring harnesses by, *inter alia*, relying on prior guilty pleas to federal criminal

28 While mere trade show or industry event attendance by individuals from each firm alone is not enough to support an inference of conspiracy, it can provide a basis to do so when coupled with other allegations suggesting an agreement was formed at the event. This factor could also be shown by interfirm communications where individuals with pricing authority are exchanging competitive information in proximity to price increases by both firms. For example, the Third Circuit has noted that it does not attach much weight to evidence of opportunity to collude – such as evidence of attendance at trade shows or other social contact – because “company personnel do not often operate in a vacuum or plastic bubble; they sometimes engage in the longstanding tradition of social discourse.” *In re Baby Food*, 166 F.3d at 133; *see also* *Petruzzi’s IGA*, 998 F.2d at 1242 n. 15 (noting that evidence of social contacts and telephone calls among representatives of the defendants was insufficient to exclude the possibility that the defendants acted independently).

29 *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d at 1348, 1360 (“[C]ollusive communications can be based upon circumstantial evidence and can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways.”).

30 *Apple*, 925 F. Supp.2d at 645.

31 *Id.* at 704.

32 *Id.*

33 *Id.* at 705. The court noted in a footnote that the publishers’ “denial at trial that they discussed the Apple agreement with one another, or that those conversations occurred at all, in the face of overwhelming evidence to the contrary, strongly supports a finding of consciousness of guilt.” *Id.* n.59. Courts have also found that competitors meeting together, without more, is not enough to raise an inference of conspiracy. *See, e.g., in re Chocolate*, 801 F.3d at 409 (holding that district court rightly declined to draw an inference of conspiracy from defendants’ trade show attendance).

34 The Supreme Court has also pointed to “a radical departure from the previous business practices of the industry” as a helpful indicator of a conspiracy. *See Interstate Circuit v. United States*, 306 U.S. 208, 222 (1939).

charges for antitrust violations relating to price fixing for bearings.³⁵ The court concluded, “Here, the component parts in the MDL involve allegations of a similar scheme in each part, and thus, provide context as to how the . . . conspiracy operated.”³⁶ In *In re Chocolate Confectionary Antitrust Litigation*, the plaintiffs sufficiently pleaded to survive a motion to dismiss by pointing to a contemporaneous Canadian conspiracy and the strength of the Canadian chocolate manufacturers’ relationships with their American counterparts.³⁷

2.a.iii. Unreasonable Restraint on Trade

If the plaintiff can establish an agreement or a plausible inference of an agreement, the next step is to prove an unreasonable restraint on trade. Unreasonable restraints on trade consist of conduct that has an anticompetitive purpose and effect. A court’s analysis of a complaint at the motion to dismiss state will differ depending on whether the plaintiff asserts a *per se* violation or unlawful conduct that requires a rule of reason analysis.

2.a.iii.(1) *Per Se* Violations

Per se violations have historically included “price fixing, division of markets, group boycotts[,] and tying arrangements.”³⁸ *Per se* violations are presumed to be unreasonable and do not warrant any further inquiry into market power or harm.³⁹ Modernly, there is no definitive line separating *per se* from rule of reason, however, as the rule of reason operates on a continuum without a sharp divide between *per se* and rule of reason.⁴⁰ Because the quantum of proof should be proportional to the nature of the conduct, courts may take a “quick look” at the facts to determine whether a certain practice appears “on its face” to restrict competition.⁴¹ Under the “quick look” approach, courts engage “in an enquiry meet for the case, looking to the circumstances, details, and logic of the restraint.”⁴² Support for the quick look protocol is widespread within the antitrust world.⁴³ As discussed by Prof. Cavanagh:⁴⁴

35 50 F. Supp. 3d 836, 848-49 (E.D. Mich. 2014) (“Based on the guilty pleas, an inference arises that not only were the market conditions alleged to be conducive to the birth of an antitrust conspiracy, the conditions allowed an antitrust conspiracy to flourish for eleven years.”)

36 *Id.*

37 602 F. Supp. 2d 538, 576-77 (M.D. Pa. 2009). At the summary judgment phase, however, the court refused to rely on the Canadian conspiracy as evidence supporting an American chocolate market conspiracy because the Canadian corporations were distinct entities operated by different people. *In re Chocolate Confectionary Antitrust Litigation*, 801 F.3d 383 (M.D. Pa. 2015).

38 *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5, (1958). While tying is still technically a “*per se*” violation, it is more akin to a violation analyzed under the rule of reason insofar as market power in the tying product must be shown.

39 *See id.*

40 *See Cal. Dental Ass’n v. F.T.C.* 526 U.S. 756, 769-70 (1999).

41 *Id.* at 780. *See also* L. SULLIVAN & W. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 206 (West Group. 2000).

42 *Id.* at 780-781.

43 Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 838 (2016) (“Support for quick look is universal within the antitrust community; courts, enforcement agencies and numerous scholars have endorsed the approach.”).

44 Edward D. Cavanagh, *Whatever Happened to Quick Look?* 26 Univ. of Miami Business Law Review 39 (2017).

Proponents of quick look view it as an improvement over traditional Rule of Reason analysis for several reasons: (1) it reduces litigation costs; (2) it fosters deterrence by encouraging lawsuits that might otherwise be intimidated by the burdens of a traditional Rule of Reason case; and (3) it achieves cost savings without barring defendants from presenting justifications for their conduct. More importantly, the quick look approach gives antitrust plaintiffs a fighting chance in cases that fall outside the *per se* ambit.

Notwithstanding their ability based on *Cal Dental* to take a quick look, courts in private antitrust actions have often been reluctant to do that truncated liability analysis,⁴⁵ and even the Supreme Court itself has shied away from it.⁴⁶ Clearly, if the plaintiff can show a *per se* violation, it can avoid the heavier burden of proving the defined relevant market, the defendant's market power, or harm.⁴⁷

In 2013, the DOJ brought a Section 1 claim against a big tech oligopoly consisting of Google, Apple, Intel, Adobe, and Intuit for engaging in mutual no poaching agreements.⁴⁸ Each firm agreed not to solicit employment to one another's tech engineers while suppressing the engineers' wages.⁴⁹ The complaint asserted that the agreement was a *per se* violation, but pleaded in the alternative that the rule of reason analysis would also show an anticompetitive purpose and effect.⁵⁰ According to the complaint, the horizontal price fixing agreement prohibited engineers from finding better employment and receiving competitive offers for higher salaries and plausibly appeared on its face to restrict trade.⁵¹

2.a.iii.(2) The Rule of Reason Analysis

If not a *per se* violation, the rule of reason approach requires a more fact intensive showing to plead an unreasonable restraint on trade. The rule of reason is the most common Section 1 analysis. In most rule of reason analyses, the plaintiff pleads and proves facts that 1) define the relevant market; 2) show the defendant's market power;⁵² and 3) demonstrate an adverse effect on competition.⁵³ Failure to define the relevant market in the complaint in a rule of reason action will result in a dismissal of the case at the motion to dismiss stage. Once the case is underway and proves up these factors, the defendant has the

45 See *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1311 n.17 (10th Cir. 2017); *Food Lion, LLC v. Dean Foods Co.*, 2016 WL 1259959 at *4 (E.D. Tenn. Mar. 30, 2016); *Major League Baseball Properties v. Salvino*, 542 F.3d 290, 334 (2d Cir. 2008) (reasoning anticompetitive effects are not obvious); *California v. Safeway, Inc.*, 651 F.3d 1118, 1137-38 (9th Cir. 2011); *Continental Airlines, Inc., v. United Airlines, Inc.*, 277 F.3d 499, 513 (4th Cir. 2002); *Food Lion, LLC*, 2016 WL 1259959 at *4; see generally Cavanagh, *supra*, at 64.

46 See *Leegin Creative Leather Prod., Inc., v. PSKS, Inc.*, 551 U.S. 877 (2007). Reversing a century of precedent, the Supreme Court held that resale price maintenance was not a *per se* violation and instead that vertically imposed price restraints must be evaluated under a full-blown rule of reason analysis.

47 See *infra* for discussion on defined market and market power.

48 See *In re High-Tech Employee Antitrust Litigation*, 985 F. Supp. 2d 1167, 1172-73 (N.D. Cal. 2013).

49 *Id.*

50 *Id.*

51 *Id.*

52 See SULLIVAN & GRIMES, *supra*, note 36, at 218 ("there continues to be at least a possibility and in many instances a likelihood that a market power showing will be required in many rule of reason cases, even though not all.").

53 *United States v. Apple, Inc.*, 925 F. Supp. 2d 638, 688 (S.D.N.Y. 2013) (citing *Geneva Pharms Tech Corp. v. Barr Labs Inc.*, 386 F.3d 485, 506-07 (2d Cir. 2004)).

opportunity to offer evidence of pro-competitive effects of their agreement.⁵⁴ If the defendants can offer procompetitive justifications for their conduct, the burden shifts back to the plaintiff who must show that “any legitimate benefits offered by defendants could have been achieved through less restrictive means.”⁵⁵ This back-and-forth burden shifting analysis requires the trier of fact to conduct a balancing act by weighing the procompetitive and anti-competitive effects of the defendant’s conduct.⁵⁶

2.a.iii.(2)(a) Relevant Market

The plaintiff must have suffered an injury in the same market where it alleges the competition is restrained. A showing of both the product market and geographic market is necessary. The market definition adopted by the court may determine the outcome of the case. A product market is “determined” among other things, “by the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producer’s ability to expand output.”⁵⁷ This is also known as the “cross-elasticity of demand.”⁵⁸ The court looks to “the responsiveness of the sales of one product to price changes of the other.”⁵⁹ Under one approach, the market definition can be determined when the plaintiff can show that a hypothetical monopolist could profitably impose a SSNIP of approximately 5%.⁶⁰ Under this approach, if the hypothetical monopolist can raise its prices by 5% without losing sales (and profits) to substitutes, the market is defined.⁶¹

The geographic market is where the alleged monopolist (or oligopoly) operates, where the consumers buy the product at issue, or where it can reasonably be interchanged. Geographic markets are local, regional, national, or international. Similar to the product market, the relevant geographic market can be defined by focusing on the consumers’ reactions to a hypothetical 5% increase in price.⁶² The geographic market will be expanded to the areas where consumers substitute their purchase after the price increase.

2.a.iii.(2)(b) Market Power

While proving market power is not required for horizontal conspiracies engaging in *per se* violations such as price fixing,⁶³ it is not presumed in rule of reason situations such as information exchanges between competitors.⁶⁴ Unless the defendant has market power in the relevant market, the plaintiff

54 Geneva Pharms Tech Corp. v. Barr Labs Inc., 386 F.3d 485, 507 (2d Cir. 2004), citing Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993) and Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991).

55 *Id.*

56 *Id.*

57 L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 423 (11th Cir. 1984).

58 SULLIVAN & GRIMES, *supra*, note 36, at 25. Cross-elasticity of demand is not the sole factor, however, for determining market definition. See, e.g., Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995) (“defining a market on the basis of demand considerations alone is erroneous”).

59 *Id.*

60 Significant and non-transitory increase in price.

61 This sometimes referenced as 5-10% and the amount probably varies by industry/market conditions.

62 While there is precedent for using the SSNIP test to define geographic markets, the SSNIP test is traditionally used for defining product markets. In fact, under the DOJ/FTC Horizontal Merger Guidelines, “the Agencies normally define geographic markets based on the locations of suppliers.”

63 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690, 694 (7th Cir. 2006)

64 Todd v. Exxon Corp., 275 F.3d 191, 199 (2nd Cir. 2001).

will not be able to show harm to consumer welfare. The defendant's market share is most often used to show market power but courts also consider the barriers to market entry and strength of competition. Generally, a defendant's market power must be more than 30% to properly allege harm to competition.⁶⁵ In concentrated markets, however, one firm's market share does not explain the oligopoly power as a whole. To fix this problem, the plaintiff can use the sum of the largest four firms in the industry to show a combined market share that would unreasonably restrict competition.⁶⁶ Another way is to use the HHI index, which is the sum of the square of each firm's market share in the industry.⁶⁷ Because market definition is a deeply fact-intensive inquiry, some courts hesitate to grant motions to dismiss for failure to plead a relevant product market.⁶⁸

2.a.iii.(2)(c) Adverse Effect on Competition

The forms of adverse effects on competition are seemingly unlimited. The Sherman Act's language fails to articulate the precise behaviors it prohibits, leaving it up to the judiciary to determine unreasonableness in restraint. Most actionable oligopoly behavior would result in horizontal conduct between competitors, as opposed to vertical restraints (between parties at differing points in the supply chain). While horizontal price restraints are very likely to result in a *per se* analysis due to the unlikelihood of interacting with competitors without a collusive motive, some horizontal conduct and arrangements between competitors are analyzed under a rule of reason analysis, such as data⁶⁹ and price information exchanges.⁷⁰ In any event, the inquiry is always whether there is an adverse effect on competition, not a competitor.

2.b. Sherman Act § 2

2.b.i. Monopolization

“Monopoly power” is classically defined as “the power to control prices or exclude competition.”⁷¹ Monopoly power, alone, however, is not a violation of any antitrust law. Indeed, a firm can obtain monopoly power by selling a superior product, by having better business skills, or even by accident.

65 *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 446 U.S. 2, 26-29 (1984), *abrogated on other grounds by Illinois Tool Works, Inc., v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006).

66 SULLIVAN & GRIMES, *supra*, note 36, at 67. “A variation of the four figure concentration is the eight figure concentration, or the sum of the market shares of the largest eight firms in the industry.” *Id.*

67 The Herfindal-Hirschman Index appears to be more commonly used in merger cases under Section 2. For a brief explanation on the theory of the HHI application, see Jamie Henikoff Moffitt, 63 VAND. L. REV. 1697, 1707-09 (2010).

68 See *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 531 (6th Cir. 2001) (“Market definition is a highly fact-based analysis that generally requires discovery.”) (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)); *Double D Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 560 (8th Cir. 1998) (noting that “courts are hesitant to dismiss antitrust actions before the parties have had an opportunity for discovery”).

69 See *Todd v. Exxon*, *supra*; *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978).

70 *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923)

71 *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. at 451, 481 (1992) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)).

A successful monopolization claim under Section 2 requires a showing of 1) a properly defined relevant market; 2) possession of monopoly power; and 3) willful acquisition or maintenance of that monopoly power through exclusionary conduct.

A monopoly, by definition, consists of a single firm. As such, a Section 2 claim alleging monopolization poses a problem with oligopolies that collectively have a monopoly-like power to set and maintain supra-competitive prices. Indeed, “[n]oncompetitive pricing may . . . be an element of proof that oligopolists possess shared monopoly power but cannot reasonably be called an antitrust offense.”⁷² Accordingly, most courts have universally rejected a cause of action under the “shared monopoly” theory against more than a single firm.⁷³ However, Professors Areeda and Hovenkamp have a different view of the “shared monopoly” theory and the use of Section 2 to combat it:

. . . although we assume that the 1890 Congress did not have the oligopoly problem in mind, this fact should not alone determine the matter. The absence of congressional contemplation should not exclude the application of Section 2 to shared monopoly any more than it has excluded many other applications of the Sherman Act to situations doubtless outside of any explicit congressional contemplation when the statute was enacted.⁷⁴

72 3A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, 809 (4th ed. 2015).

73 *Id.*; *In re Credit Default Swaps Antitrust Litigation*, 2014-2 Trade Cas. (CCH) ¶ 78898, 2014 WL 4379112 at *13 (S.D. N.Y. 2014) (“It is settled that such a ‘shared monopoly’ theory cannot support a Section 2 attempt-to-monopolize claim”); *In re Aluminum Warehousing Antitrust Litigation*, 2014-2 Trade Cas. (CCH) ¶ 78885, 2014 WL 4277510 at *36 (S.D. N.Y. 2014), opinion supplemented, 2014 WL 4743425 (S.D. N.Y. 2014), *aff’d*, 833 F.3d 151 (2d Cir. 2016) (“The law does not recognize a ‘shared monopoly’”); *ID Security Systems Canada, Inc. v. Checkpoint Systems, Inc.*, 249 F. Supp. 2d 622, 649 (E.D. Pa. 2003), order amended, 268 F. Supp. 2d 448 (E.D. Pa. 2003) (“Section 2 ... applies to the conduct of single firms only, rather than to the conduct of a small number of firms engaged in tacit collusion, as in cases involving oligopoly, shared monopoly, or, as here, duopoly...”; *Sun Dun, Inc. of Washington v. Coca-Cola Co.*, 740 F. Supp. 381 (D. Md. 1990) (explaining that because oligopoly does not violate § 2, it is not sufficient to allege that a group possesses monopoly power together); *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 748 F. Supp. 344 (M.D. N.C. 1990), *aff’d*, 964 F.2d 335 (4th Cir. 1992), *aff’d*, 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) (rejecting shared-monopoly theory); *Am. Tel. & Tel. Co. v. Delta Communications Corp.*, 579 F.2d 972 (5th Cir. 1978), *reh’g denied* and opinion modified, 590 F.2d 100 (5th Cir. 1979); *Precision CPAP, Inc. v. Jackson Hospital*, 2010-1 Trade Cas. (CCH) ¶ 76939, 2010 WL 797170 (M.D. Ala. 2010) (noting that the Fifth Circuit has rejected the shared monopoly theory); *In re Southeastern Milk Antitrust Litigation*, 801 F. Supp. 2d 705 (E.D. Tenn. 2011) (noting that “the Sixth Circuit, by clear implication, rejected the ‘shared monopoly’ theory of the plaintiffs.”); *Southeast Missouri Hosp. v. C.R. Bard, Inc.*, 2008-1 Trade Cas. (CCH) ¶ 76095, 2008 WL 199567 (E.D. Mo. 2008) (rejecting shared monopoly theory); *Foam Supplies, Inc. v. The Dow Chemical Co.*, 2008-1 Trade Cas. (CCH) ¶ 76027, 2007 WL 4210354 (E.D. Mo. 2007) (holding that “a firm can only be liable for monopolization ... where it can monopolize the relevant market while acting on its own.”); *Lenhoff Enterprises, Inc. v. United Talent Agency, Inc.*, 2015-2 Trade Cas. (CCH) ¶ 79312, 2015 WL 7008185 at *3 (C.D. Cal. 2015) (the Ninth Circuit does not recognize a “shared” or “joint” monopoly); *United Food and Commercial Workers Local 1776 & Participating Employers Health and Welfare Fund v. Teikoku Pharma USA, Inc.*, 74 F. Supp. 3d 1052, 1076 (N.D. Cal. 2014) (“A monopoly, by definition, consist of a single firm, and both monopolization and attempted monopolization are single firm violations”; *Oxbow Carbon & Minerals LLC v. Union Pacific R. Co.*, 926 F. Supp. 2d 36 (D.D.C. 2013) (“The very phrase ‘shared monopoly’ is paradoxical”); but see *JES Properties, Inc. v. USA Equestrian, Inc.*, 253 F. Supp. 2d 1273 (M.D. Fla. 2003) (refusing to reject the claim out of hand, but explaining that “[t]he court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader’s suppositions.”); *Stewart Glass & Mirror Inc., v. USA Glas, Inc.*, 940 F. Supp. 1026, 1038 (E.D. Tex. 1996) (acknowledging that a shared monopoly can exist but dismissing the claim on other grounds).

74 AREEDA & HOVENKAMP, *supra*, note 58, at 501-02.

As discussed herein, a Section 1 claim against an oligopoly is viable if the plaintiff can successfully plead and prove an anti-competitive agreement, especially since treble damages are available under either Section 1 or Section 2. Ultimately, filling the Section 2 gap that allows oligopolies to “slip past” the Sherman Act’s monopolization prohibition is up to Congress and the judiciary.⁷⁵

2.b.ii. Conspiracy to Monopolize

Conspiracy to monopolize under Section 2 of the Sherman Act focuses on coordinated conduct between two or more actors. A plaintiff must show: 1) the existence of a combination or conspiracy; 2) an intent to monopolize; and 3) an overt act in furtherance of the conspiracy. Section 2 requires a more rigorous hurdle of showing the defendants’ specific intent to monopolize. Because a conspiracy to monopolize requires an agreement, the less burdensome approach would be to bring a claim under Section 1. Indeed, a conspiracy that offends antitrust policy under Section 2 most likely would be held to be an unreasonable restraint on trade under Section 1. The plaintiff would also probably prefer the benefit of a potential *per se* analysis, eliminating the need to show a defined relevant market, market power, and harm to competition. Similar to the Section 2 monopolization claim, some courts have rejected the idea that an oligopoly could conspire to collectively monopolize.⁷⁶

2.b.ii.(1) Existence of Combination or Conspiracy

Showing the existence of a combination or conspiracy is similar to showing an agreement under Section 1. As stated above, the plaintiff can rely on direct or indirect evidence to establish a common scheme to achieve a monopoly.⁷⁷

2.b.ii.(2) Intent to Monopolize

Specific intent can be proven directly or indirectly. However, because intent is not often expressed, it can be inferred either from the defendants’ anticompetitive behavior or from the oligopoly’s collective monopoly power. To successfully plead this element, facts must be alleged to plausibly show that all conspirators had the requisite intent.⁷⁸

⁷⁵ See *id.* at 499.

⁷⁶ *RxUSA Wholesale Inc. v. Alcon Laboratories*, 391 Fed. Appx. 59 (2d Cir. 2010) (per curiam summary order) (dismissing plaintiffs complaint because it failed to allege that any defendant, by itself, had a monopoly, and the shared-monopoly allegations merely repeated plaintiffs’ § 1 allegations, which failed to sufficiently allege a conspiracy), *aff’d* 661 F. Supp. 2d 218 (E.D.N.Y. 2009) (noting that Second Circuit has rejected the shared-monopoly theory); *In re Credit Default Swaps Antitrust Litigation*, 2014-2 Trade Cas. (CCH) ¶ 78,898, 2014 WL 4379112 at *13 (S.D. N.Y. 2014) (“It is settled that such a ‘shared monopoly’ theory cannot support a Section 2 attempt-to-monopolize claim.... There is no binding authority, however, on whether a conspiracy-to-monopolize claim can be based on a ‘shared monopoly.’); *Terminalift LLC v. International Longshore and Warehouse Union Local 29*, 195 L.R.R.M. (BNA) 2900, 2013-1 Trade Cas. (CCH) ¶ 78,388, 2013 WL 2154793 (S.D. Cal. 2013) (holding that a conspiracy to create a shared monopoly fails to state a claim under § 2); *Standfacts Credit Services, Inc. v. Experian Information Solutions, Inc.*, 405 F. Supp. 2d 1141, 1152 (C.D. Cal. 2005), *aff’d in part*, 294 Fed. Appx. 271 (9th Cir. 2008) (“Since Section 2 prohibits only monopolization by a single entity, as opposed to shared monopolization, ... an allegation of conspiracy to create a shared monopoly does not plead a claim of conspiracy under Section 2.”).

⁷⁷ *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

⁷⁸ *Rome Ambulatory Surgical Ctr., LLC v. Rome Memorial Hosp., Inc.*, 349 F. Supp. 2d 389 (N.D.N.Y. 2004).

2.b.ii.(3) Overt Act in Furtherance of the Conspiracy

To satisfy the overt act requirement, any evidence of a Section 1 violation will suffice. The violation does not need to be *per se* and can include rule of reason violations such as price-fixing, horizontal agreements that restrain trade, or group boycotts.⁷⁹

3. Tips for Oligopolists

With oligopolies under increased legal scrutiny, some basic steps can be taken to avoid liability. First, obviously avoid collusive activity that is patently illegal such as price fixing agreements. Second, avoid activity that hints at illegality, such as parallel conduct that has no business justification—for example, actions against an entity's self-interest. Third, make sure that those actions that are taken to react to a competitor have provable unilateral, lawful, and independent business justifications, as opposed to collusion. Fourth, be sensitive to trade show and industry event appearance by company personnel who are in a position to control such factors as pricing and/or who have the authority to form agreements between corporations. Fifth, remember that it is the implied agreements based on circumstantial evidence that are the most difficult to defend against because of the limitless ways in which a conspiracy can be inferred, and also because the unreasonableness of a restraint on trade is determined in the context of the industry and technology at issue.

Lastly, and this issue extends far beyond the antitrust context of this article, be careful of what is said in emails, which are the daily diaries of the corporate world. Juries and judges tend to believe documents more than people.⁸⁰ Likewise, if the corporation has an email destruction policy, make sure it complies with industry and government regulations.⁸¹

4. Conclusion

Understanding oligopolies and how oligopolistic conduct can violate the antitrust laws is of increased importance in advising corporations with significant market shares as to the boundaries of conduct that will not run afoul of the antitrust laws.

⁷⁹ *Advanced Health-Care v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990).

⁸⁰ See *FTC v. Qualcomm Inc.*, 2019 U.S. Dist. LEXIS 86219, *28 (N.D. Cal. 2019) (“The Court finds Qualcomm’s internal, contemporaneous documents more persuasive than Qualcomm’s trial testimony prepared specifically for this antitrust litigation. ... Specifically, many Qualcomm executives’ trial testimony was contradicted by these witnesses’ own contemporaneous emails, handwritten notes, and recorded statements to the Internal Revenue Service”).

⁸¹ The Sarbanes Oxley Act, for example, recommends a seven-year email retention period for all public companies and the Internal Revenue Service requires a similar retention period for all companies.