6. Proving Conspiracy

Antitrust Law

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Topics

- Substance
  - Sherman Act § 1
  - Plurality
  - Agreement
- Testing alleged agreements
  - Motions to dismiss
  - Summary judgment motions
  - Trial
  - Appeals
    - Jurisdiction
    - Standards of review

Sherman Act § 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.

- Four elements of *every* Section 1 offense:
  - A *plurality of actors* with the legal capacity to combine or conspire
  - *Concerted action*—the contract, combination, or conspiracy
  - A *restraint* of trade or commerce
  - *Unreasonableness*, which may be proved under either:
    - Per se rule
    - Rule of reason
    - "Quick look"
- Gravamen of a Section 1 offense
  - The illegal agreement itself, not the overt acts performed in furtherance of it[1]

[1] United States v. Kissel, 218 U.S. 601, 606-07 (1910).

Concerted Action

- Fundamental distinction: *Concerted action* v. *unilateral action*
  - The Sherman Act contains a "basic distinction between concerted and independent action."[1]
  - Sherman Act § 1 applies only to concerted action
    - Has no application to unilateral conduct (the "*Colgate* doctrine")[2]
  - Sherman Act § 2 applies to unilateral action
    - Monopolization
    - Attempted monopolization
    - Although can apply to concerted action as well:
      - Joint monopolization
      - Conspiracies to monopolize

[1] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984).
[2] United States v. Colgate & Co., 250 U.S. 300 (1919).

Concerted Action

- History of distinction
  - The Senate Judiciary Committee, in completely rewriting the Sherman bill, simply adopted the terms of English common law, which included common law offenses for—
    - Concerted action (e.g., contracts in restraint of trade; conspiracies in restraint of trade), and
    - Unilateral conduct (e.g., monopolization and attempted monopolization)
- U.S. evolution
  - The Sherman Act was designed as an enabling act to permit the continue common law evolution of competition law in the courts
    - Not to codify the common law as it existed at the time of enactment
  - Over time, courts—
    - Took a restrictive view of concerted action that eliminated competition, but
    - Took an increasingly lenient view of unilateral action
  - Idea
    - The elimination of rivalry among competing firms (at least without integration through a merger) is unlikely to promote consumer welfare[1]
    - But aggressive, unilateral conduct—even if it harmed competitors—could be procompetitive

[1] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69 (1984) (Burger, C.J.) (finding that concerted activity is "fraught with anti-competitive risk" because it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands").

Concerted Action

- Result
  - A “gap” developed between the treatment of concerted and unilateral conduct, in many cases making the distinction outcome-determinative
    - Section 2 prohibits monopolization and attempted on monopolization
    - Section 1 prohibts unreasonable restraints of trade, including restraints that fall short of theatening monopolization
    - BUT Section 1’s more restrictive standards applies only to concerted action
      - Unilateral conduct unreasonably restrains trade but does not rise to the level of monopolization or attempted monopolization does not violate the Sherman Act

Concerted Action

- Rationalizing the "gap"

> In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.
>
> . . .
>
> The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.[1]

[1] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-69 (1984); *see* American Needle, Inc. v. National Football League, 560 U.S. 183, 190 n.2 (2010) ("If Congress prohibited independent action that merely restrains trade (even if it does not threaten monopolization), that prohibition could deter perfectly competitive conduct by firms that are fearful of litigation costs and judicial error.").

Concerted Action

- The concerted action element of a Section 1 violation has two parts:
  - Actors must have the *legal capacity to conspire* with one another ("plurality")
  - There must be an actual *agreement* among these actors
    - *NB*: The cases have never drawn a meaningful distinction between "contract," "combination" and "conspiracy" within the context of Section 1

Plurality

- Requirement
  - Actors must have the *legal capacity to conspire* within the meaning of the antitrust laws
    - Idea is that the actors should be legally independent persons and not part of a single enterprise
- Question
  - Unrelated companies are “independent centers of decisonmaking” and hence there is little dispute that they have the capacity to conspire
  - But what of related companies? Consider—
    - Parent and wholly-owned subsidiary?
    - Parent and “controlled” subsidiary?
    - Two commonly-owned sister corporations?
    - Joint venture parents in a joint venture (such as a credit card network or a sports league)?

Plurality

- Antitrust history
  - Early cases
    - Early courts, seeking to expand the coverage of Section 1 and minimize the "gap" between Section 1 and Section 2, held that related companies had the capacity to conspire
      - Accordingly, agreements between related companies—such as a parent corporation and its wholly-owned subsidiary—could be reached under Section 1
      - Known as "intraenterprise conspiracies" or "bathtub conspiracies"
    - Key precedents
      - *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*:[1] Two wholly-owned subsidiaries of a liquor distiller had the capacity to conspire in connection with a joint refusal to supply a wholesaler who declined to abide by a maximum resale pricing scheme
      - *United States v. Yellow Cab Co.*:[2] Indicating that a shareholder and five taxicab companies he had acquired and then controlled had the capacity to conspire with one another

[1] 340 U.S. 211 (1951).
[2] 332 U.S. 218 (1947).

Plurality

- Antitrust history
  - Modern cases
    - *Copperweld* (1984)[1]
      - *Question*: Does a parent company and its wholly-owned subsidiary have the capacity to conspire with one another within the meaning of Section 1?
      - Supreme Court (6-3): No, as a matter of law
        - Narrow decision: "We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act."[2]
      - More generally, entities lack the capacity to conspire, regardless of corporate structure, when treating them as a single enterprise would not "deprive[ ] the marketplace of independent centers of decisionmaking that competition assumes and demands"[3]
      - Stevens' dissent:
        - Should continue to employ an expansive notion of concerted action to give Section 1 broad coverage and use the "reasonableness" of the restraint as the test of legality
        - "As an economic matter, what is critical is the presence of market power, rather than a plurality of actors."[4]

[1] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69 (1984).
[2] *Id* at 767.
[3] *Id*. at 768-69; *accord* American Needle, Inc. v. National Football League, 560 U.S. 183, 190 (2010).
[4] *Copperweld*, 467 U.S. at 789.

Plurality

- Antitrust history
  - Modern cases
    - *American Needle* (2010)[1]
      - *Question*: Whether the actions of the 32 separately-owned teams of the National Football League and a corporate entity (NFLP) they formed to manage their trademarks and other IP have the capacity to conspire within the meaning of Section 1?
        - Arose when a former licensee-appeal manufacturer challenged the loss of its license when the teams voted to authorize the NFLP to grant exclusive licenses and the NFLP granted an exclusive license to Reebok International
      - District court and Seventh Circuit—No capacity
        - Summary judgment—Operate as a single enterprise with respect to conduct at issue (IP licensing) since teams have economic power only when functioning collectively as a single unit to produce NFL football
      - Supreme Court—Capacity (Stevens for a unanimous Court)
        - *The modern test*: Whether there are "separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking and therefore of diversity of entrepreneurial interests and thus of actual or potential competition"[2]
        - *Query*: In what sense, if any, can NFL teams "actually or potentially compete" in the licensing of their team logos? (Stevens had to find that they could compete in order to reach his result.)

Remember: Stevens dissented in *Copperweld*

[1] American Needle, Inc. v. National Football League, 560 U.S. 183 (2010) (Stevens, J.) (9-0)
[2] *Id*. at 2212 (internal quotations and citations omitted).

Plurality

- "Independent personal stake" exception
  - Two actors that normally lack the capacity to conspire may nonetheless have the capacity if one of them has an "independent personal stake" in the subject matter on which the restraint operate
    - Can make the actor with a personal stake an "independent center of decisionmaking" and so capable of conspiring
    - *American Needle* rule:

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

  - In *American Needle*, the Supreme Court held that the NFL teams would be competitors in the market to produce and sell team logo wearing apparel and headgear by licensing their intellectual property and dealing with suppliers and therefore had the capacity to conspire with one another and the NFLP in connection with restrictions on the licensing of this intellectual property.

[1] American Needle, Inc. v. National Football League, 560 U.S. 183, 200 (2010).

Plurality

- "Independent personal stake" exception
  - Examples
    - When an automotive parts supplier created independent franchises to distribute its products and sold the franchises to its employees, the employees had an independent stake that gave them the capacity to conspire with the supplier-employer with respect franchises[1]
    - President of a newspaper company could have an independent stake when he had an interest in another newspaper and he stood to benefit by pushing the plaintiff competitor out of the market[2]
    - Practicing dentists who were members of a state regulatory board had the capacity to conspire with the board and each other in pursuing efforts to block nondentists from providing teeth-whitening services[3]
  - Not adopted by all circuits
    - The Sixth Circuit has not adopted the independent stake exception[4]

[1] Motive Parts Warehouse v. Facet Enters., 774 F.2d 380, 387 (10th Cir.1985).
[2] Greenville Publ'g Co. v. Daily Reflector, Inc., 496 F.2d 391, 399-400 (4th Cir. 1974).
[3] North Carolina State Bd. of Dental Examiners v. FTC, 717 F.3d 359 (4th Cir. 2013), *aff'd*, 135 S. Ct. 1101 (2015).
[4] Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605, 615 (6th Cir. 1990), *opinion modified on reh'g*, 927 F.2d 904 (6th Cir. 1991)

Agreement

- Source of requirement
  - Derives from Section 1 requirement that there be a "contract, combination . . . or conspiracy"
  - Antitrust law has never drawn a meaningful distinction between the three types of statutory concerted action
- Definitions
  - A "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement"[1]
  - A "conscious commitment to a common scheme designed to achieve an unlawful objective"[2]
- No requirement of formal agreement
  - Concerted action does not require a formal agreement
  - Agreement may be tacit and achieved without any verbal communications about the terms of agreement among the parties ("tacit agreements")

[1] American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946).
[2] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

Agreement

- Tacit agreements—Examples
  - *Container Corp.*[1]
    - Reversed district court's dismissal of the case after a bench trial
      - Until 1974, the Expediting Act provided appeals from final judgments in all government civil actions would lie only to the Supreme Court
    - Evidence
      - Practice was that a corrugated container firm could ask its competitor-defendant for information about the most recent price charged or quoted to a specific customer
      - Each defendant gave price information to other defendants with the expectation of reciprocity
      - No evidence of an express agreement or understanding between or among any of the defendants to either exchange price information or to restrict price competition
      - Defendants accounted for 90% of corrugated container shipments
      - Product fungible and demand inelastic
      - Industry overcapacity, but reciprocal information exchange stabilized downward pricing
    - Result
      - As direct evidence, sufficient to establish an agreement to exchange price information
      - As circumstantial evidence, practice + effect on price sufficient to sustain a finding of a per se illegal price-fixing agreement

[1] United States v. Container Corp. of Am., 393 U.S. 333, 336-37 (1969), *rev'g* 273 F. Supp. 18 (M.D.N.C. 1967).

Agreement

- Nonconcerted oligopolistic interdependence
  - Is there an antitrust violation when similar practices—
    - Are adopted unilaterally by firms in a concentrated industry
    - But are neither restrictive, predatory nor adopted for the purpose of restraining competition
    - Yet are shown to raise prices above competitive levels?
  - Sherman Act § 1
    - No, since there is no agreement by hypothesis
  - Sherman Act § 2
    - Monopolization—No, if no firm has monopoly power[1]
    - Attempted monopolization—No, if the practice does not entail a dangerous probability of success of a firm obtaining market power*
    - Conspiracy to monopolize—No, since there is no agreement
  - FTC Act § 5 ("unfair methods of competition)
    - No, efforts by the FTC rejected by the courts

[1] Sufficient but not necessary to avoid a violation.

Agreement

- Nonconcerted oligopolistic interdependence
  - The *Ethyl* case[1]
    - FTC complaint file May 30, 1979
      - No allegation of concerted action
      - But allegation that the four defendant firms, actually unilaterally, adopted the following practices in a highly concentrated, high barriers to entry, demand-inelastic market for gasoline "antiknock" additives with the result that prices increased anticompetitively—
        - Sale of lead antiknock additives only on the basis of a delivered price
        - The use by Du Pont and Ethyl of "most favored nation" (MFN) clauses in their standard form sales contracts and the use of such clauses by Nalco in a substantial number of its sales contracts
        - The use by each company of contract clauses requiring at least 30 days advance notice to customers of changes in price; and
        - Providing advance notice of price increases to the press
    - FTC
      - Found that the combined use of MFN clauses, uniform delivered pricing, and extra advance notice of prices increases violated FTC Act § 5 ("unfair methods of competition")
        - Facilitated price coordination among competitors, resulting in higher prices than would have existed in the absence of the practices
        - Was remediable (i.e., an FTC cease and desist order could halt the practices without any ambiguity)

[1] E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984), *vacating* Ethyl Corp., 101 F.T.C. 425 (1983).

Agreement

- Nonconcerted oligopolistic interdependence
  - The *Ethyl* case
    - Second Circuit—Vacated FTC's order as outside the scope of Section 5's prohibitions
      - FTC interpretation of Section 5 is entitled to "great weight"
        - Not strictly limited to violations of the antitrust laws
        - May prohibit incipient antitrust violations
        - May prohibit conduct that is contrary to the "spirit" of the antitrust laws
      - But Section 5 does not reach conduct that substantially reduces competition where, as here, the challenged conduct is:
        - Not collusive
        - Not coercive
        - Not predatory or exclusionary
        - Not motivated by anticompetitive intent or purpose
        - Supported by legitimate business explanations
      - Key:

> Section 5 is aimed at conduct, not at the result of such conduct, even though the latter is usually a relevant factor in determining whether the challenged conduct is "unfair."[1]

[1] *Du Pont*, 729 F.2d at 138.

Agreement

- Invitations to enter into a price-fixing agreement
  - Sherman Act § 1
    - Invitations to collude that are not accepted do not entail an agreement and hence are not subject to scrutiny under Sherman Act § 1
  - Sherman Act § 2
    - If the agreement was accepted and the result would be a joint monopolization of a relevant market, an unaccepted invitation to collude can predicate attempted monopolization[1]
  - FTC Act § 5
    - An unaccepted invitation to collude violates FTC Act § 5[2]

[1] United States v. American Airlines, 743 F.2d 1114 (5th Cir. 1984), *rev'g and remanding* 570 F. Supp. 654 (N.D. Tex. 1983).

[2] *See, e.g.*, Complaint, *In re* Valassis Commc'ns, No. C-4160 (FTC filed Mar. 14, 2006).

Types of Evidence

- Two types
  1. Direct evidence
     - Evidence that is "explicit and requires no inferences to establish the proposition or conclusion being asserted"[1]
     - Examples
       - Testimony of a conspirator
       - Wire or videotape evidence
       - Documents
     - Direct evidence is often not available in conspiracy cases
  2. Circumstantial evidence
     - Evidence that requires the fact finder to draw inferences in order to reach the conclusion that is advanced[2]
     - However, the Supreme Court has explained that certain evidentiary restrictions are necessary in antitrust cases since "mistaken inferences . . . are especially costly because they chill the very conduct the antitrust laws are designed to protect."[3]

[1] *In re* Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999).
[2] *See* Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 271 (5th Cir. 2008).
[3] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986).

Impermissible Inferences

- Conspiracy cannot be inferred from nothing more than:
  - Parallel conduct[1]
  - "Conscious parallelism," where firms in a concentrated market recognize their shared economic interests and their interdependence with respect to price and output decisions and behave in a parallel manner[2]
    - "[M]ere interdependence of basic price decisions is not conspiracy"[3]
    - Common feature of oligopolistic markets in the absence of conspiracy
    - Judicial concerns
      - Overinclusiveness errors
      - Irremediable behavior—What is a nonconspiring oligopolist to do?
  - Mere participation in the same trade associations[4]
    - "[O]pportunity, without more, is not a plausible basis to suggest a conspiracy"[5]

[1] Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954).
[2] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993); *Theatre Enters.*, 346 U.S. at 541.
[3] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554 (2007).
[4] *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 910-11 (6th Cir. 2009).
[5] *In re* California Title Ins. Antitrust Litig., No. C 08-01341 JSW, 2009 WL 3756686 (N.D. Cal. Nov. 6, 2009).

Monsanto/Matsushita rule

- Rule
  - Above types of evidence are—
    - admissible circumstantial evidence for showing conspiracy,[1]
    - but by themselves insufficient to draw a permissible inference of conspiracy
  - Need something in addition to make an inference of conspiracy reasonable
  - General rule

> When using circumstantial evidence to prove conspiracy, a permissible inference of conspiracy arises only if there is evidence tending to exclude the possibility of independent action[2]

    - In parallel conduct cases, these additional facts are known as *plus factors* or *facilitating devices*

[1] Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).
[2] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 768 (1984); *accord* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986); *Twombly*, 550 U.S. at 554.

Monsanto/Matsushita rule

- "Plus factors"
  - In *Twombly,* the Supreme Court noted a number of "plus factors" that could support a plausible inference of such a collusive agreement, including:
    - "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties;"
    - conduct indicating "restricted freedom of action and sense of obligation that one generally associates with agreement;"
    - or "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason."[1]

    NB: This is not an exhaustive list of plus factors. Any facts tending to show collusion and excluding unilateral conduct can be a plus factor.
  - Generally, if the defendants' actions, if taken independently, would be contrary to their economic self-interest in the absence of conspiracy, then an inference of conspiracy is permissible[2]

[1] *Twombly*, 550 U.S. at 556 n.4 (internal citations omitted).
[2] *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 907 (6th Cir. 2009).

Monsanto/Matsushita rule

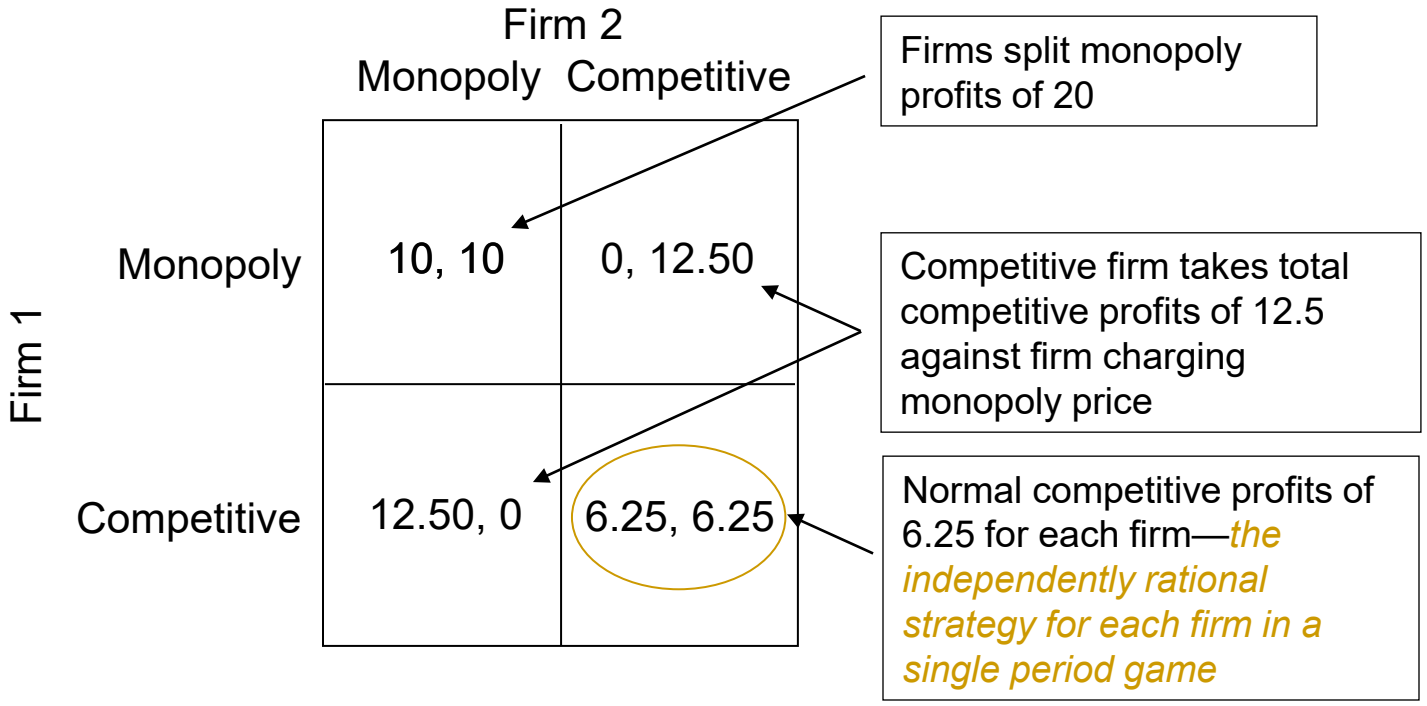
- Against self-interest/"Plus factors"—Examples
  - Evergreen Partnering Group, Inc. v. Pactiv Corp.[1]
    - Finding that plaintiff adequately pled that defendants acted against their own interests in refusing to do business with plaintiff, where successful pilot programs showed that participation in plaintiff's recycling enterprise would have been cost-neutral to defendants and would have increased sales to defendants' customers.
  - Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers (ICANN)[2]
    - Finding that plaintiff failed to plead a conspiracy among ICANN, its board members, and industry insiders to deny plaintiff new "top level domain" (TLD) internet names where:
      - Plaintiff alleged motive to conspire but included no specific allegations of wrongdoing that would indicate that the board members acted with an improper motive; and
      - The application process was facially neutral and there were no allegations that the selection process was illogical, suspicious, or rigged.

> "ICANN's independent business decisions about how many TLDs to create, and at what price they are offered, are not policed by § 1."[3]

[1] 720 F.3d 33 (1st Cir. 2013).
[2] 795 F.3d 1124 (9th Cir. 2015).
[3] *Id*. at 1130.

Monsanto/Matsushita rule

- Recall the price fixing "prisoner's dilemma" in single period game
  - Two symmetrical firms



Key result: Charging the competitive price is the *dominant strategy* for each firms in the single period game, regardless of what strategy the other firm chooses. But mutual monopoly strategies earn each firm higher profits.

Monsanto/Matsushita rule

- But the courts recognize that other individually rational—that is, non-cooperative—equilibria exist in repeated games
  - Recall the *Folk Theorem*: In an infinitely repeated game with homogeneous products, any common pricing strategy ($p_1 = p_2$) between the competitive price and the monopoly price can be supported non-cooperatively in equilibrium
  - The intuition behind the Folk Theorem drives the rule that parallel behavior, especially in pricing, is (usually) insufficient evidence from which to infer conspiracy[1]
  - But—
    - Also recall that while the Folk Theorem tells us that multiple equilibria exist in repeated games, it does not tell us how a particular equilibrium arises
    - The *Monsanto*/*Matsushita* rule (and plus factors and facilitating devices) when properly applied seek to identify whether the circumstances leading to a particular equilibrium indicate that some form of agreement was present

[1] *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 908-10 (6th Cir. 2009) (expressing similar logic, albeit without reference to game theory).

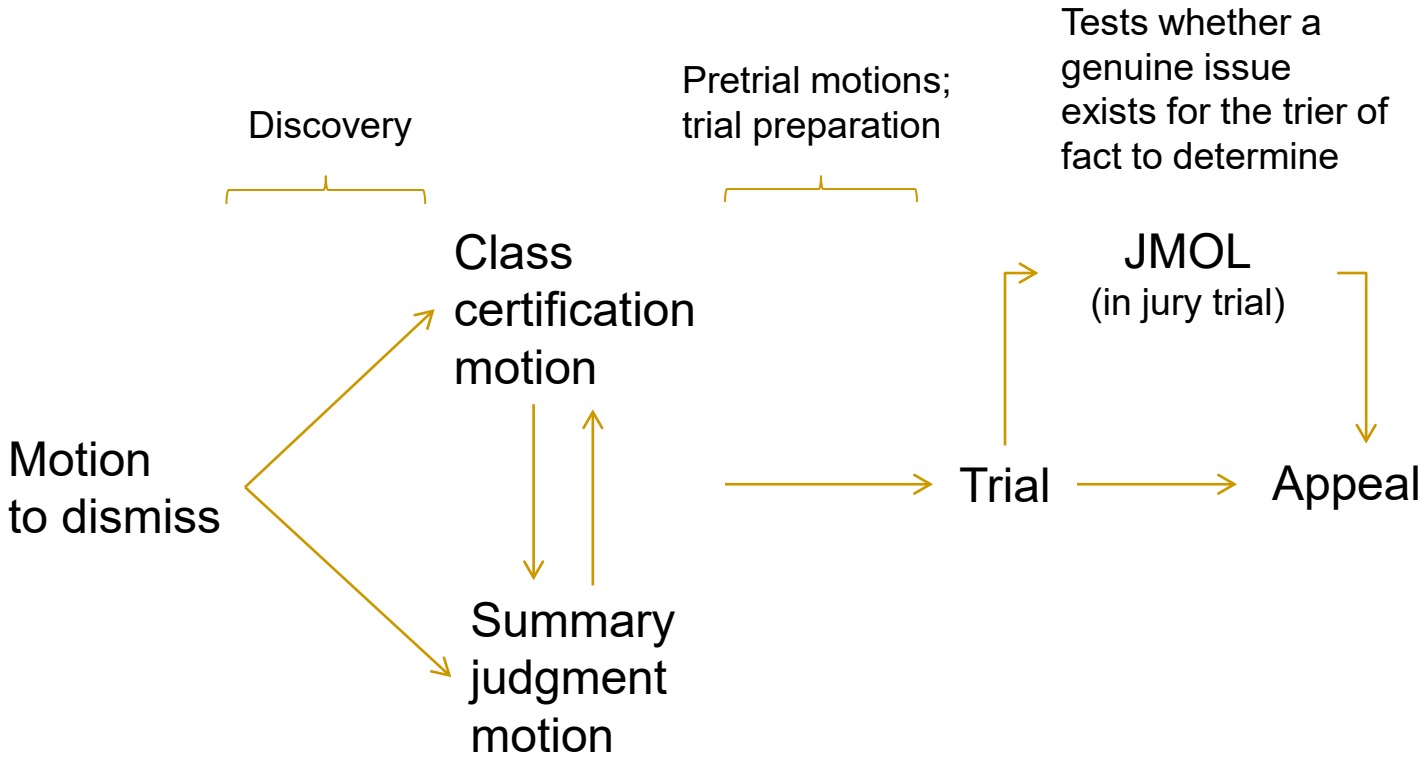
Questions

- Should the *Monsanto*/*Matsushita* rule apply to direct evidence?
  - In a dispositive motion?
  - At trial?
- How should the court treat direct evidence of conspiracy where the economic evidence is persuasive that a conspiracy could never be successful (and hence would be irrational)?

Testing Alleged Agreements

- There are three stages in a litigation to test an alleged agreement
  - Motion to dismiss
    - Tests whether the complaint contains sufficient allegations of an agreement
  - Motion for summary judgment
    - Tests whether the evidence raises a genuine issue of fact as to the existence of the alleged conspiracy
  - Trial
    - Tests whether the preponderance of the evidence indicates that the alleged conspiracy exists

Flow of Litigation



Tests sufficiency of complaint to proceed to discovery

Tests whether a genuine issue of material fact exists for resolution by the trier of fact

Resolves any genuine issue of material fact; applies law as instructed to facts

Tests resolution in trial court

Motions to Dismiss

- Federal Rules of Civil Procedure
  - FRCP 8(a) governs the content of a complaint
  - FRCP 11 limits ungrounded claims or factual allegations
  - FRCP 12(b)(6) provides for dismissal of the action if the complaint is legally insufficient
    - A legally sufficient complaint requires the defendant to—
      - File an answer,
      - Submit to discovery, and
      - If applicable, defend against a motion for class certification
    - A legally insufficient complaint prevents the plaintiff from proceeding with its action
      - However, courts almost permit the plaintiff to replead
      - Remember, the grant of a motion to dismiss is *not* a judgment of dismissal
        - The district court retains jurisdiction in the case and the plaintiff has no right to appeal as a matter of law until the court enter a *judgment* of dismissal under FRCP 54
        - This enables the court, in its discretion, to give the plaintiff leave to amend its complaint to correct the deficiencies

Motion to Dismiss

- FRCP 8(a)
  - Requires that a pleading that states a claim for relief must contain—
    1. a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
    2. a short and plain statement of the claim showing that the pleader is entitled to relief; *and*
    3. a demand for the relief sought, which may include relief in the alternative or different types of relief.

Motion to Dismiss

- FRCP 11
  - Signing
    - Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name[1]
  - Certification
    - By presenting a filing to the court, the signing attorney certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:[2]
      - The filing is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation
      - The claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law
      - The factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery
        - This is the basis for pleading "on information and belief"
      - The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information
  - Sanctions
    - An attorney who violates Rule 11 may be sanctioned[3]

[1] Fed. R. Civ. P. 11(a). [2] *Id*. 11(b). [3] *Id*. 11(c).

Motion to Dismiss

- FRCP 12(b)(6)
  - Provides that "a party may assert the following defenses by motion: . . . failure to state a claim upon which relief can be granted"
    - Tests the legal sufficiency of the allegations of the complaint
    - A complaint is sufficient if it—
      - gives the defendant fair notice of the plaintiff's claims,
      - adequately indicates the grounds upon which they rest, and
      - states claims upon which relief could be granted[1]
    - Conversely, a complaint is legally insufficient if it either—
      - fails to provide sufficient allegations from which to infer each and every essential element of the plaintiff's prima facie case of a violation, or
      - fails to provide sufficient allegations that the plaintiff is entitled to relief

[1] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002); *see* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam).

Motion to Dismiss

- Burdens
  - *Plaintiff*: To defeat a MTD, must sufficiently plead each and every essential element of the prima facie case
  - *Defendant*: To win a MTD, need only show that one element of the plaintiff's prima facie case is inadequately pleaded

Elements	π	Δ
Subject matter jurisdiction	✓	
Personal jurisdiction/venue	✓	
Prudential standing	✓	
Plurality	✓	
Agreement	✓	✗
Participation	✓	✗
Restraint of trade	✓	
Unreasonableness	✓	✗
Causality/fact of injury	✓	

Most frequently attacked elements

Frequently challenged in rule of reason cases

Motion to Dismiss

- Timing
  - Rule 12(b)(6) motion to dismiss must be made before an answer is filed
- The motion to dismiss record
  - Must accept as true all well-pleaded factual allegations in the complaint[1]
  - Must not consider allegations that merely state a legal conclusion
  - Must not consider materials outside of complaint
    - Must not consider additional materials in briefs
    - Must not assume that the plaintiff can prove facts that it has not alleged
    - *Exception*: Judicial notice under FRE 201
- Inferences
  - Court must draw all *reasonable* inferences in favor of the plaintiff
  - Query: Does the *Monsanto*/*Matsushita* rule apply to motions to dismiss?
    - That is, assuming that there is evidence to support the factual allegations, would this evidence support a permissible inference of conspiracy under the *Monsanto*/*Matsushita* rule?
    - Before answering, must look at *Twombly*/*Iqbal*[1]

[1] Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

Motion to Dismiss

- Effect of dismissal
  - First dismissal under Rule 12(b)(6) is generally without prejudice
    - *Exception*: Where it is clear the complaint cannot be saved by amendment
  - Second dismissal is usually with prejudice[1]
    - But courts sometimes give the plaintiff multiple opportunities to replead
- Appeal
  - Reviewed *de novo*
    - Accept all factual allegations as true
    - No effect to legal conclusions couched as factual allegations

[1] *See In re* California Title Ins. Antitrust Litig., No. C 08-01341 (JSW), 2009 WL 3756686 (N.D. Cal. Nov. 6, 2009).

Motion to Dismiss

- *Twombly* (2007)[1]
  - Rule
    - To survive a motion to dismiss for failure to state a claim, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face"[1]
    - "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[3]
    - Examples of a parallel conduct allegation that would suffice under this standard include "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties."[4]
    - A "formulaic recitation of the elements of a cause of action will not do"[5]

[1] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (7-2 decision).
[2] *Id*. at 570.
[3] *Id*. at 556.
[4] *Id*. at 556 n. 4.
[5] *Id*. at 555.

Motion to Dismiss

- *Iqbal* (2009)[1]
  - Held that *Twombly's* "facial plausibility" standard applies to all civil suits in federal courts[2]
  - Refined the *Twombly* rule by explaining:

Key rule

> "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[3]

  - Also—and controversially—said:

> Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief."[4]

  - A plaintiff with an insufficient complaint is entitled to *no* discovery, no matter how limited[5]

[1] Ashcroft v. Iqbal, 556 U.S. 662 (2009) (5-4).
[2] *Id*. at 679.
[3] *Id*. at 678 (emphasis added).
[4] *Id*. at 679.
[5] *Id*. at 686.

Motion to Dismiss

- *Twombly/Iqbal*
  - Rationale

    "Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago . . . 'a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'"[1]
  - Abrogated *Conley* rule
    - *Twombly* retired the prior *Conley* rule of that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[2]
    - The *Conley* rule may it very difficult to obtain a dismissal on the pleadings
    - Still, under *Twombly*, "[s]pecific facts are not necessary; the statement need only give the defendant[s] fair notice of what . . . the claim is and the grounds upon which it rests"[3]

[1] *Twombly*, 550 U.S. at 558; *see In re* Text Messaging Antitrust Litig., 630 F.3d 622, 625 (7th Cir. 2010) (*Twombly* "is designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand.").

[2] *Id*. at 563; *see* Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (quoted language).

[3] Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (internal quotation marks omitted).

Motion to Dismiss

- Does *Twombly* import *Monsanto*/*Matsushita* into a motion to dismiss?
  - That is, does a complaint largely predicted on parallel conduct need factual allegations that tend to exclude the possibility of unilateral action in order to be plausible and so survive a motion to dismiss?
  - Critical question:
    - Does the court only have to determine if the factual allegations in the complaint make the claim of conspiracy plausible, without considering alternative explanations, OR
    - Even if the plaintiff's claim is plausible, does the court have to consider alternative explanations to determine if the plaintiff's allegations exclude the possibility of unilateral conduct?

Motion to Dismiss

- Does *Twombly* import *Monsanto*/*Matsushita* into a motion to dismiss?
  - The trend appears to be yes, but often implicitly[1]
  - Some cases and commentators explicitly say no
    - "The 'plausibly suggesting' threshold for a conspiracy complaint remains considerably less then the 'tends to rule our the possibility' standard for summary judgment."[2]
    - "While for purposes of a summary judgment motion, a Section 1 plaintiff must offer evidence that "tend[s] to rule out the possibility that the defendants were acting independently," to survive a motion to dismiss under Rule 12(b)(6), a plaintiff need only allege "enough factual matter (taken as true) to suggest that an agreement was made."[3]

[1] *See, e.g.*, *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 907 (6th Cir. 2009) (holding that a plaintiff must allege either an explicit agreement to restrain trade or "sufficient circumstantial evidence tending to exclude the possibility of independent conduct"); Eclectic Properties E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014) .
[2] *See* SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412 (4th Cir. 2015); Anderson News, L.L.C. v. American Media, Inc., 680 F.3d 162, 189-90 (2d Cir. 2012); 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 307d1 (3d ed. 2007).
[3] Starr v. Sony BMG Music Entm't, 592 F.3d 314, 325 (2d Cir. 2010); see Evergreen Partnering Grp.. v. Pactiv Corp., 720 F.3d 33, 47 (1st Cir. 2013) ("It is also clear that allegations contextualizing agreement need not make any unlawful agreement more likely than independent action nor need they rule out the possibility of independent action at the motion to dismiss stage.").

Motion to Dismiss

- Granting motion to dismiss—Examples
  - The *Text Messaging* Litigation[1]
    - Complaint: Four national providers of text messaging services fixed prices
    - Allegations
      - Parallel pricing and opportunity to collude through industry group
      - Failed to deny price fixing when responding to congressional inquiries
      - Concentrated market structure is conducive to collusion
      - Recent price increases "historically unprecedented"
    - Grounds for dismissal
      - Failed to identify any specific times, places, or persons involved in the conspiracy
      - No details about the industry group meeting to indicate collusion
      - Allegations reflected at most an opportunity to conspire
    - Second amended complaint sustained
      - Express agreement to adopt uniform per-unit prices
      - Industry group formed committees that focused on text messaging delivery and pricing and where defendants exchanged information about pricing
      - Identified defendant employees who participated in industry groups and dates of meetings

[1] *In re* Text Messaging Antitrust Litig., MDL No. 1997, 2009 WL 5066652 (N.D. Ill. Dec. 10, 2009) (dismissing complaint), *later opinion*, 2010 WL 1782006 (N.D. Ill. Apr. 30, 2010) (granting leave to amend and sustaining amended complaint), *aff'd*, 630 F.3d 622 (7th Cir. 2010) (sustaining amended complaint).

Motion to Dismiss

- Denying motion to dismiss—Examples
  - The *SRAM* Litigation[1]
    - Complaint: Defendant manufacturers agreed on information exchanges with the purpose and effect of keeping prices at supracompetitive levels
    - Grounds for sustaining the complaint—Allegations include:
      - SRAM market is susceptible to price fixing
        - SRAM is a homogeneous product sold primarily on price
        - Market is highly concentrated
        - High manufacturing and technological barriers to entry
      - Defendants conspired to fix and maintain artificially high prices for SRAM
        - Common members in the same trade associations provided a forum to conspire
        - In-person, telephone, and email communications regarding pricing to customers and market conditions (supported by quotations in some e-mails)
        - Exchanged product roadmaps
      - Prices increased during the alleged conspiracy period
    - Comment
      - Court saw this as a *Container*-type case
        - Market susceptibility
        - Price information exchanges
        - Higher prices

[1] *In re* Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896 (N.D. Cal. 2008).

Motion to Dismiss

- Denying motion to dismiss—Examples
  - The *TFT-LCD I* Antitrust Litigation[1]
    - Grounds for sustaining the complaint—Allegations include:
      - Complex and unusual pricing practices by defendants, which cannot be explained by the forces of supply and demand
      - Preconspiracy prices were falling
        - In the pre-conspiracy market, the industry faced declining TFT-LCD panel prices, which industry analysts attributed to advances in technology and improving efficiencies
        - New companies entered the market, resulting in increased competition and significant price declines
      - Beginning in 1996, however, the TFT-LCD product market characterized by—
        - unnatural and sustained price stability
        - certain periods of substantial increases in prices
        - a compression of price ranges for TFT-LCD products

        All of which is inconsistent with natural market forces
      - Defendants controlled prices by manipulating the capacity of various generations of fabrication plants, as well as the timing of bringing new capacity online

[1] *In re* TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109 (N.D. Cal. 2008).

Motion to Dismiss

- Denying motion to dismiss—Examples
  - *Potash* Antitrust Litigation[1]
    - Complaint: Potash producers conspired to arrest price declines and raise prices by a coordinated strategy of mine closures and other supply restrictions
    - Grounds for sustaining complaint—Allegations include:
      - Numerous mine closures by multiple firms, often within short time periods
      - Numerous opportunities to conspire at trade association meetings
      - Mine closures often followed shortly after meetings
      - Follow-on mine closures not in the individual economic interest of the defendants
      - Mine closures represented a "radical change" in historical behavior
      - 600% increase in the price of potash between 2003 and 2006, which is not explainable by increases in demand or changes in the cost of production
      - Market is generally conducive to conspiracy
        - Inelastic demand
        - High variable costs relative to fixed costs
        - Very high barriers to entry (new mine costs $2.5 billion)
    - Comment
      - Court recognized that the resolution is difficult and stated it would consider certifying and interlocutory appeal under 28 U.S.C. § 1292(b)

[1] *In re* Potash Antitrust Litig., 667 F. Supp. 2d 907 (N.D. Ill. 2009).

Motion to Dismiss

- Denying motion to dismiss—Examples
  - *Private Equity* Antitrust Litigation[1]
    - Complaint: PE firms conspired to suppress shareholder prices in taking public companies private in "club" deals by—
      - submitting sham bids,
      - agreeing not to submit bids,
      - granting management certain incentives, and
      - including "losing" bidders in the final transaction
    - Grounds for sustaining complaint
      - Complaint include allegations regarding nine specific transactions where overlapping groups of defendants were part of the winning syndicate
      - Complaint specifically alleged that defendants conspired to prevent open, competitive bidding for the target companies
    - Comment
      - One of the more lenient of the post-*Twombly* cases

[1] Dahl v. Bain Capital Partners, LLC, 589 F. Supp. 2d 112 (D. Mass. 2008).

Motion to Dismiss

- Have the courts gone too far in applying *Twombly*?
  - Some judges think so
    - "[D]istrict court judges across the country have dismissed a large majority of Sherman Act claims on the pleadings misinterpreting the standards from Twombly and Iqbal, thereby slowly eviscerating antitrust enforcement under the Sherman Act."[1]
  - Most academic commentary is critical
  - A *Twombly* repealer had been introduced in Congress:

> Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957).[2]

    - But since 2010 there has been no interest in moving this bill forward and the idea now appears to have die.

[1] *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896 (6th Cir. 2009) (Merritt, J., dissenting).
[2] Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009) (referred to the Senate Committee on the Judiciary).

Motion for Summary Judgment

- Motion
  - Permitted by Rule 56
  - Tests whether there are issues for the trier of fact to decide at trial
    - Applies to defenses and claims
    - Cannot be used to test the relevancy of a facutal allegation to a claim or defense
  - Also serves as a vehicle to make the opposing party reveal much of the legal structure and supporting evidence of its case
    - In opposing a motion for summary judgment, the opponent is likely to make its best case, connecting its legal theory, its supporting case law, and its supporting facts, to convince the trial court that it has a strong case and to minimize the possibility that summary judgment will be entered against it
    - Of course, the moving party will do similarly
  - Any party may make a motion for summary judgment
    - Fairly common for other party to respond with a cross-motion
  - Timing
    - Any time until 30 days after the close of all discovery, unless local rule or court sets a different time[1]

[1] FRCP 56(b).

Motion for Summary Judgment

- Test
  - Summary judgment is appropriate when
    1. there is no *genuine issue* as to any *material fact*, and
    2. the moving party is entitled to a judgment as a matter of law[1]
  - Material fact
    - A fact that might affect the outcome of the suit
    - Governing substantive law determines which facts are material
    - Governing law, in turn, is determined by the law invoked in the pleadings in the case
    - Factual disputes that are irrelevant to the outcome of the action will not be counted
    - Evidentiary standard at trial plays no role in determining what facts are material
  - Genuine issue
    - An issue of material fact is genuine if, under the applicable evidentiary standard, a reasonable trier of fact could find for the nonmoving party on the issue, so that the issue cannot be decided absent trial

[1] FRCP 56(a).

Motion for Summary Judgment

- Test (con't)
  - Entitled to a judgment as a matter of law
    - Where the moving party would not bear the burden of persuasion at trial:
      - Demonstrates that the summary judgment record is insufficient to permit the trier of fact to find at least one essential element of the non-moving party's claim; *or*
      - Submits affirmative evidence that negates an essential element of the nonmoving party's claim *and* the moving party fails to submit countervailing evidence sufficient to raise a genuine issue of material fact
        - For example, the defendant submits evidence that the claim is time-barred under the statute of limitations and the plaintiffs submits no evidence to the contrry
    - Where the moving party bears the burden of persuasion at trial:
      - Summary judgment record is sufficient to permit the trier of fact to find every essential element of the moving party's claim, *and*
      - The non-moving party has failed to raise a genuine issue of material fact as to any essential element of the moving party's claim

Motion for Summary Judgment

- Summary judgment record[1]
  - Pleadings
  - Discovery and disclosure materials on file
    - That is, submitted in the papers in the summary judgment proceeding
  - Affidavits from percipient witnesses[2]
    - Must be made on personal knowledge
    - Must set out facts that would be admissible in evidence
    - Must show that the affiant is competent to testify on the matters stated
  - Affidavits from expert witnesses
    - Ubiquitous on both sides in antitrust summary judgment proceedings
    - Admissibility of expert testimony technically is governed by the same rules as it is at trial
      - But some courts have taken the view that difficult *Daubert* questions should be left for trial and admitted for the limited purpose of deciding the summary judgment motion
    - Whatever the standard, courts have rejected unsupported assertions in an expert's affidavit as sufficient to create a genuine issue of material fact
  - Facts subject to judicial notice under FRE 201

[1] FRCP 56(c). [2] *Id*. 56(e)(1).

Motion for Summary Judgment

- Opposing party's obligation to respond[1]
  - When a motion is properly made and supported, opposing party may not rely merely on allegations or denials in its own pleading
  - Must set out specific facts showing a genuine issue for trial
  - If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party
- Example: Defendant moves for summary judgment—

Elements	Δ	π
Plurality	Does not challenge	May standing on pleading
Agreement	Challenges—Adequate	Must adduce evidence
Participation	Challenges—Adequate	Must adduce evidence
Restraint of trade	Does not challenged	May standing on pleading
Unreasonableness	Challenges-Inadequate	May standing on pleading

Motion for Summary Judgment

- Opportunity for discovery[1]
  - Summary judgment be denied where the nonmoving party has not had the opportunity to discover information that is essential to his opposition[2]
  - Rule 56(f): Where the opposing party shows by affidavit specific reasons why it cannot present facts essential to justify its opposition, the court may:
    - deny the motion;
    - order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
    - issue any other just order

[1] FRCP 56(f).
[2] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n. 5 (1986).

Motion for Summary Judgment

- Reviewing the record
  - Must
    - Review the record "taken as a whole"[1]
    - Resolve all ambiguities and draw all justifiable factual inferences in favor of the party against whom summary judgment is sought[2]
  - Must not
    - Weigh the evidence
    - Assess its probative value
    - Resolve any factual disputes
  - Summary judgment is appropriate where
    - the antitrust claim "simply makes no economic sense,"[3] or
    - "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party"[4]

[1] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).
[2] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).
[3] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 467 (1992).
[4] Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Motion for Summary Judgment

- Disposition
  - May be granted in full on the merits of:
    - the entire case, or
    - the merits of a particular claim
  - May be granted in part
    - deciding particular questions of fact for which there is no genuine issue, which will be binding on the remainder of the trial court proceeding,[1] or
    - adjudicating the issue of liability while leaving open the issue of relief[2]
  - BUT motion must be brought with respect to a *claim*
    - Cannot be used in isolation to establish or challenge a fact or an element of a claim, since a judgment may not be entered as to a fact or an element of a claim
  - AND the grant of summary judgment is not a *final judgment*
    - A final judgment (for the purposes of appeal) should be entered under FRCP 54 and 58

[1] FRCP 56(d)(1).
[2] *Id.* 56(d)(2).

Motion for Summary Judgment

- History in antitrust law
  - Until recently, disfavored and rarely granted:
    - "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"[1]
  - Today, regarded as an "essential tool in the area of antitrust law because it helps avoid wasteful and lengthy litigation that may have a chilling effect on procompetitive market forces"[2]
  - No heightened standard
    - There is no heightened standard for summary judgment in complex antitrust cases
    - Grants of summary judgment in antitrust cases are common

[1] Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962) (footnote omitted).
[2] Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 495 (2d Cir. 2004).

Trial

- Role of the jury
  - Function
    - To resolve disputes of fact, and
    - Render a verdict applying the law as instructed by the judge to the facts

- Jury instructions

Trial

- Jury instructions on the *Monsanto/Matsushita* inferences rule
  - *Monsanto/Matsushita* governs inferences drawn from circumstantial evidence in all procedural contexts
  - But what if—
    - the evidence at trial consists of both direct and circumstantial evidence, and
    - the direct evidence alone is sufficient to sustain a verdict finding conspiracy

    Must a *Monsanto/Matsushita* instruction be given? Would it be error to give one?
  - A *Monsanto/Matsushita* instruction should be given
    - Just because the direct evidence is sufficient to sustain a jury verdict (say as found in a summary judgment motion) does *not* mean that the jury has to credit the evidence
    - Consequently, a limiting instruction should be given on drawing inferences solely from the circumstantial evidence[1]

[1] For an example of such an instruction and an analysis, see Toledo Mack Sales & Serv. Inc. v. Mack Trucks, Inc., No. 093013, 2010 WL 2676391, at *7-9 (3d Cir. 2010) (unpublished).

Trial

- Judgment as a matter of law (JMOL)
  - FRCP 50
    - Tests sufficiency of plaintiff's prima facie case on an *issue* in a jury trial
      - *Basic question*: Whether a jury, viewing the evidence in the light most favorable to the prevailing party, could have properly reached the jury's conclusion
    - Court may grant motion if:[1]
      - A party has been fully heard on an issue during a jury trial, and
      - Court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue
        - Must view the evidence in the light most favorable to the opposing party
        - Give the opposing party the advantage of every fair and reasonable inference
        - Evidence should not be weighed
        - Credibility of the witnesses should not be questioned
    - Basis for jmol—Movant must specify in its motion:[2]
      - the judgment sought, and
      - the law and the facts that entitle the movant to that judgment
    - Pre-verdict grant of a jmol is discretionary[3]
      - The court "*may* grant a motion for judgment as a matter of law"[4]

[1] *See* Fed. R. Civ. P. 50(a).
[2] *Id*. 50(a)(2).
[3] Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc. 546 U.S. 394, 405 (2006).
[4] Fed. R. Civ. P. 50(a)(1).

Trial

- Judgment as a matter of law (JMOL)
  - FRCP 50
    - Timing of motion
      - May be made any time before the submission of the case to the jury[1]
    - Post-verdict renewal[2]
      - If court does not grant the original motion, not later than 28 days after the entry of judgment movant may file a renew motion for—
        - JMOL
        - May include in the alternative a motion for a new trial under FRCP 59
      - Disposition[3]
        - If court grants jmol, it must also conditionally rule on any motion for a new trial in the event that the jmol is vacated or reversed on appeal
      - Jurisdictional
        - In the absence of a renewed jmol motion, an "appellate court lacks the power to direct the district court to enter judgment contrary to the one it had permitted to stand[4]
    - Standard on appeal—Plenary
      - Identical to that used by the district court

[1] Fed. R. Civ. P. 50(a)(2).
[2] *Id*. 50(b).
[3] *Id*. 50(c)(1).
[4] Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc. 546 U.S. 394, 400-01 (2006).

Trial

- FRCP 59—New trial
  - Authorizes courts to order a new trial on some or all the issues and to any party:[1]
    - After a jury trial—"for any reason for which a new trial has heretofore been granted in an action at law in federal court"
    - After a nonjury trial—"for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court"
  - Common reasons for a new trial
    - Substantial errors in the admission or rejection of evidence
    - Giving or refusal of instructions
    - Jury verdict against the weight of the evidence
    - Excessive damages
  - General understanding
    - Motion granted only when the court has the sense that the challenged actions rendered the trial unfair and caused a clear miscarriage of justice[2]

[1] Fed. R. Civ. P. 59(a).

[2] *See, e.g.*, US Airways, Inc. v. Sabre Holdings Corp., No. 11 CIV. 2725 (LGS), 2017 WL 1064709 (S.D.N.Y. Mar. 21, 2017) ("A court may grant a new trial only where the court determines, in its independent judgment, that the jury has reached a seriously erroneous result or [if] its verdict is a miscarriage of justice.") (internal quotation marks omitted).

Trial

- FRCP 59—New trial
  - Court may order a new trial sua sponte[1]
    - Must give parties notice and an opportunity to be heard
    - Must specify reasons in the order granting the new trial

[1] Fed. R. Civ. P. 59(d).

Appeal

- Jurisdiction
  - Courts of appeal must be assigned jurisdiction by statute in order to hear an appeal
- Jurisdiction in three types of appeal
  - Appeals of final judgments
  - Appeals of the grant or denial of injunctive relief
  - Interlocutory appeals certified for appellate review by the district court and accepted by review by the court of appeals

Appeal

- Appeals of final judgments—28 U.S.C. § 1291
  - Courts of appeal have appellate jurisdiction over all "final decisions" of the district courts[1]
    - Once a final judgment is reached, the appellate court has jurisdiction to review all district court orders in the litigation that preceded the judgment[2]
  - Matter of right
    - Appeals of final judgment are available as a matter of right
    - An appeal of a final judgment is initiated by the filing of a notice of appeal in the district court[3]
    - When other avenues of interlocutory appeal are not available, in some circumstances a party may ask the court to enter a final judgment against it, which then would be appealable[4]
      - Key is for the party not to consent to the adverse judgment or dismiss the action—for that would waive its right to appeal—but rather seek a final judgment from the court as opposed to an interlocutory order

[1] 28 U.S.C. § 1291.
[2] Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 710 (1996).
[3] Fed. R. App. P. 3.
[4] United States v. Procter & Gamble Co., 356 U.S. 677, 985-86 (1958).

Appeal

- Appeals of final judgments—28 U.S.C. § 1291
  - Entry of final judgment
  - Timing
    - To bring an appeal, a notice of appeal must be filed within
      - 30 days of entry of the final judgment[1]
        - *Exception*: 60 days from entry of final judgment where the United States is a party[2]
        - Under very limited circumstances, the district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered[3]
      - Timing requirements are jurisdictional[4]

[1] 28 U.S.C. § 2107(a).
[2] *Id*. § 2107(b).
[3] Fed. R. App. P. 4(a)(6).
[4] Bowles v. Russell, 551 U.S. 205 (2007).

Appeal

- Appeals of the grant or denial of injunctive relief—28 U.S.C. § 1292(a)
  - Courts of appeals have appellate jurisdiction over interlocutory orders of the district courts

    granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court[1]

[1] 28 U.S.C. § 1292(a)(1).

Appeal

- Certified interlocutory appeals—28 U.S.C. § 1292(b)
  - Background
    - Section 1292(b) appeals were intended, and should be reserved, for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts[1]
    - "The antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence of a particular case."[2]

[1] *See, e.g.,* McFarlin v. Conseco Servs., LLC, 381 F.3d 1251, 1259 (11th Cir. 2004)
[2] *Id*.

Appeal

- Certified interlocutory appeals—28 U.S.C. § 1292(b)
  - Appeals of interlocutory orders are not as of right
  - Certification: Two-tiered screening procedure—
    - *District court*: Appellate jurisdiction exists when the district court in a civil action certifies an interlocutory order for immediate appeal where the court determines that—
      1. the order involves a controlling question of law
      2. as to which there is substantial ground for difference of opinion, and
      3. that an immediate appeal from the order may materially advance the ultimate termination of the litigation[1]
    - *Court of appeals*: Discretionary with appellate court
      - District court's certification only provides the court of appeals with jurisdiction to hear the appeal
      - Certification does not require the appellate court to accept the appeal
    - Courts rarely apply Section 1292(b)
      - Strong policy disfavor of piecemeal appeals
      - Discretionary veto on the part of both the district court and the court of appeals,

[1] 28 U.S.C. § 1292(b).
[2] Katz v. Carte Blanche Corp, 496 F.2d 747, 755 (3d Cir. 1974).

Appeal

- Certified interlocutory appeals—28 U.S.C. § 1292(b)
  - Certification
    - Controlling question of law—Exists if either:
      - an incorrect application of the law would constitute reversible error if presented on final appeal, *or*
      - the question of law is "serious to the conduct of the litigation either practically or legally"[1]
    - Substantial ground for difference of opinion—Exists when:
      - controlling authority fails to resolve the question of law, *and*
      - there is grounds for genuine doubt as to the proper legal standard
    - Material advancement of litigation—Exists if an immediate appeal could either:
      - eliminate the need for a trial, simplify the case by foreclosing complex issues, *or*
      - enable the parties to complete discovery more quickly or less expensively
    - Certification decision lies in the discretion of the district court
      - Court may decline to certify an order even if the parties have satisfied all of the statutory requirements
    - PLUS court of appeals has discretion to hear or decline to hear a certified interlocutory appeal

[1] Katz v. Carte Blanche Corp, 496 F.2d 747, 755 (3d Cir. 1974).

[2] *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 624 (7th Cir. 2010) (accepting certified interlocutory appeal on the sufficiency of a complaint under *Twombly*).

Appeal

- Certified interlocutory appeals—28 U.S.C. § 1292(b)
  - Effect on district court jurisdiction
    - If a Section 1292(b) appeal is accepted by the court of appeals, then the district court will be deprived of jurisdiction over the order certified (and presumably related subject matter) unless the appeal is decided.

Appeal

- Standards of review
  - Interpretation of the law—De novo
    - No deference provided to the district court
    - Applies to—
      - Legal standards used to decide motions
      - Legal standards to decide merits in a bench trial
      - Jury instructions
      - Judgment as a Matter of Law (JMOL)

[1] Anderson v. Bessemer City, N.C., 470 U.S. 564, 573 (1985).
[2] *Id*. at 573-74.
[3] *Id*. at 574.
[4] *Id*. at 575.

Appeal

- Standards of review
  - Finding of facts in a bench trial—Clearly erroneous rule
    - A factual finding is clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed"[1]
      - Does not entitle reviewing court to reverse finding of trier of fact simply because it is convinced that it would have decided case differently[2]
      - When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous[3]
      - When findings are based on determinations regarding the credibility of witnesses, even greater deference to the trial court's findings is required[4]
    - Applies to—
      - Facts found in a bench trial
      - Expert testimony relied upon by the finder of fact
      - Mixed questions of law and fact

[1] Anderson v. Bessemer City, N.C., 470 U.S. 564, 573 (1985).
[2] *Id*. at 573-74.
[3] *Id*. at 574.
[4] *Id*. at 575.

Appeal

- Standards of review
  - Findings of fact by a jury—Substantial evidence rule
    - Applies whether findings are explicit or implicit within the verdict
    - Means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[1]
    - Must view the evidence in the light most favorable to the prevailing party and draw all reasonable inferences in favor of the prevailing party
  - Matters in the trial court's of discretion—Abuse of discretion
    - Occurs when court:
      - Adopts an incorrect legal rule
      - Relies upon a factor not legally cognizable under a proper legal rule
      - Omits consideration of a factor entitled to substantial weight under the proper legal rule
      - Makes a clear error in weighing the factors, or
      - rests its conclusions on clearly erroneous factual determinations.
    - Applies to (examples)—
      - Evidentiary rulings (including *Daubert* motions)
      - Class action decisions

[1] Richardson v. Perales, 402 U.S. 389, 401 (1971).

Appeal

- Division of jurisdiction between appellate court and trial court
  - An appeal as a matter of right in a civil case is triggered by the filing of a *notice of appeal* in the district court[1]
    - Normally, must be filed with 30 days after the entry of judgment of the order being appealed
    - If the United States or a U.S. agency is a party, then the time is 60 days
  - The filing of a notice of appeal—
    1. confers jurisdiction on the court of appeals, and
    2. divests the district court of its control over those aspects of the case involved in the appeal
  - The filing of the *mandate* by the court of appeals returns jurisdiction to the district court[2]
    - Think of the mandate as the judgment of the appellate court
    - Filing a petition for a writ of certiorari to the U.S. Supreme Court does not automatically stay the mandate
      - But provides a common basis for the appellate court to issue a stay[3]

[1] Fed. R. App. P. 4.
[2] *Id.* 41.
[3] *See id.* 41(d)(2).