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Antitrust Issues for Lawyers Representing Small Businesses

Alan F. Blakely

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ANTITRUST ISSUES FOR LAWYERS REPRESENTING SMALL BUSINESSES

Alan F. Blakley*

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I. INTRODUCTION

Most small business clients believe that antitrust laws are largely irrelevant to them. Antitrust issues seem to have been settled long ago by the trust busters or to involve huge national companies like Cargill,¹ du Pont,² or IBM.³ Even when an antitrust lawsuit has a dramatic impact on a small business client, that client frequently sees it as a battle among giants while the small business watches from the sidelines.⁴

1. See *Cargill, Inc. v. Monfort of Colo. Inc.*, 479 U.S. 104 (1986).

2. See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

3. See *Transamerica Computer Co. v. International Business Mach. Corp.*, 698 F.2d 1377 (9th Cir. 1983).

4. For instance, even though many states, through their Attorneys General, were par-

Antitrust laws frequently have significant impacts on small businesses.⁵ Sometimes the antitrust laws are used by small businesses to gain protection from the economic power of large, national companies. For instance, in *Martin B. Glauser Dodge Co. v. Chrysler Corp.*,⁶ an automobile dealership sued a national company to ensure that the national company's new policies did not injure the dealership's place in the market.⁷

Small businesses can also find themselves as defendants in antitrust lawsuits even when they follow what they consider to be normal business operations.⁸ Even professionals carrying on their businesses can be subject to enforcement actions based on the antitrust laws.⁹ The antitrust laws can become traps for the unwary¹⁰ or those not paying proper attention.¹¹

Courts give consumers the best access for enforcing antitrust laws against national companies,¹² and consumers seem to have the best chance of success in the enforcement arena despite special rules regarding standing to bring suit.¹³ Through careful and

ties to the lawsuit against Nintendo on behalf of consumers, *New York v. Nintendo of Am., Inc.*, 775 F. Supp. 676 (S.D.N.Y. 1991), most acted as silent partners, entering after the lawsuit had been instituted by the larger states. This lawsuit, which was settled and provided a modest settlement for all Nintendo customers, did not make a great impression in many places. As another example, in Montana even the lawsuit in which its Buttrey stores were removed from the conglomerate that had owned them did not make many headlines. See *California v. American Stores Co.*, 495 U.S. 271 (1990).

5. Throughout this Article examples are drawn from small Montana businesses. However, any of the examples are equally as applicable in other states. Most small businesses share attitudes that antitrust is only marginally relevant. However, sometimes the small business may be unpleasantly surprised. See *United States v. Missouri River Marine, Inc.*, Cr. No. 91-34-GF (D. Mont. Sept. 19, 1991) (involving a Montana business), noted in *Marketers of Branded Boats Must Defend Customer and Territory Allocation Charges*, 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 364 (1991). See also *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72 (3d Cir. 1977) (involving a local company against a national giant).

6. 570 F.2d 72 (3d Cir. 1977).

7. *Id.* at 79.

8. For instance, in *Holly Sugar Corp. v. Goshen County Co-op Beet Growers Ass'n.*, 725 F.2d 564, 566 (10th Cir. 1984), an agricultural co-op continued to attempt to convince additional persons to join the co-op. The co-op wished to rely upon the exemption to the antitrust laws granted by the Capper-Volstead Act. See *infra* notes 199-208 and accompanying text. However, the court held that the agricultural exemption was not absolute, and if the plaintiffs could produce proper evidence of coercion or other prohibited practices, the co-op's actions would fall outside the exemption.

9. See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). Even groups of lawyers (albeit criminal defense lawyers) have found themselves afoul of the antitrust laws. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

10. See *Holly Sugar*, 725 F.2d 564.

11. See *Superior Court Trial Lawyers*, 493 U.S. 411.

12. See *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982) (consumer brought a lawsuit against a national health insurance giant).

13. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 n.3 (1979) (in which the special

thoughtful use of antitrust laws, small businesses can protect themselves from the advantages that large companies derive from their economies of scale, market positions, and wealth, and prevail against large multinational corporations.¹⁴ A small business need not even file a lawsuit, however, to obtain the protection of the antitrust laws.¹⁵

The business lawyer must look to a wide variety of sources to understand antitrust law. Typically, the primary body of law is federal statutory antitrust law. However, additional federal statutes supplement that antitrust law. Most states have enacted antitrust statutes that parallel the federal law. This Article begins with an overview of the vast body of federal statutory law and judicial interpretations, which are overtly devoted to antitrust. This Article then describes some of the other federal law that affects antitrust.

Montana's antitrust statutes provide an example of one state's antitrust scheme. This Article describes those statutes to provide an alternative base of antitrust liability and enforcement. After the law has been described, several examples provide an opportunity to discover the potential antitrust liability of small businesses and potential uses of antitrust law to benefit such businesses.

II. FEDERAL STATUTES PROVIDE THE GREATEST BODY OF ANTITRUST LAW¹⁶

By far the greatest volume of antitrust law derives from federal statutes. Consequently, this Part of this Article is necessarily lengthy. The two greatest sources of antitrust law, the Sherman Act of 1890¹⁷ and the Clayton Act of 1914,¹⁸ became the basis of all

"standing rules" developed in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977), and discussed *infra* at text accompanying notes 274-81, were curiously not enforced as to consumers only because those rules were not raised on appeal; the Court seems to ignore the rule that subject matter jurisdiction may always be raised).

14. See *Hasbrouck v. Texaco, Inc.*, 631 F. Supp. 258 (E.D. Wash. 1986) (gasoline stations brought an antitrust action against the national petroleum company and, after prevailing, recovered their attorney fees from Texaco).

15. This topic is expanded *infra* part V.

16. Representative cases illustrating particular points, included in footnotes, are chosen for their analysis, not necessarily for their precedential value in any particular circuit. Long strings of citations are not included. Practitioners are urged to read the cited cases as well as later cases, United States Supreme Court cases, and cases from their particular jurisdictions, which in some instances may slightly differ. For instance, those practitioners in the Ninth Circuit, on reviewing applicable law, would find that it is the only circuit that may not always require a market analysis prior to finding a dangerous probability of success in attempted monopolization cases. See *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884 (1992); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1029-30 (9th Cir. 1981); *infra* notes 153-54 and accompanying text.

17. 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988)).

antitrust liability and enforcement. This Part describes those laws, as interpreted by the courts, in some detail. Other laws enacted by the United States supplement these two acts. This Part ends with a brief treatment of some of those laws particularly applicable to small businesses.¹⁹

A. *The Primary Source of Antitrust Law is the Sherman Act*

The Sherman Act of 1890²⁰ constitutes the oldest body of federal antitrust statutory law. The Act literally prohibits every contract, combination, or conspiracy that in any way restrains trade.²¹ The United States Supreme Court held, at a very early date, that only unreasonable restraints of trade were prohibited by the Sherman Act.²² Yet it decided that courts need not consider the reasonableness of every business action independently each time a violation was alleged. Consequently, the Court developed a list of business activities that are always considered to be unreasonable.²³

The Supreme Court's decisions created a dichotomy between those activities that are always unreasonable restraints of trade²⁴ and those that may or may not be unreasonable.²⁵ An understanding of this dichotomy is critical to an understanding of antitrust law. The characterization of an arrangement as either always unreasonable (known as a *per se* offense),²⁶ or as sometimes unreasonable (known as a "Rule of Reason" case)²⁷ is perhaps the most important factor in evaluating a potential Sherman Act claim.

18. 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 12 (1988)).

19. Some elements of antitrust law are not discussed in this article because they typically do not impact small businesses. Two areas omitted are criminal liability and the labor exemption to antitrust laws.

20. 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988)).

21. 15 U.S.C. § 1 (1988). The courts quickly realized that virtually every agreement between two businesses places some restraint on trade. *See, e.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1, 63 (1911). Congress, the courts reasoned, could not have intended to outlaw all contracts or agreements that restrain trade since that would, in essence, destroy American business competition. *See Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

22. *Standard Oil*, 221 U.S. at 63-67.

23. *See, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210-11, 218, 222-23 (1940); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 467-68 (1941).

24. *Fashion Originators'*, 312 U.S. at 468.

25. *See National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 99-101 (1984).

26. *Fashion Originators'*, 312 U.S. at 467-68.

27. *Board of Regents*, 468 U.S. at 103. If activity fits within the definition of a *per se* offense, the courts automatically hold the activity is an unreasonable restraint of trade. However, if the actions do not constitute such a *per se* offense, the inquiry is not finished. The courts determine whether the activity is reasonable. Applying these rules of reasonableness led to the characterization of those cases as "Rule of Reason" cases.

1. First Inquire Whether an Activity is Per Se Unreasonable

If an action taken by a business fits within the definition of a per se offense, such a business will almost always be held liable for the antitrust violation.²⁸ For instance, if two competing businesses selling the same product agree to set prices on that product, the businesses have committed a per se offense.²⁹ These businesses cannot defend their actions in any way, not even by showing that their prices are reasonable or even lower than they otherwise would be.³⁰

The most frequently litigated questions in per se cases concern whether or not a particular activity fits within the definition of the particular per se offense. For instance, in *Arizona v. Maricopa County Medical Society*,³¹ the United States Supreme Court considered whether an agreement between two independent groups of doctors to set the maximum fees they would charge amounted to a per se violation.³² The Ninth Circuit had held that it did not.³³ Even though the doctors argued that they were not really fixing prices,³⁴ the Supreme Court held that their activity fit within the definition of price-fixing and was, therefore, per se illegal.³⁵

Competitors may also respond to a price fixing charge by claiming that they independently adopted each other's price. This is called "conscious parallelism."³⁶ "Conscious parallelism" is not a per se violation of the Sherman Act.³⁷ For instance, in *Maricopa County*,³⁸ if one of the groups of doctors had known of the other's maximum rates and chosen to adopt those rates, this consciously parallel pricing of identical services would not necessarily have constituted a violation of the antitrust laws.³⁹ Something more

28. *Fashion Originators'*, 312 U.S. at 468.

29. *Id.* at 466-67.

30. *Id.* at 467. The Supreme Court has explained this relative harshness, in the context of a different per se violation, by reasoning that "[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). The monopoly power gained through such actions can later be used to extract monopoly rents and perform other actions that only a monopolist has the power to perform in manipulating the market. *Id.* at 397-98.

31. 457 U.S. 332 (1982).

32. *Id.* at 335-36.

33. *Id.* at 337-38.

34. *Id.* at 355.

35. *Id.* at 356-57.

36. *Theater Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954).

37. *Id.* at 541.

38. 457 U.S. 332.

39. See *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136 (2d Cir. 1984); *In re*

would need to be proved to sustain an antitrust violation. The courts will not find conscious parallelism, however, but rather per se horizontal price fixing if behavior such as communication between competitors, a radical departure from prior business practices, lack of legitimate business reasons for the parallel action, or artificial standardization of products or services exists.⁴⁰ Parallel behavior that is inconsistent with behavior to be expected from independent participants individually pursuing their own economic interests may lead to the inference of the existence of agreement or concerted action and, thus, constitutes a per se offense.⁴¹

Courts must draw a fine line between "competition on the merits" and conduct that constitutes per se offenses.⁴² Many times courts will find seemingly insignificant factors sufficient to place a business's activity on one side or the other of that line.⁴³ The potential defendant must seek to have its conduct classified as healthy competition,⁴⁴ while the plaintiff wishes to define the defendant's conduct as a per se offense.⁴⁵

The following subsections provide a brief overview of a few common activities that are classified as per se offenses by most courts. Businesses must avoid even the appearance of engaging in these sorts of activities because litigation to show that no per se offense has occurred is quite time consuming and costly.⁴⁶ Those offenses described below are most frequently encountered by small

Beef Indus. Antitrust Litig., 713 F. Supp. 971, 974 (N.D. Tex. 1989), *aff'd*, 907 F.2d 510 (5th Cir. 1990).

40. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 448-49 (1978) (discussing these factors and how the courts apply them); *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969).

41. *Container Corp.*, 393 U.S. at 337-38.

42. See *Transamerica Computer Co. v. International Business Mach. Corp.*, 698 F.2d 1377, 1384 (9th Cir. 1983).

43. See, e.g., *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1956) (characterizing behavior, which could be defined as per se illegal "tying," as good, healthy competition). See *infra* text accompanying notes 83-92 for discussion of "tying." The Court is fond of saying that the antitrust laws are to protect competition, not competitors even though it never provides a convincing explanation of the differences. See, e.g., *Cargill Inc. v. Monfort of Colo. Inc.*, 479 U.S. 104, 115-16 (discussion of the Clayton Act is saturated with the Court's dogma that all antitrust laws are to promote competition and to benefit consumers, rather than to protect other competitors but nowhere does the Court explain why protecting competitors and promoting competition are independent).

44. See, e.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990) (involving defendants who were not successful in having their behavior characterized as a promotion of healthy competition and in furtherance of the needs of consumers of their services).

45. See, e.g., *Times-Picayune*, 345 U.S. at 614 (involving the plaintiff United States' unsuccessful attempt to have the newspaper's behavior characterized as illegal tying).

46. See, e.g., *Cargill*, 479 U.S. at 107-08.

businesses.⁴⁷

a. Competitors May Not Agree to Set Prices

Horizontal price fixing among competitors is one of the most blatant and common examples of a Sherman Act violation.⁴⁸ A per se violation occurs any time two competitors agree to set a price that has the effect of raising, depressing, fixing, pegging, or stabilizing prices.⁴⁹ "Any combination [group of one or more competitors] which tampers with price structures is engaged in an unlawful activity."⁵⁰ As described above, once it is shown that competitors have agreed to fix the price, the activity is illegal whether the prices fixed are reasonable, low,⁵¹ or even if the behavior is designed to foster a public good.⁵² Furthermore, the price fixing need not be based upon an expressed written agreement but can be implied by the conduct of the parties.⁵³

Most businesses realize that they may not engage in horizontal price fixing. But vertical price fixing may also be a per se violation.⁵⁴ Illegal vertical price fixing occurs when a business fixes prices with another business that is not a competitor but is elsewhere in the chain of production or distribution.⁵⁵ This can occur without either business being conscious of committing a violation. Prior to *Monsanto Co. v. Spray-Rite Service Corp.*, the law was relatively clear that any scheme to fix either a minimum or a maximum resale price whether horizontally or vertically was illegal.⁵⁶ The Rehnquist Court was asked to reconsider whether resale price maintenance was a per se violation in *Monsanto*.⁵⁷ While the Court reaffirmed the per se nature of such offenses, it dramatically changed the law of resale price maintenance.⁵⁸

47. The best treatise on antitrust is JULIAN O. VON KALINOWSKI, *ANTITRUST AND TRADE REGULATION* (1993). This treatise has sixteen volumes and is updated frequently. It provides expansive descriptions of most per se offenses.

48. See *Socony-Vacuum*, 310 U.S. at 219-20.

49. *Id.*

50. *Id.* at 221. See also *Simpson v. Union Oil Co.*, 377 U.S. 13 (1962).

51. *Maricopa County*, 457 U.S. at 351.

52. See *Fashion Originators*, 312 U.S. at 468 (holding that the public good of eliminating companies illegally pirating clothing designs was not sufficient to justify a per se antitrust violation).

53. See, e.g., *Container Corp.*, 393 U.S. at 334-35; *U.S. Gypsum*, 438 U.S. at 429.

54. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

55. *Id.* at 761. Vertical price fixing, also known as resale price maintenance, is per se illegal. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

56. See *Albrecht v. Herald Co.*, 390 U.S. 145, 151-52 (1968); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911).

57. *Monsanto*, 465 U.S. at 759.

58. *Spray-Rite*, a distributor and discounter of Monsanto's products, brought suit

Following *Monsanto*, it is only per se illegal to terminate a price cutting dealer where that termination is pursuant to an agreement with those in competition with the terminated dealer, and where the purpose is setting a price or price level.⁵⁹ *Monsanto's* teaching allows a supplier to announce its resale prices in advance and unilaterally refuse to deal with those who fail to comply, even if that supplier's decision is a result of complaints from other customers.⁶⁰ The business must be careful in how it explains its business practices to its customers.⁶¹ Congress has attempted to overrule *Monsanto's* evidentiary standards repeatedly but with no success to date.⁶² It is possible that such a bill could become law shortly, under the new administration.⁶³

b. Dividing Markets Among Competitors is a Per Se Violation

Not only may competitors not agree to set prices, but they may not agree among themselves to divide customers or territories.⁶⁴ A market allocation occurs when two or more competitors

against Monsanto alleging that Monsanto and several other distributors conspired to eliminate Spray-Rite as a distributor because it was also a discounter. *Id.* at 757. Spray-Rite had been selling Monsanto for many years at reduced prices. *Id.* at 756. Following Monsanto's receipt of complaints from those other distributors, Monsanto refused to renew its contract to supply goods to Spray-Rite. While the Supreme Court upheld this as an illegal resale price maintenance offense, the Court held that the evidentiary standard applied in these cases is so strict as practically to preclude resale price maintenance cases. *Id.* at 764. The Court held that the act of a supplier, acting against a customer based upon complaints from other customers, in terminating its sale of goods to that customer, is not in itself a per se offense. *Id.* Something more than complaints on the parts of other customers must be shown. *Id.* at 763-64. The plaintiff must show that its supplier and those complaining of the prices were not acting independently, *id.* at 764, and must produce some evidence, whether direct or circumstantial, that tends to show that the supplier and those complaining formed some sort of combination or conspiracy to achieve an unlawful objective. *Id.*

59. See *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726-27 (1988).

60. *Monsanto*, 465 U.S. at 764.

61. Nevertheless, consumers like discounts. While a supplier may legally terminate a dealer selling at discount, it may not be wise to do so.

62. See Freedom from Vertical Price Fixing Act of 1987, H.R. 585, 100th Cong., 1st Sess. (1987), and the Price Fixing Prevention Act of 1991, H.R. 1470, 102d Cong., 1st Sess. (1991). Each time the bill is introduced, it seems to gather more support. For instance, see the report in *Bill to Alter Standard in RPM Cases Approved by House Judiciary Committee*, 60 Antitrust & Trade Reg. Rep. (BNA) No. 1522, at 877 (1991).

63. Bush Administration Acting Assistant Attorney General Charles A. James, just after the election, wondered how legislation to repeal *Monsanto* would fare under the Clinton Administration. See *Antitrust Agency Heads Cite Guidelines as Major Administration Accomplishment*, 63 Antitrust Trade Reg. Rep. (BNA) No. 1590, at 584 (1992).

64. Such a division is known as a "horizontal market allocation" because the competitors are on the same level in the chain of production or service in the industry. If the two participants are at different levels, for instance, wholesaler and retailer, any arrangement is

agree on which of their customers will be served by which competitor based on identifiable factors: geography, products to be sold, or any other identifiable reason.⁶⁵ Unlike price fixing which is per se illegal whether horizontal or vertical, vertical market allocation is not a per se violation, while horizontal market allocation is.⁶⁶ Of course, the Sherman Act may be violated by vertical allocations under the Rule of Reason test.⁶⁷ The practitioner must be aware of potential market allocations and help businesses avoid them. It may not always be obvious whether an arrangement is a horizontal allocation, which is a per se violation, or a vertical allocation, which is not.⁶⁸

In *United States v. Topco Associates, Inc.*, a chain of independent grocers agreed to sell Topco brand products in such a way that the independent grocers would not be in competition with each other for the sales within a particular territory.⁶⁹ The Topco associated stores merely sought to allocate the territory so that they could compete more effectively with national and regional chains.⁷⁰ The Supreme Court held that because no Topco grocer could sell Topco products in the territory of another Topco grocer without that second grocer's permission, a per se illegal horizontal market allocation had occurred.⁷¹

c. *Groups of Businesses May Not Boycott*

While price fixing and market allocations are proactive violations, reactions such as group boycotts and refusals to deal are also per se offenses.⁷² These offenses include agreements to refuse to do business with a third party.⁷³ Frequently, this third party is a competitor whose practices are disagreeable to the offenders.⁷⁴ For in-

called "vertical."

65. *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 608 (1972).

66. *Id.* at 612. Vertical market allocations include such arrangements as exclusive territorial rights to sell granted by a supplier to a dealer.

67. One of the strangest quasi vertical market allocation cases but one that provides significant insights is *Northrop Corp. v. McDonnell Douglas Corp.*, 498 F. Supp. 1112 (C.D. Cal. 1980).

68. For instance, in a different context, a parent company and a subsidiary company may or may not be horizontal. In *Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool Corp.*, 785 F.2d 1240 (5th Cir. 1986), *cert. denied*, 479 U.S. 848 (1987), a parent, in the context of the Robinson Patman Act, did not control its subsidiary's activities, therefore, the two were considered independent and presumably "horizontal."

69. *Topco Assocs.*, 405 U.S. at 600.

70. *Id.* at 599.

71. *Id.* at 612.

72. *Fashion Originators*, 312 U.S. at 468.

73. *Id.*

74. *Id.* at 461.

stance, in *Fashion Originators Guild v. FTC*, a group of garment manufacturers entered into an agreement not to sell garments to department stores that did business with manufacturers who were allegedly pirating designs.⁷⁵ As with all other per se offenses, the antitrust violation was not justified by the public good of attempting to eliminate illegal conduct by the design pirates.⁷⁶ There are no defenses to the per se violations and no balancing of the public good is allowed.⁷⁷

*FTC v. Superior Court Trial Lawyers Association*⁷⁸ illustrates the harshness of the per se rule. In that case, the public defenders of the District of Columbia refused to take cases until their hourly rates were increased.⁷⁹ The Court held that this was a per se antitrust offense,⁸⁰ a refusal to deal, in violation of the Sherman Act even though the attorneys' compensation was found to be dreadfully low and even though the attorneys argued that they needed more pay to give their indigent clients constitutionally adequate representation.⁸¹ These public goods were termed immaterial to the outcome of the case.⁸²

d. Individual Businesses May Not Force Others to Use Undesirable Products

Tying occurs when one business with market power over one product or service refuses to sell that product or service to a buyer unless the buyer agrees to purchase a separate product or service in which the seller also has a financial interest and which the buyer does not want to purchase.⁸³ It is, therefore, a per se offense committed by an individual business.⁸⁴

In a classic tying case, *Times-Picayune Publishing Co. v. United States*,⁸⁵ the owner of both a morning and evening newspa-

75. *Id.*

76. *Id.* at 468.

77. *Id.*

78. 493 U.S. 411 (1990).

79. *Id.* at 416.

80. *Id.* at 434.

81. *Id.* at 424.

82. *Id.* Remember, however, that a violation requires an agreement, so that if one individual attorney had decided to refuse to deal independently, no violation probably would have occurred. *Id.* at 422-23. Additionally, the association was not a union so the labor exemption under 15 U.S.C. § 17 could not be invoked.

83. *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949).

84. *Id.* An individual business need not always act in concert with another business as in price fixing, market allocations, or group boycotts in order to commit an antitrust violation.

85. 345 U.S. 594 (1953).

per in the New Orleans market,⁸⁶ refused to allow advertisers to advertise in either of its newspapers unless the advertiser bought space in the Times-Picayune evening newspaper.⁸⁷ The Supreme Court held this not to be a tying offense, however, because it found Times-Picayune lacked sufficient market power.⁸⁸ It is important to note that simply joining two products together is not necessarily tying.⁸⁹ The seller must have sufficient market power to force its customers to accept the tying arrangement.⁹⁰ Additionally, two different products must be involved⁹¹ and the arrangement must unreasonably foreclose or restrain market competitors in the relevant market.⁹²

e. Conscious Fluctuation of Prices to Destroy Competition is Illegal

While the greatest difficulty in all per se offenses is establishing that the activity constitutes the prohibited conduct,⁹³ it is most significant in the realm of predatory pricing. In a pure, hypothetical predatory pricing case, one business will lower its prices drastically enough to drive its horizontal competitor out of the relevant market and to create a monopoly.⁹⁴ Once a monopoly is created,

86. The New Orleans newspaper market had only one other newspaper, an evening newspaper. *Id.* at 596.

87. *Id.* at 596-97. Thus, the putative tying product is advertising in the morning newspaper, and the tied product is advertising in the evening newspaper. The scheme would have allegedly caused the other evening newspaper to lose the capacity to compete with the Times-Picayune evening paper by tying advertising in the morning paper, which many advertisers wanted, to advertising in the Times-Picayune's evening paper, which they may not have wanted.

88. *Id.* at 611. The case is particularly instructive, however, in that the Court explains tying theory in great depth in order to distinguish Times-Picayune's behavior from both the per se tying offense and the Rule of Reason offense of attempted monopoly based upon the United States' claims. *See infra* text accompanying notes 105-28. It remains a seminal case in tying law, in spite of the conclusion that Times-Picayune had committed no violation, because of its sound teaching. It is a good case to read to learn how courts attempt to define whether conduct fits within the definitions of per se offenses, as well as to gain an understanding of the application of the Rule of Reason.

89. *Times-Picayune*, 345 U.S. at 627.

90. *Id.* at 611.

91. *Id.* at 614. The Court also held that the Times-Picayune's actions did not fit within the definition of tying because the two products in that case were identical. *Id.* The Court determined that morning newspaper advertising and afternoon newspaper advertising were not different products, but part of the same relevant product market. *Id.* *See infra* notes 112-20 and accompanying text for a discussion of relevant product market and an expanded explanation of the importance of carefully defining it and convincing the court to accept that definition.

92. *Id.* at 614.

93. *See, e.g., id.*

94. *See* A.B.A. ANTITRUST SEC., *Antitrust Law Developments* 125-30 (2d ed. 1984).

the predator will raise its prices significantly, extracting monopoly rents.⁹⁵ In the real world, predatory pricing is extremely difficult to prove because it is difficult to distinguish between price reductions taken to increase competition and those which are intended to harm competition.⁹⁶ Courts have devised a series of intricate evidentiary tests to determine whether predatory pricing has occurred.⁹⁷ The court in *A.A. Poultry Farms* describes the three most widely used tests: (1) determining whether the price charged exceeds the cost to produce,⁹⁸ (2) determining the pricer's intent,⁹⁹ and (3) determining whether the pricer is making an investment in a future monopoly.¹⁰⁰

f. Courts Have Specified Other Activities as Per Se Unreasonable

The previous five examples are not an exclusive list of per se offenses; a variety of others are defined by the courts. For instance, bid rigging (where bidders plan in advance who will submit the low bid) is sometimes considered part of price fixing and sometimes is considered a separate per se offense.¹⁰¹ In any event, bid rigging is a per se violation of the Sherman Act.¹⁰²

Courts are likely to view as per se offenses anything that will consistently and unreasonably restrain trade. However, courts have been reluctant to expand the list of per se offenses in the recent

95. *Id.* Monopoly rents are the excess profits a monopolist reaps due solely to the existence of the monopoly.

96. *See* *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981) (illustrating the difficulty courts have with this distinction). The courts, based on public policy, favor price reductions to increase competition. But, in many cases, such as *Northeastern Telephone*, the courts must predict the future to decide whether the conduct amounts to predatory pricing.

97. *See* *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1400-02 (7th Cir. 1989).

98. *Id.* at 1400.

99. *Id.*

100. *Id.* at 1401. As *A.A. Poultry* illustrates, the Seventh Circuit prefers a complex test, dramatizing the difficulty of proving a predatory pricing case. *Id.* at 1401-02. Even if the pricer is successful in defending its practices, however, an incredible amount of defense cost is involved in these evidence intensive lawsuits. *See* *Northeastern Telephone*, 651 F.2d at 76. The practitioner is best advised to help the business client avoid any appearances of predatory pricing.

101. *Underground Construction Contractors Will Plead Guilty to Section 1 Allegations*, 60 *Antitrust & Trade Reg. Rep. (BNA) No. 1522*, at 884 (1991) (discussing *United States v. ICOS Corp. of Am.*, No. 91-151-D (W.D. Wash. June 20, 1991)).

102. *Id.* In *ICOS Corp.*, ICOS Corporation was charged with bid rigging contracts with the Army Corps of Engineers to repair the Mud Mountain Dam in Washington. ICOS had agreed to pay each of the other bidders if they would allow ICOS to submit the low bid. *Id.*

past.¹⁰³ With proper planning and research, businesses will achieve their legitimate ends while avoiding per se offenses.¹⁰⁴

2. Activities Which Are Not Per Se Unreasonable May Still Be Prohibited

Every other contract, combination, or conspiracy that restrains trade and is not conduct defined as a per se violation is governed by the Rule of Reason.¹⁰⁵ Almost any business activity could be conducted so unreasonably as to violate the Sherman Act.¹⁰⁶ Potential violations have been considered so frequently that the practitioner should be aware that courts are likely to find the conduct to be an unreasonable restraint even if that conduct has not yet been characterized as a per se offense. These activities could become per se offenses: exclusive contracts which border on tying arrangements,¹⁰⁷ unilateral distributorship terminations,¹⁰⁸ territorial market allocations,¹⁰⁹ and unilateral refusals to deal.¹¹⁰

The Rule of Reason case requires a higher degree of proof than the per se offenses.¹¹¹ Some courts impose a threshold inquiry into whether the alleged offender has substantial market power in the relevant market.¹¹² This, of course, requires that "relevant market" be defined. Relevant market has two components. The first component is product market, defined as those products that are reasonably interchangeable in terms of price, use, and quality. Even though not identical or fungible, these products must be reasonable substitutes.¹¹³ The definition of a relevant product market

103. See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16 (1984).

104. For instance, as *Monsanto* teaches, a business can engage in behavior that results in vertical price restraints without committing antitrust violations so long as the business structures its actions properly. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. at 763-64. Examples can be found in all "per se offense categories" of achieving the results while not committing the offense. See, e.g., *Times-Picayune*, 345 U.S. at 610-11.

105. See *NCAA v. Board of Regents*, 468 U.S. 85, 103 (1984).

106. See *Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

107. See *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988).

108. See *Monsanto*, 465 U.S. at 764.

109. See *Marketers of Branded Boats Must Defend Customer and Territory Allocation Charges*, 61 Antitrust & Trade Reg. Rep. (BNA) No. 1534, at 364 (1991) (discussing *Missouri River Marine*, No. 91-34-GF (D. Mont. Sept. 19, 1991)).

110. *Trans Sport Inc. v. Starter Sportswear, Inc.*, 775 F. Supp. 536, 541-44 (N.D.N.Y. 1991), *aff'd*, 964 F.2d 186 (2d Cir. 1992).

111. *NCAA v. Board of Regents*, 468 U.S. at 104 n.26.

112. See *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 315-16 (8th Cir. 1986). While this case is based upon South Dakota's antitrust law, federal case law is used to supply South Dakota's law of the Rule of Reason. *Id.* at 315.

113. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 392-95 (1956).

typically requires the use of expert economists who conduct a study known as "cross-elasticity of demand."¹¹⁴ A relevant product market is defined by determining how likely a consumer is to choose one product irrespective of availability or other concerns.

The second component of relevant market is the relevant geographic market. Generally, the Elzinga-Hogarty test¹¹⁵ is applied to determine relevant geographic market. This test weighs such factors as the perishability of the product, shipping patterns, plant locations, customer buying practices, transportation costs, and location of sales persons.¹¹⁶ Both the relevant product market and the relevant geographic market can be defined very widely or very narrowly. When combined, the overall relevant market can be quite large or quite small.¹¹⁷

The court usually must find that the alleged monopolist holds market power with respect to the relevant market.¹¹⁸ If actual proof of detrimental effects from the conduct of a business exists, however, the court will not inquire into market power.¹¹⁹ In *FTC v. Indiana Federation of Dentists*, confronted with a conspiracy to withhold information from consumers, the Court required only a showing that the dentists caused some bad effects. The Court did not inquire into market power because it found information neces-

114. For examples of cross-elasticity studies in the food industries, see generally *FOOD DEMAND ANALYSIS* (Oral Capps, Jr. & Benjamin Senauer, eds. 1986) and *THE ECONOMICS OF MEAT DEMAND* (Rueben C. Buse, ed. 1989). The question posed in a cross-elasticity study is when will consumers choose a new product over an old product as factors such as price, health, and availability make the old product less desirable, and which new products are chosen first as substitutes.

115. The Elzinga-Hogarty test is named after Kenneth Elzinga and Thomas Hogarty who wrote two particularly important articles about defining geographic markets. See Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 *ANTITRUST BULL.* 45 (1973) [hereinafter Elzinga & Hogarty I]; Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation Revisited: The Case of Coal*, 23 *ANTITRUST BULL.* 1 (1978) [hereinafter Elzinga & Hogarty II]. While the Elzinga-Hogarty test has not been accepted in every instance by every court, the test has been used widely by courts in determining geographic markets. See, e.g., *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251, 1266 (N.D. Ill. 1989) (illustrating one district court's treatment of the Elzinga-Hogarty test), *aff'd*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990).

116. Elzinga & Hogarty I, *supra* note 115, at 72. See also A.B.A. ANTITRUST SEC., *Antitrust Law Developments* 115-16 (2d ed. 1984).

117. *Compare Northrop Corp. v. McDonnell Douglas Corp.*, 498 F. Supp. 1112, 1123 (C.D. Cal. 1980) (arguing the relevant product market was all aircraft and the relevant geographic market was the entire world, leading to quite a large relevant market) with *Lorain Journal Co. v. United States*, 342 U.S. 143, 146-47 (1951) (arguing the relevant product market was the local newspaper and the relevant geographic market consisted of one small town in Ohio leading to a rather small relevant market).

118. See *NCAA v. Board of Regents*, 468 U.S. at 109.

119. *Indiana Fed'n of Dentists*, 476 U.S. at 460-61.

sary for making an informed choice was being withheld, and this was a sufficient detrimental effect.¹²⁰

Regardless of whether market power must be shown, courts consider certain factors to determine whether the activity has unreasonably restrained trade. These factors include: (1) the nature and character of the industry and the competitors in that industry,¹²¹ (2) competition in the industry—with and without the restraints in question,¹²² (3) the nature or character of the restraints and their actual or probable effects,¹²³ (4) the history of the restraints,¹²⁴ (5) the reasons for the particular practices alleged to be unreasonable restraints,¹²⁵ and (5) whether the restraints are reasonably necessary to achieve a legitimate business purpose.¹²⁶ Courts are likely to engage in a balancing test, balancing the bad effects of the restraint with legitimate business purposes.¹²⁷ The greater the bad effects and the less the reasonable necessity for legitimate business purposes, the more likely a court will find an antitrust violation has occurred.¹²⁸

3. *Intentionally Attempting to Maintain or Acquire a Monopoly is Forbidden*

Beyond per se offenses and Rule of Reason liability, the second section of the Sherman Antitrust Act of 1890¹²⁹ makes it illegal to “monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce.”¹³⁰ The courts have split this portion of the Sherman Act into two types of cases: monopolization¹³¹ and attempted monopolization.¹³² A business commits a monopolization offense if it possesses monopoly power as a result of its willfully acquiring or maintaining that power or if the business uses monopoly power to prevent competition, gain a competitive advantage, or destroy a competitor.¹³³ The

120. *Id.* at 463-64.

121. *See* NCAA v. Board of Regents, 468 U.S. at 105 n.29.

122. *See id.* at 106 n.30.

123. *Id.* at 107.

124. *Id.* at 115-16.

125. *Id.* at 113.

126. *Id.* at 114-15 (holding that the restraints did not enhance either production or efficiency and thus had no legitimate business purpose).

127. *Indiana Fed'n of Dentists*, 476 U.S. at 460-61.

128. *NCAA v. Board of Regents*, 468 U.S. at 119-20.

129. 15 U.S.C. § 2 (1988 & Supp. III 1992).

130. 15 U.S.C. § 2 (1988 & Supp. III 1992).

131. *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966).

132. *A.A. Poultry*, 881 F.2d at 1402.

133. *Grinnell Corp.*, 384 U.S. at 570-71.

simple possession of monopoly power or the existence of a business as a monopoly is not in and of itself a violation of the antitrust laws.¹³⁴ The monopolist must have also engaged in some sort of anticompetitive conduct.¹³⁵

It is necessary to define relevant geographic and product markets¹³⁶ in a monopolization case because an offender must have the power unilaterally to affect competition in a relevant market.¹³⁷ While market share is a question of fact to be determined in every case individually, fifty percent is typically not enough¹³⁸ while eighty percent of the market will almost always be found to be sufficient to create monopoly power.¹³⁹

Once the business is shown to have possessed monopoly power in a relevant market, it must be shown that the business intended to use that power to eliminate competition.¹⁴⁰ Businesses can manifest this intent in virtually innumerable ways. Actions need not even be actual restraints of trade in and of themselves to manifest this intent to establish or to maintain monopoly power.¹⁴¹ In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the dominant

134. *Id.*

135. *Id.* If this were not the case, many small businesses in small towns in Montana would be automatically in violation of the Sherman Act. In many small towns, the economy will only bear one market participant in any particular product market. Additionally, many small towns would be a relevant geographic market due to the great distances and sparse population in Montana. For instance, many towns are served by only one ready-mix concrete company. Concrete, being very heavy and having a very short "shelf life," typically has a very small geographic market and because concrete has not been freely interchanged with another product, it has a very narrow product market description. Ready-mix will be used as an example frequently in this Article because of its narrow relevant market descriptions. See, e.g., *Richter Concrete Corp. v. Hilltop Basic Resources, Inc.*, 547 F. Supp. 893 (S.D. Ohio 1981), *aff'd*, 691 F.2d 818 (6th Cir. 1982). The antitrust laws would be foolish indeed if they required two industry participants in a relevant market where the economy can only support one. Either some sort of state supports would be necessary to prevent those two market participants from disintegrating or many small towns would have no market participants.

136. These markets are defined in precisely the same way as above. See *supra* notes 114-18 and accompanying text. In fact both *Elzinga & Hogarty I* and *Elzinga & Hogarty II*, concerning geographic markets, were written with the Clayton Act in mind and have been applied to all Sherman Act claims where geographic markets must be defined. See *Grinnell Corp.*, 384 U.S. at 572 (defining markets with respect to Sherman Act § 2 claims).

137. 3 JULIAN O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 8.02[3] (1993).

138. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984) (stating that before a defendant can be found to be liable for monopolization, it must have a market share of at least fifty percent). While this is dictum, it is indicative of most courts' thoughts. See also *Slocum Indus. Inc. v. Chelsea Indus., Inc.*, 1984-1 Trade Cas. (CCH) ¶ 65,932, at 68,028-29 (E.D. Pa. Feb. 17, 1984).

139. See *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

140. *United States v. Griffith*, 334 U.S. 100, 107 (1948).

141. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603-04 (1985).

ski operator ceased its involvement in a long-standing marketing arrangement where skiers could purchase a pass for use at multiple areas.¹⁴² The Court found that the smaller ski area could not compete.¹⁴³ Even though the act was not a restraint of trade in itself, the intent was to create a monopoly,¹⁴⁴ and consequently, liability was found.¹⁴⁵ Some intent to commit a wrongful act, however, must always be found since the antitrust laws were not intended to punish competitors for competing fairly and successfully and attaining size due to superior goods or services.¹⁴⁶

Attempts to monopolize are also illegal under section two of the Sherman Act.¹⁴⁷ The elements of an attempt to monopolize are: (1) the specific intent to monopolize a relevant market,¹⁴⁸ (2) conduct that constitutes willful acquisition or maintenance of monopoly power if done by a true monopolist,¹⁴⁹ and (3) a "dangerous probability of success."¹⁵⁰ In most circuits, a finding of "a dangerous probability of success" can only be made after relevant geographic and product markets are defined and the alleged violator's market share has been defined.¹⁵¹ In these circuits, the market share necessary to support a finding of attempted monopolization is typically less than the level required to support an actual monopolization case.¹⁵²

The Ninth Circuit has been alone in not requiring a market analysis in order to support a finding of "a dangerous probability of success."¹⁵³ The Ninth Circuit allows an inference of "a dangerous probability of success" to be drawn from a finding of specific intent and anticompetitive conduct.¹⁵⁴ Regardless of whether such

142. *Id.* at 589.

143. *Id.* at 594.

144. *Id.* at 610.

145. *Id.* at 611.

146. *Id.* at 600. *See also* United States v. Alcoa, 148 F.2d 416, 432 (2d Cir. 1945).

147. 15 U.S.C. § 2 (1988 & Supp. III 1992).

148. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1400-01 (7th Cir. 1989).

149. TransAmerica Computer Co. v. International Business Mach. Corp., 698 F.2d 1377, 1382 (9th Cir. 1983) (providing an extensive discussion of this element).

150. Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1262 (E.D. Pa. 1987).

151. *See, e.g.,* Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., Inc., 783 F.2d 159, 161-62 (10th Cir. 1986). *See also* Deauville Corp. v. Federated Dep't Stores, 756 F.2d 1183, 1188 (5th Cir. 1985); National Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020, 1025 (8th Cir. 1985); White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 507 (6th Cir. 1983); Nifty Foods Corp. v. Great Atlantic & Pac. Tea Co., 614 F.2d 832, 841 (2d Cir. 1980).

152. *Tasty Baking*, 653 F. Supp. at 1268.

153. William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1029 n.11 (9th Cir. 1981).

154. *Id.* at 1029. This rule seems to be changing. A recent case relying upon *William*

a showing is necessary, all three elements must be proved to have a valid attempted monopolization case.

Beyond per se offenses, Rule of Reason cases, and monopolization and attempt cases, most other antitrust law is built upon the foundation laid by the Sherman Act. The practitioner should not attempt to rely upon this article alone without reading the cases cited and performing additional research. The Sherman Act, as well as the other antitrust laws, are quite complex. For instance, the interplay between economics and law¹⁵⁵ requires great precision and care. Additionally, in the 100 years since the Sherman Act was first enacted, the courts have created an immense body of law covering virtually every type of activity imagined in business settings. The cases discussed above with respect to the Sherman Act and those presented below represent but a few of the types of cases and doctrines that have developed. Careful research must precede any work in the antitrust field and any advice given to businesses concerning antitrust issues.¹⁵⁶

B. *The Clayton Act Primarily Addresses Mergers*

The Sherman Act, from which per se offenses, Rule of Reason cases, and attempted monopolization analysis developed, was supplemented in 1914 by the enactment of the Clayton Act.¹⁵⁷ Section

Inglis was reviewed by the United States Supreme Court. *McQuillan v. Sorbothane, Inc.*, 907 F.2d 154 (9th Cir. 1990), *rev'd sub nom. Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884 (1992). The Court in *Spectrum Sports* held the plaintiff must perform a market analysis to prevail in showing a dangerous probability of success. *Id.* at 892. While the unanimous Court did not specifically overrule *William Inglis, Spectrum Sports* seems to bring the Ninth Circuit in line with the other circuits in requiring both a product and geographic market analysis prior to a finding of attempted monopoly. *Id.* However, it may be too soon to predict how the Ninth Circuit will interpret *Spectrum Sports*. See also *PLI Conference Explores Ins and Outs of Federal Agencies' Antitrust Enforcement*, 63 *Antitrust & Trade Reg. Rep. (BNA) No. 1591*, at 615 (1992) (discussing the oral arguments in *McQuillan* on Nov. 10, 1992).

155. The complex interplay is best illustrated by the case analysis and the economic analysis that pervades *Elzinga I* especially. See *Elzinga & Hogarty I*, *supra* note 115, at 52-72.

156. As one additional example of how specific and detailed the law has become, the courts have developed what is known as the Intracorporate Conspiracy Doctrine concerning whether one subsidiary of a corporation or a set of persons working within one business can commit an antitrust violation in combination with another subsidiary or another group of persons of that same corporation or business. See *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988). For an overview of the many cases prior to *Oltz* that have analyzed this rather occult question see Milton Handler & Thomas A. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 *CARDOZO L. REV.* 23, 26 (1981). In other words, whatever the issue confronting the small business client, some court has probably already considered it. The practitioner's challenge is to unearth the proper doctrine from the 100 year history of antitrust law developments.

157. 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1988)).

Seven of the Clayton Act prohibits mergers and acquisitions where "the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly."¹⁵⁸ The Clayton Act is primarily concerned with mergers of competitors having antitrust results.¹⁵⁹ A relevant market must be established for a merger to violate the antitrust laws.¹⁶⁰ The relevant market for Clayton Act claims is defined in the same way as for Sherman Act claims.¹⁶¹ Once the particular product and geographic markets are defined, the merger violates the Clayton Act if a likely and substantial lessening of competition results from the merger.¹⁶²

Courts analyze four factors—market share, industry structure, barriers to entry, and economies of scale—to determine whether the merger has an anticompetitive effect. First, while not determinative, market share is quite important.¹⁶³ Second, the overall structure of the industry is used to determine market concentration. Traditional antitrust law used the "four firm" ratio to determine industry structure, market share, and concentration.¹⁶⁴ This "four firm" ratio is the traditional method as also used in Sherman Act claims.¹⁶⁵ An industry is considered highly concentrated where four firms control seventy-five percent or more of the industry.¹⁶⁶

During the 1980s the Justice Department and various state attorneys general began to rely on a new method, the Herfindahl-Hirschman Index, to gauge market concentration.¹⁶⁷ Unlike the

158. 15 U.S.C. § 18 (1988).

159. *Brown Shoe Co. v. United States*, 370 U.S. 294, 333 (1962).

160. *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1283-84 (7th Cir. 1990), *cert. denied*, 498 U.S. 920 (1990).

161. See *Elzinga & Hogarty I*, *supra* note 115, at 73-74.

162. A recent case that provides an excellent explanation of the proof necessary in a merger case is *Rockford Memorial*, 898 F.2d at 1283-86.

163. *Brown Shoe*, 370 U.S. at 328.

164. 2 Trade Reg. Rep. (CCH) ¶ 13,103 (1984).

165. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 331 (1963) (assuming that four firm percentage is the proper inquiry).

166. 2 Trade Reg. Rep. (CCH) ¶ 13,103 (1984).

167. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, MERGER GUIDELINES, 13-15, (June 14, 1984) [hereinafter 1984 MERGER GUIDELINES]; States Attorneys General, *Merger Guidelines*, reprinted in *Merger Guidelines*, 50 Antitrust & Trade Reg. Rep. Supp. (BNA) S-1 (1987). The Herfindahl-Hirschman Index ("HHI") "is calculated by summing the squares of the individual market shares of all the firms included in the market," 1984 MERGER GUIDELINES at 13, once the relevant product and geographic markets have been defined. The question becomes what is the relationship between the premerger HHI and the postmerger HHI. "[I]f the increase in the HHI exceeds 100 and the post-merger HHI substantially exceeds 1800, only in extraordinary cases will such factors establish that the merger is not likely substantially to lessen competition." *Id.* at 15. If one firm holding ten percent of the market merges with another firm holding five percent of the market, an increase of 100 occurs. It is very easy for the HHI to become quite a high number. For instance, "a market consisting of four firms with market shares of 30 percent, 30 percent, 20 percent and 20 percent has an

four firm ratio, the Herfindahl-Hirschman Index calculates the level of concentration in an industry considering *all* market participants, not only the largest four.¹⁶⁸

Third, courts consider "barriers to entry."¹⁶⁹ The more easily an incumbent can enter a new market, the less likely a Clayton Act violation will be found. Finally, economies of scale or market efficiencies are considered in viewing merger transactions.¹⁷⁰ The Supreme Court has stated, however, that economies of scale by themselves are not a complete defense in merger actions.¹⁷¹ As with the Sherman Act, a great deal of research must be done prior to initiating an antimerger lawsuit or advising a client as to the antitrust implications of a potential merger acquisition.

Many acquisitions by Montana businesses may not directly implicate the Clayton Act,¹⁷² nor would a Montana business likely find itself a defendant in a Clayton Act action. As will be discussed below in Part V, however, Montana businesses can use the Clayton Act for protection against large national or multinational corpora-

HHI of 2600." *Id.* at 14 n.14. A market with only one participant, a pure monopoly, has an HHI of 10,000. *Id.*

168. See *Merger Guidelines*, 50 Antitrust & Trade Reg. Rep. Supp. (BNA) S-7 (1987). The author believes that the HHI is no more useful than the older four firm ratio. The HHI provides a number between one (in a market with a virtually unlimited number of participants such as summer lawn mowing youth) and 10,000. 1984 MERGER GUIDELINES, *supra* note 167, at 14 n.14. The HHI can be simply inflammatory and confusing. For instance, if one firm controls 70% of a market, the HHI will likely be at least 6,000 (70 squared plus the squares of all the other percentages of market share). This HHI seems astronomical and is already well above the 1,800 described by the Justice Department as being highly concentrated. *Id.* at 15. Whereas, if the other three largest businesses have only two or three percent each, the four-firm ratio may be as low as 76%. A merger that increases the four firm ratio from 76% to 77% will appear to be as insignificant as it is, while the same merger considered under the HHI approach will look outrageous.

169. *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1326 (7th Cir. 1986) (describing the ease of entry analysis). See also *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990).

170. See *Rockford Memorial*, 898 F.2d at 1283. See also Steve Stockum, *The Efficiencies Defense for Horizontal Mergers: What is the Government's Standard*, 61 ANTITRUST L.J. 829, 840-47 (1993) (discussing a variety of mathematical models for defining market efficiencies).

171. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967). A variety of other defenses, issues, and factors exist that are sometimes considered in Clayton Act cases; however, these four are almost universally analyzed. For some of the other issues see, for example, the failing firm defense in *United States v. General Dynamics Corp.*, 415 U.S. 486, 506-07 (1974).

172. The antitrust laws should not be forgotten, however, because, as many have learned, antitrust enforcement can be initiated when enforcement is least expected. See, e.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (two of the thousands of antitrust cases that surprised defendants). Nonprofit corporations can also find themselves targets of federal antitrust enforcement. See *Rockford Memorial*, 898 F.2d 1278.

tions seeking to acquire or compete with a small Montana business.

C. The Sherman and Clayton Acts May Be Enforced by the United States, the States, and Private Persons

A business may become the target of enforcement of the Sherman Act or the Clayton Act, as described above in Part II.A and B, in a variety of ways. First, the federal government may bring an action for civil penalties¹⁷³ and, in merger cases, divestiture and injunctive relief.¹⁷⁴ These actions may be brought either by the Justice Department¹⁷⁵ or the Federal Trade Commission.¹⁷⁶ Additionally, the antitrust laws allow criminal enforcement against businesses.¹⁷⁷ A growing number of state attorneys general are bringing actions against businesses for antitrust violations on behalf of consumers.¹⁷⁸ In many cases, the attorneys general of several states work together to seek enforcement.¹⁷⁹

Both the Sherman Act and Clayton Act also allow for private enforcement.¹⁸⁰ An injured party¹⁸¹ may bring a private cause of action against an antitrust offender for three times the actual damages incurred and may recover attorney fees, costs of suit, and prejudgment interest.¹⁸² Private individuals, as well as the government, may receive equitable remedies¹⁸³ in most cases.

D. Other Federal Laws Supplement the Sherman and Clayton Acts

A variety of other federal laws may supplement the antitrust laws or provide relief in specific cases. Before advising a client, the

173. 15 U.S.C. §§ 21(a), (b) (1988).

174. 15 U.S.C. § 21(b) (1988).

175. 15 U.S.C. § 9 (1988).

176. 15 U.S.C. § 21(a) (1988).

177. 15 U.S.C. § 1 (1988). While criminal liability is beyond the scope of this Article, with the increase in corporate criminal liability in the last few years, businesses should be concerned about potential criminal liability.

178. See 15 U.S.C. § 15c (1988). See also *Texas v. Scott & Fetzer Co.*, 709 F.2d 1024, 1026 (5th Cir. 1983) (demonstrating an interaction between state and federal law and the bringing of an action by a state attorney general); *Pennsylvania v. Mid-Atlantic Toyota Distribs., Inc.*, 704 F.2d 125, 128 (4th Cir. 1983) (involving suits brought by attorneys general of Maryland, Pennsylvania, and Delaware and counsel for the District of Columbia); *Tennessee v. Highland Memorial Cemetery, Inc.*, 489 F. Supp. 65, 68 (E.D. Tenn. 1980) (Tennessee Attorney General sued cemeteries for violations of the Sherman Act).

179. See, e.g., *New York v. Nintendo of Am., Inc.*, 775 F. Supp. 676 (S.D.N.Y. 1991).

180. 15 U.S.C. § 15(a) (1988).

181. See *infra* notes 275-83 and accompanying text for a definition of "injured party."

182. 15 U.S.C. § 15(a) (1988).

183. 15 U.S.C. § 26 (1988).

practitioner should consider whether other applicable laws exist. Some of the most frequently implicated federal laws particularly applicable to small businesses address discriminatory pricing, agricultural exemptions to antitrust laws, special rules applicable to packers and stockyards, the role of the Federal Trade Commission, and special notice requirements for large mergers. Each of these is discussed in detail in this Section.

1. *Sellers May Not Discriminate in Price Among Similar Buyers*

The Robinson-Patman Anti-Discrimination Act,¹⁸⁴ for instance, was designed to prevent discriminatory pricing of the same goods in interstate commerce without a valid reason.¹⁸⁵ A business may not either directly or indirectly discriminate in price between different purchasers of similar goods in interstate commerce if that discrimination lessens competition or tends to create a monopoly.¹⁸⁶ The definition includes several important elements which must be proved to maintain a successful Robinson-Patman action.¹⁸⁷ The first element is the charging of different prices for the same goods by the same seller to different customers.¹⁸⁸ The second element is jurisdictional; the sales must occur in interstate commerce.¹⁸⁹ The final element considered by the courts is whether a reasonable possibility exists that the discrimination in price may harm competition.¹⁹⁰ As may be expected, these elements are frequently complex. For instance, the same seller must be involved in both sales.¹⁹¹ Much litigation has discussed whether the goods sold in each sale are of "like grade and quality."¹⁹²

184. 15 U.S.C. §§ 13-13b, 21a (1988) (originally enacted as Act of June 19, 1936, ch. 592, 49 Stat. 1526).

185. *Dean Milk Co. v. FTC*, 395 F.2d 696, 701-02 (7th Cir. 1968).

186. *See* 15 U.S.C. § 13 (1988).

187. The same enforcement rules, including a private right of action and attorney fees, apply to the Robinson-Patman Act as apply to the Sherman and Clayton Acts. *See* 15 U.S.C. § 15 (1988).

188. *Ashkanazy v. I. Rokeach & Sons, Inc.*, 757 F. Supp. 1527, 1545-46 (N.D. Ill. 1991).

189. *Misco, Inc. v. United States Steel Corp.*, 784 F.2d 198, 202 (6th Cir. 1986). However, such a requirement is not the virtually automatic and formalistic finding prevalent in determinations of "in commerce" in Constitutional Commerce Clause cases. Compare the Robinson-Patman "commerce" treatment in *Misco*, 784 F.2d at 202 with that in the Commerce Clause realm as detailed in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) and *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942).

190. *Ashkanazy*, 757 F. Supp. at 1546.

191. *See Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool Corp.*, 785 F.2d 1240, 1243 (5th Cir. 1986) (finding that a parent corporation and a wholly owned subsidiary were not the same seller for purposes of the Robinson-Patman Act).

192. *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1517-18 (11th Cir. 1989) (finding sufficient identity between two physically identical products to sus-

Finally, the United States Supreme Court has held that an antitrust injury must occur.¹⁹³ The mere fact of price discrimination without this concomitant injury is not sufficient to justify liability under this act.¹⁹⁴ Also, unlike per se violations of the Sherman Act, some defenses are available to the business charged with price discrimination so that the mere act of discrimination need not always lead to liability.¹⁹⁵

A business is well advised to be careful any time it provides different prices for goods to different purchasers.¹⁹⁶ The Robinson-Patman Act was designed generally to prevent large national businesses from gaining discriminatory preferences over small businesses due solely to the large businesses' greater purchasing power.¹⁹⁷ Without providing similar benefits to the small purchaser, these preferential prices could be devastating.¹⁹⁸ Considering the prevalence of small businesses in Montana, the Robinson-Patman Act may be particularly helpful.

2. *Many Agricultural Endeavors Are Exempt from Federal Antitrust Law*

While the Robinson-Patman Act creates an additional, specific area of antitrust enforcement, the Capper-Volstead Act¹⁹⁹ and Section 6 of the Clayton Act²⁰⁰ provide certain exemptions from the reach of the antitrust laws for agricultural interests. Given the large number of agricultural cooperatives in Montana, the Capper-Volstead Act is particularly important. Provided that the agricultural cooperative is organized for the mutual benefit of its members, those members may make the necessary contracts and agree-

tain a Robinson-Patman claim, even though the products were labeled and branded differently), *reh'g denied*, 896 F.2d 560 (1990), *cert. denied*, 494 U.S. 1081 (1990).

193. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981) (defining an "antitrust injury" to mean the sort of injury to competition envisioned by the antitrust laws as being an evil sufficient to justify treble damages and the other remedies in 15 U.S.C. § 15). "Antitrust injury" is defined similarly in standing cases under the Clayton and Sherman Acts. *See, e.g.*, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990).

194. *Atlantic Richfield*, 495 U.S. at 334.

195. *See, e.g.*, *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 555-56 (1990) (discussing the "functional discount" defense); *Anderson Foreign Motors, Inc. v. New England Toyota Distrib., Inc.*, 492 F. Supp. 1383, 1386-87 (D. Mass. 1980) (discussing the analysis of delivery preferences that may justify variances in prices charged).

196. *See, e.g.*, *Anderson Foreign Motors*, 492 F. Supp. at 1387 (illustrating that businesses need to use care in charging different prices to different purchasers).

197. *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1326 (6th Cir. 1983).

198. *Id.*

199. 7 U.S.C. §§ 291-92 (1988) (originally enacted as an Act of February 18, 1922, ch. 57, §§ 1, 2, 42 Stat. 388).

200. 15 U.S.C. § 17 (1988).

ments to affect common marketing.²⁰¹

The Capper-Volstead Act and section 6 of the Clayton Act, however, do not provide absolute immunity to agricultural concerns.²⁰² The Capper-Volstead Act itself gives the Secretary of Agriculture the authority to issue cease-and-desist orders against agricultural cooperatives that monopolize or restrain trade to the extent the price of the agricultural product is unduly enhanced.²⁰³ Cooperatives that resort to coercive or predatory practices to increase membership or to restrain competition through discriminatory pricing are not exempt from the antitrust laws for those acts.²⁰⁴ Furthermore, agricultural associations and cooperatives may not enter into agreements with persons not engaged in agricultural production to acquire monopoly power.²⁰⁵ Finally, the practitioner must be certain that the entity fits within the Capper-Volstead Act's definition of "farmers agricultural associations" or "cooperations."²⁰⁶ If not, the entity may not qualify for exemption under the Act.²⁰⁷ In fact, some associations that otherwise would qualify for the exemption may be disqualified if unqualified persons are members.

Provided that due care is taken, the Capper-Volstead Act and Section 6 of the Clayton Act provide a great deal of freedom from antitrust enforcement for Montana's agricultural community. For example, an agricultural cooperative is permitted to fix prices, and the cooperative can willfully obtain a monopoly through voluntary enrollment of its members or through voluntary combination with other cooperatives.²⁰⁸

3. *Special Laws Apply to Packers and Stockyards*

Other agricultural interests are governed by the Packers and Stockyards Act,²⁰⁹ which enhances the antitrust laws rather than expanding exemptions. The Packers and Stockyards Act was en-

201. 7 U.S.C. § 291 (1988).

202. See *Holly Sugar Corp. v. Gosen County Coop. Beet Growers Ass'n*, 725 F.2d 564, 569 (10th Cir. 1984) (involving an agricultural cooperative that was not exempted from the antitrust laws because it was engaging in picketing and harassment to coerce persons to join its association and then to fix prices).

203. 7 U.S.C. § 292 (1988).

204. *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1182-83 (8th Cir. 1982).

205. *Holly Sugar*, 725 F.2d at 569.

206. 7 U.S.C. § 291 (1988).

207. See *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 826-27 (1978).

208. *Alexander*, 687 F.2d at 1182.

209. 7 U.S.C. §§ 181-229 (1988) (originally enacted as Act of Aug. 15, 1921, ch. 64, title I, 42 Stat. 159).

acted because the executive branch of the federal government had been unable to show a violation of any of the then existing anti-trust laws by the five largest meat packers, even though the government believed the meat packers' activities should be prohibited.²¹⁰ The Act enumerates several unlawful practices.²¹¹ Persons may not engage in unfair, unjustly discriminatory, or deceptive practices;²¹² provide unreasonable preferences;²¹³ apportion supply that tends to restrain commerce;²¹⁴ control output or set prices to create monopoly;²¹⁵ or generally perform monopolistic behavior.²¹⁶

The Packers and Stockyards Act has become little more than a "weights and measures" act over the past 12 years.²¹⁷ The Act, however, should not be ignored by Montana cattle producers and feedlots as a potential source of relief from the current Big Three meat packers.²¹⁸ Two major problems with the use of the Packers and Stockyards Act are that courts have been reluctant to grant attorney fees in private enforcement actions,²¹⁹ and only single damages are allowed,²²⁰ whereas, under the Sherman and Clayton

210. 61 CONG. REC. 1601 (May 26, 1921) (statement of Rep. Haugen).

211. 7 U.S.C. § 192 (1988).

212. 7 U.S.C. § 192(a) (1988). See also *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961).

213. 7 U.S.C. § 192(b) (1988).

214. 7 U.S.C. § 192(c) (1988).

215. 7 U.S.C. § 192(d) (1988).

216. 7 U.S.C. § 192(e) (1988). In essence, the Packers and Stockyards Act specifically prohibits, with respect to meat packers and some others, the same sorts of activities which are prohibited in the Sherman and Clayton Acts as to all businesses. Courts have held, however, that the Packers and Stockyards Act is broader and more far reaching than the Sherman Act due to the expansive legislative history. See *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962). For instance, the Packers and Stockyard Act does not require the government to prove injury to competition. *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968).

217. Stephen Burke, *Who Will Own the Cattle?*, NAT'L CATTLEMAN, August 1988, at 5.

218. In 1988, Cargill Incorporated, ConAgra Incorporated, and IBP Incorporated controlled over 70% of the beef packing industry nationwide. CENTER FOR RURAL AFFAIRS, COMPETITION AND THE LIVESTOCK MARKET (1990). While traditional antitrust laws have not been particularly helpful, perhaps the Packers and Stockyards Act could be used successfully to protect local ranchers and feedlot owners. Cf. *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148 (5th Cir. 1979); *In re Beef Indus. Antitrust Litig.*, 710 F.2d 216 (5th Cir. 1983); *In re Beef Indus. Antitrust Litig.*, 713 F. Supp. 971 (N.D. Tex. 1988) (holding in these related cases that the Sherman and Clayton Acts alone would not allow the plaintiffs to prevail, however, none of these cases involved the Packers and Stockyards Act, which might have made a difference).

219. See *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 933 (10th Cir. 1974). This is very different from the liberal attorney fees available under the Sherman and Clayton Acts. See 15 U.S.C. § 15 (1988); *Hasbrouck v. Texaco*, 631 F. Supp. 258, 268 (E.D. Wash. 1986).

220. 7 U.S.C. § 209(a) (1988).

Acts, treble damages and attorney fees are provided.²²¹

4. *A Special Federal Commission Oversees Antitrust Enforcement*

The Federal Trade Commission Act²²² provides an entity to coordinate enforcement and interpretation of all the federal antitrust law.²²³ The Federal Trade Commission Act itself prohibits unfair methods of competition in commerce and unfair or deceptive acts or practices,²²⁴ and empowers the Commission created by the Act to prevent and seek redress for such actions.²²⁵ While the Commission has published extensive regulations,²²⁶ the actual level of enforcement depends upon the members of the commission.²²⁷ A more active commission will clearly seek greater enforcement of the antitrust laws.

The Federal Trade Commission Act provides the final source of enforcement. The Sherman and Clayton Acts allow the United States Attorney General,²²⁸ states' attorneys general,²²⁹ and private individuals²³⁰ to enforce the antitrust laws. The Federal Trade Commission Act created another entity with the power to enforce.²³¹ Nevertheless, the Federal Trade Commission Act does not create nor enhance a private cause of action.²³² Private individuals must rely upon the traditional antitrust laws.²³³

5. *Certain Mergers Trigger Greater Scrutiny*

While an abundance of other federal acts and amendments have some impact in the antitrust area,²³⁴ these Acts are not treated in this article because most of the practices which they ad-

221. 15 U.S.C. § 15(a) (1988).

222. Federal Trade Commission Act, Ch. 311, 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41-71 (1988)).

223. See *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F.2d 346, 351 (3rd Cir. 1964), *aff'd*, 381 U.S. 311 (1965). See also 15 U.S.C. § 44 (1988).

224. 15 U.S.C. § 45(a)(1) (1988).

225. See 15 U.S.C. § 45(a)(2) (1988).

226. See generally 16 C.F.R. §§ 0.4 - 0.16 (1988).

227. See generally 15 U.S.C. § 41 (1988).

228. 15 U.S.C. § 9 (1988).

229. 15 U.S.C. § 15c (1988).

230. 15 U.S.C. § 15(a) (1988).

231. 15 U.S.C. § 41 (1988).

232. *Baum v. Great Western Cities, Inc.*, 703 F.2d 1197, 1209 (10th Cir. 1983).

233. See *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 281 (9th Cir. 1973).

234. See, e.g., *McFadden Interlocking Directorates Act*, Ch. 323, 38 stat. 732 (1914) (codified at 15 U.S.C. § 19 (1988)); *Unfair Competition Act*, Ch. 463, 39 stat. 798 (1916) (codified at 15 U.S.C. § 71 (1988)).

dress are also addressed by other laws. The Hart-Scott-Rodino Act,²³⁵ on the other hand, can have important implications for some small businesses.²³⁶ The Hart-Scott-Rodino Act requires persons who are preparing to acquire, either directly or indirectly, the voting securities or assets of another "person" to notify the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice of that intention in cases of large mergers where the transactions are not specifically exempted from the antitrust laws.²³⁷ Those mergers which require this notification involve very large businesses. Most transactions and mergers among small businesses would not require such pre-merger notification; however, large mergers which do require such notice may have a significant impact on a small business in the same industry.

The Hart-Scott-Rodino Act can be useful, however, for Montana corporations who may be market participants in industries dominated by multi-national corporations. In these cases, if huge corporations seek to merge, they are required to file a pre-merger notification.²³⁸ Following that filing, the Commission must publish a notice concerning the proposed acquisition in the *Federal Register*.²³⁹ A waiting period then begins during which the merger may not occur.²⁴⁰ During this waiting period a Montana business could seek to prevent the merger, invoking the Clayton Act, or it could use the waiting period to prepare for the aftermath of the merger.

III. A STATE'S ANTITRUST STATUTES MAY SUPPLEMENT THE FEDERAL LAW

States had antitrust law before the federal laws were enacted.²⁴¹ But since the enactment of the Sherman and Clayton Acts, the federal law has had the greatest impact in antitrust. However, recent state enforcement has seen a renewed enthusi-

235. Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. 94-435, 90 Stat. 1383 (1976) (codified at 15 U.S.C. §§ 1 note 8, note 12, 15c-15g, 16, 18a, 26, 66, 1311-1344, 28 U.S.C. § 1407 (1988)).

236. The Hart-Scott-Rodino Act makes a variety of changes in the antitrust law, including allowing states' attorneys general to bring suit. See 15 U.S.C. § 15c (1988). Nevertheless, the most important addition is the pre-merger notification requirement discussed in this Article. 15 U.S.C. § 18a(a) (1988).

237. 15 U.S.C. § 18a(a) (1988).

238. 15 U.S.C. § 18a(a) (1988).

239. 15 U.S.C. § 18a(b)(2) (1988).

240. 15 U.S.C. § 18a(b)(1) (1988).

241. John Kincaid, *Commentary: State Antitrust Law*, 29 WASHBURN L.J. 188, 198 (Winter 1990).

asm.²⁴² Many states' antitrust laws are modeled on the federal law and share many commonalities.²⁴³ Through the Antitrust Committee of the National Association of Attorneys General, the states have achieved a great degree of consensus concerning antitrust enforcement.²⁴⁴ Montana's Act is similar to other states' acts.

This section addresses Montana's Unfair Trade Practices and Consumer Protection Act.²⁴⁵ Montana's Act mirrors the Sherman Act, Clayton Act, and Robinson-Patman Act.²⁴⁶ In fact, the Montana Act directs courts to give "due consideration and weight" to judicial interpretations of federal laws that are similar to the Montana Act.²⁴⁷

Even though the Montana Act provides for injunctions, treble damages, attorney fees, and other remedies,²⁴⁸ very little litigation has been brought under the law. The Montana Act should not be discounted, however, because some practices which may be difficult to prove under federal law may be more clearly defined under the Montana Act.

Predatory pricing, the practice of pricing goods at such a low cost as to drive a competitor from business, is very difficult to prove under the federal law.²⁴⁹ However, the Montana law simply forbids sales at less than the cost of the item for the purpose of injuring competitors and destroying competition.²⁵⁰ Furthermore, interstate commerce is not necessary to trigger a state action claim.

Injunctions and treble damages are available under the Montana Act, as in the federal antitrust laws.²⁵¹ Additionally, business directors, officers, and agents who, directly or indirectly, assist or aid the violation of the Montana Act are responsible equally with

242. *Id.* at 188.

243. *See generally* Robert Abrams, *Antitrust Enforcement in the 1990s*, 29 WASHBURN L.J. 350 (Winter 1990).

244. *Id.* at 353.

245. MONT. CODE ANN. §§ 30-14-101 to -224 (1991).

246. *See* MONT. CODE ANN. § 30-14-205 (1991).

247. *See* MONT. CODE ANN. § 30-14-104 (1991). To see how one federal court used federal case law to interpret a state's antitrust laws see *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 313 (8th Cir. 1986) (applying South Dakota law by using federal case law interpretations of federal antitrust law).

248. MONT. CODE ANN. § 30-14-222 (1991).

249. For instance, under federal interpretations, the business may be allowed to sell below cost without a finding of illegality. *See MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1114 (7th Cir. 1983). The Seventh Circuit has even added a requirement that the plaintiff must be able to show that the price cutting monopolist would be able to recover later any losses he suffered during the predatory pricing. *See AA Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396, 1400 (7th Cir. 1989).

250. MONT. CODE ANN. § 30-14-209 (1991).

251. MONT. CODE ANN. §§ 30-14-222(1), (2) (1991).

the business for whom the person acts.²⁵² The Montana Act, which uses more precise language than the federal laws because it was written in light of federal developments, could become quite well used.²⁵³

In a related field, the Montana legislature in the 1991 session enacted the Montana Retail Motor Fuel Marketing Act.²⁵⁴ This temporary law, which is in effect only until July 1, 1993, was designed to protect independent, small dealers and distributors from below cost pricing by large national corporations.²⁵⁵ No cases have been reported under this Act but its enactment does tend to show that the Montana legislature is concerned about antitrust issues and protecting Montana businesses.

Furthermore, the Montana Legislature passed Senate Bill 190 in the 1991 legislature.²⁵⁶ This bill, which was vetoed by Governor Stephens,²⁵⁷ was an *Illinois Brick Co. v. Illinois* repealer.²⁵⁸ Should such a bill be enacted by a future legislature, the Montana state antitrust law could be used to fill the gap created in federal law by *Illinois Brick*.²⁵⁹

IV. POTENTIAL LIABILITY OF SMALL BUSINESSES

Large multinational corporations, such as the Bell Telephone system, are not the only targets of antitrust enforcement.²⁶⁰ Small businesses must be aware of potential liability as well.²⁶¹ This Part uses the characteristics of the Montana business community for examples of potential antitrust liability. As more and more national businesses enter Montana and as Montana businesses enter

252. MONT. CODE ANN. § 30-14-203 (1991).

253. The Montana Act is probably better written than the federal antitrust law because the Montana Act was written significantly later than the federal law and benefits from the years of refinement to the federal law. Those points that were honed over time by the federal courts were incorporated into the Montana law.

254. MONT. CODE ANN. §§ 30-14-801 to -806 (1991).

255. MONT. CODE ANN. § 30-14-802 (1991).

256. S.B. 190, 52d Mont. Leg. (1991).

257. Veto Message of Gov. Stan Stephens, April 8, 1991, 2 S. Journal 1391, 52d Mont. Leg. (1991) [hereinafter Veto Message].

258. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (holding that only those persons dealing directly with a monopolist have standing to sue that monopolist in federal antitrust law). See *infra* notes 274-81 and accompanying text.

259. See discussion *infra* at note 277 concerning *Illinois Brick* repealers elsewhere.

260. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). This national case involving the break up of Bell was originally filed in 1949. While many antitrust cases consume a great amount of time, this is unusually long. The break up of Bell and its impact on virtually every American household probably accounts for the public's awareness of antitrust.

261. See *infra* notes 305-09 and accompanying text.

national markets, practitioners must be able to advise those small businesses concerning antitrust matters.²⁶² This Part uses examples to illustrate some of the most common small business violations. Finally, a discussion of enforcement against small businesses provides the practitioner with information necessary to encourage small businesses to address potential problem areas.

A. *Small Businesses Have Attributes that Increase Some Antitrust Risks*

Due to the geographic size and sparse population of Montana, a great number of small businesses have monopolies.²⁶³ Consider as an example of monopolies²⁶⁴ in Montana, ready-mix concrete sales.²⁶⁵ Many small towns in Montana cannot support but one ready-mix concrete company. Consequently, the fact that only one market participant exists does not indicate the participant is bad or in any other way attempting to exploit the market in violation of antitrust laws.²⁶⁶

The simple possession of monopoly power by a business by itself does not constitute an antitrust violation.²⁶⁷ For such a violation to occur, that business must have obtained or maintained that monopoly power through anticompetitive means.²⁶⁸ Monopolies do occur without bad acts. The antitrust laws are not in place to force businesses out of business simply because a monopoly happens to exist or to force two competitors to share a product and geographic

262. See discussion of the global economy and state antitrust issues in Kincaid, *supra* note 241, at 194-97.

263. Four types of situations are frequently described generically as "monopoly." A monopoly is the exclusive possession of the market position for manufacture or sale of a particular product as the seller, WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 548 (3d ed. 1969). Monopsony is the exclusive possession of the market position as a buyer of a particular product. *Id.* at 549. Oligopoly is the non-exclusive yet limited participation in the sale of a particular product by a few competitors. *Id.* at 588. Oligopsony is the non-exclusive possession of buying position by a few powerful market participants. *Id.* Typically, for purposes of antitrust law, "monopoly" is used as a generic to include any or all of these. However, in the example to be used in this section, the participants in the particular product market have an actual, technical monopoly in their geographic markets.

264. "Monopoly" is not used as a pejorative in all situations but rather is merely a descriptive term.

265. Ready-mix concrete is defined by the courts as a product market. The geographic market for ready-mix is extremely small due to its limited "shelf life." See *Richter Concrete Corp. v. Hilltop Basin Resources, Inc.*, 547 F. Supp. 893, 902 (S.D. Ohio 1981).

266. *Havre Ready-Mix Concrete Company* in *Havre*, *Lunda Redi-Mix, Inc.* in *Cut Bank*, and *R&H Concrete* in *Columbus* are examples of a few places in Montana with only one ready-mix company. Even a city the size of *Missoula* has only three ready-mix concrete companies.

267. *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966).

268. *Id.*

market that cannot bear but one such business. If the business's monopoly power was gained or maintained through competition "on the merits,"²⁶⁹ no violation of the antitrust laws occurs.²⁷⁰ Consequently, the simple fact of the existence of a monopoly in ready-mix in a small town such as Havre, Montana or the existence of an oligopoly in ready-mix in a city such as Missoula, Montana does not, in itself, lead to the conclusion that an antitrust violation has occurred.²⁷¹ However, the existence of such a monopoly should lead the Montana business to exercise caution. The narrow lines between anticompetitive conduct and competition on the merits,²⁷² and between free and fair competition in pricing and predatory pricing designed to maintain a monopoly,²⁷³ demand careful attention when a new entrant appears in the market and when the business environment changes.

1. *Small Businesses May be Trapped Between Monopolists and Consumers*

The United States Supreme Court in *Illinois Brick* held that the only private individuals who could maintain antitrust lawsuits based on federal law are those persons who deal directly with the monopolist.²⁷⁴ Others, such as those who purchase from a wholesaler who, in turn, purchased from a monopolist are precluded from bringing antitrust actions based on federal law.²⁷⁵

The *Illinois Brick* repealer for Montana passed in the 1991 legislature,²⁷⁶ but was vetoed by Governor Stan Stephens ostensibly because it would have a chilling impact on national businesses

269. The line between competition on the merits and anticompetitive conduct is sometimes not easily drawn. See *TransAmerica Computer Co. v. International Business Mach. Corp.*, 698 F.2d 1377, 1384 (1983).

270. *Olympia Equip. Leasing Co. v. Western Union Tel.*, 797 F.2d 370, 375 (7th Cir. 1986).

271. *Id.*

272. See *TransAmerica Computer*, 698 F.2d at 1384.

273. See *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 87 (2d Cir. 1981).

274. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977).

275. In *Illinois Brick*, the State of Illinois and several Illinois cities brought an action against the brick company based on the Clayton Act. They said Illinois Brick's monopolistic practices caused an increase in the price that contractors purchasing concrete blocks were charged. The contractors then used the blocks in buildings constructed for the state and municipalities. The important issue was that the contractors themselves did not sue the company. *Illinois Brick* remains the applicable law in federal antitrust cases except that lawsuits by individual consumers seem to be immune from the *Illinois Brick* problem. See *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 474-75 (1982); *Reiter v. Sontone Corp.*, 442 U.S. 330, 337 (1979).

276. S.B. 190, 52d Mont. Leg. (1991).

doing business in Montana.²⁷⁷ This repealer would have allowed persons to reach past the person selling the goods and strike at the monopolist.

While this may not seem important at first glance, frequently businesses are caught between monopolists whom the small business cannot afford to irritate by challenging its practices and an indirect purchaser who has no standing.²⁷⁸ Montana retailers were caught between Nintendo and consumers recently.²⁷⁹ Those retailers had good reason not to bring an antitrust action against Nintendo when Nintendo was engaged in price fixing because they feared Nintendo would retaliate and because Nintendo products were so popular. Consumers were forced to wait until the states' attorneys general brought suit against Nintendo in their name.²⁸⁰ Montana's Attorney General joined the suit on behalf of Montana consumers.²⁸¹ Had an *Illinois Brick* repealer been in place, consumers or others negatively impacted by Nintendo's antitrust violations could have sought redress even though they were not in direct contact with Nintendo.

277. See Veto Message, *supra* note 257. The author drafted that *Illinois Brick* repealer to help Montana businesses and consumers because states that have the strongest *Illinois Brick* repealers and consumer protection laws seem to do best with business growth. Sixteen states enacted *Illinois Brick* repealers by August, 1990. See ABA *Revises Code of Judicial Conduct, Urges Congress to Study Dual Enforcement*, 59 Antitrust Trade Reg. Rep. (BNA) No. 1479, at 257 (1990). The National Association of Attorneys General has advocated such repealers for a long time. *NAAG and Federal Agencies Accentuate Positives in Antitrust, Consumer Issues*, 57 Antitrust Trade Reg. Rep. (BNA) No. 1446, at 854 (1989). Additionally, the United States Supreme Court has held that state *Illinois Brick* repealers are not preempted by federal law. *California v. ARC America Corp.*, 490 U.S. 93, 105-06 (1989).

278. In *Illinois Brick*, the contractors who bought from the brick company did not bring the action. They were most likely concerned that if they brought suit against their brick supplier, that supplier would delay their shipments, refuse to extend them credit, or a variety of other acts that might annoy them or hurt their business but which could not be shown to be retaliatory. See *Illinois Brick*, 431 U.S. at 746. Not many businesses can afford to irritate their suppliers, especially if their suppliers are monopolists. These difficulties seem to be much more significant than the problem the courts will have in apportioning damages, the principle reason that Justice White used to support the holding in *Illinois Brick*. See *id.* at 715.

279. See *New York v. Nintendo of Am., Inc.*, 775 F. Supp. 676 (S.D.N.Y. 1991). With the popularity of Nintendo products, a retailer could not afford to alienate Nintendo and take a chance of its customers defecting to retailers who could stock an entire line of Nintendo products because Nintendo might decide to delay or reduce shipments to the plaintiff retailer.

280. *Id.*

281. *Id.*

2. Sometimes Small Business Entrepreneurial Spirit May Cause Problems

Not only may small businesses be walled in the middle by *Illinois Brick*, so that they may not be willing to alienate their suppliers to protect consumers, the businesses traditionally have not thought of antitrust in the day-to-day dilemma of keeping their businesses afloat. However, this entrepreneurial spirit can lead to potential antitrust problems.

Return to the example of the ready-mix industry. Suppose that in one of Montana's towns, which has only had one ready-mix company, another business seeks to sell ready-mix.²⁸² The second company can only quarry enough stone for its own needs, however, and cannot sell crushed rock to its customers. To attempt to maintain its strong position, the first ready-mix company, which quarries sufficient quantities of stone to sell crushed rock as well as ready-mix, tells its customers that it will only sell crushed rock to those who also buy its ready-mix.

This could be a tying violation.²⁸³ Even if the first company were to tell its customers that they would receive a discount, either on ready-mix or on crushed rock, if both products are bought from them, a Robinson-Patman Act violation may occur.²⁸⁴ These are the types of practices that are likely to develop when a small Montana entrepreneur attempts to stay in business and maximize market share.

B. Four Temptations of Small Businesses That Could Trigger Liability

Small business owners and managers spend most of their time and energy keeping their businesses operating. The exigencies of conducting a small business occupy such a vast amount of time that few owners and managers can consider antitrust implications of their actions. Four practices in particular can cause antitrust problems to businesses that are not careful. First, small business owners in similar fields tend to talk to each other. If their conversations result in price fixing, an antitrust violation may occur. Second, to encourage customers to use all of the businesses products

282. As with all of the examples used, this example is fictitious but is built upon the author's experience in a different industry.

283. *Southern Concrete Co. v. United States Steel Corp.*, 394 F. Supp. 362 (N.D. Ga. 1975), *aff'd*, 535 F.2d 313 (5th Cir. 1976).

284. See *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1517 (11th Cir. 1989). If interstate commerce is not implicated, then Montana's law declaring preferential pricing illegal might apply. See MONT. CODE ANN. § 30-14-205 (1991).

or services, a business may commit a tying violation. Third, businesses may illegally allocate markets in an effort to maximize effectiveness or to work together with their peers. Finally, growth through mergers can sometimes trigger scrutiny and the discovery of antitrust liability. Each of these areas is explored in this section by the use of examples.²⁸⁵

1. *Price Fixing*

Suppose that there are two automobile repair businesses in Smalltown, Montana, Low Fixit and High Fixit. The owners likely know each other. For example, Mrs. S. Mith brings her car to High Fixit for a tuneup. She is told the price will be \$50. She responds truthfully by saying that Low Fixit only charges \$45. If High Fixit only charges her \$45 now, it is merely conscious parallelism and no antitrust violation occurs.²⁸⁶

However, suppose Mr. High, the owner of High Fixit, phones Mr. Low that evening and says "Mrs. Mith came in today and told me you only charge \$45 for a tuneup. It costs me \$40 to do a tuneup and I want to make \$10 profit so we need to charge \$50." If Mr. Low does anything except continue to charge \$45, he is potentially committing an antitrust violation.²⁸⁷ Mr. Low need not specifically state "yes, I agree to charge \$50," his actions can show his agreement.²⁸⁸ Of course, Mr. High may have committed an antitrust violation based on the Rule of Reason analysis simply by asking that the prices be fixed.²⁸⁹

2. *Tying*

Tying need not be as obvious or extreme as the example from the ready-mix industry given above. Often, tying in Montana is much more subtle. Many consumers and businesses in Montana have purchased personal computers in the last few years. Some people save money by buying their computers from large national mail order companies. Because those companies purchase those

285. Each of the examples is analyzed with respect to federal antitrust law, and federal cases applying that law are used. The reader may wish to consider the appropriate state law in each circumstance as well to supplement the federal law.

286. See generally *E.I. du Pont De Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

287. See *id.* at 139.

288. See *id.*

289. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 344 (9th Cir. 1982). This kind of behavior is not exclusively confined to the auto repair business. An example could be drawn from virtually every business and industry in Montana, including the practice of law.

computers in large quantities and can resell them much less expensively than a local Montana computer business, they can charge less than the local computer store.

Suppose that a Montana business, Harry's Hats, bought a computer from a national mail order company and new software from a local computer store. Later, when Harry has difficulty using the software, he asks the store for help. The store owner is not very helpful. As Harry leaves the store, the owner turns to another businessman, Ed, who has just listened to the interchange. The owner says, "if Harry had bought his computer from us, we would have helped him more with the software he bought from us."

Ed decides to buy his computer from the local store and buys software identical to that bought by Harry. The computer store owner goes to Ed's business and gives him extensive assistance with the software. Later when Ed is having the same problem that Harry had, the owner spends hours training Ed. This may be an illegal tying.²⁹⁰ Even if the computer store owner can show that he charged a higher price for the computer he sold to include subsequent service on installing subsequently purchased software or as part of a package, he could face significant costs of defense.²⁹¹ However, if Harry paid the same price for software as Ed yet received different service, and Ed knew about this, Ed may not have bought the computer from the computer store had it not been tied to subsequent software service.²⁹²

3. Market Allocations

The geographic size of Montana and the locations of population and economic centers may make market allocations attractive. Consider two grocery wholesalers in the same Montana population center, Wesell Grocers and Webuy Grocers. Within that population center, it is likely that both wholesalers will attempt to sell their products to all grocery retailers. The distances from that large city to smaller cities, or towns, may be so great that the wholesaler may not wish to attempt to service every small town between its population center and the distribution zone of the next population

290. *Standard Oil Co. v. United States*, 337 U.S. 293, 305 (1949).

291. See *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 597-602 (1953) (detailing the extensive procedural history of this case in which the original defendant finally prevailed).

292. See generally *Southern Concrete Co. v. United States Steel Corp.*, 394 F. Supp. 362 (N.D. Ga. 1975), *aff'd*, 535 F.2d 313 (5th Cir. 1976) (involving a purchase of concrete tied to accepting loans, showing that, as in the software and computer example, the tied product and the tying product need not be similar products and, in fact, need not be "products" at all but can be services, commercial paper, or any combination).

center. If Wesell and Webuy agree that Wesell will sell to the retailers in the geographic territory to the north and west of the city, and Webuy will sell to the stores in the geographic territory to the east and south of the city, an illegal market allocation may have occurred.²⁹³

This illegal market allocation may even have been economically necessitated by the great geographic distances and the numbers of days of the week when each of the wholesalers has a delivery truck available for out-of-town deliveries.²⁹⁴ However, if there is an agreement to allocate the geographic markets in this way, there is an illegal market allocation.²⁹⁵

Product markets can also be allocated illegally. For instance, Wesell and Webuy may decide that they both can survive in the industry while supplying the typical grocery goods—canned vegetables, produce, and the like—but only room in the market exists for one market participant in candy and one market participant in cosmetic products. If the two competitors agree that one will handle cosmetic products and not candy, and the other will handle candy and not cosmetic products, an illegal product market allocation may have occurred.²⁹⁶

4. Mergers

Sooner or later, virtually every successful Montana business will either get to the point that it wishes to expand by entering a new geographic or product market or, if it has been very successful, will find itself the target of another company's expansion. Merging with another company is perhaps the easiest way to expand. For the purposes of the Clayton Act, a merger need not be defined as narrowly as the purchase of every asset of another business.²⁹⁷ A merger may be the purchase of a business's stock,²⁹⁸ the purchase of a business's name and customers even though someone else purchases the inventory, or other activities of a similar nature.²⁹⁹

Because many industries in Montana within geographic markets are either monopolies or oligopolies, it is quite common for a

293. See *United States v. Topco Assocs.*, 405 U.S. 596, 612 (1972) (involving grocers who decided who would be licensed geographically and thereby allocating the market).

294. *Id.*

295. *Id.*

296. See *id.* at 605.

297. 15 U.S.C. § 18 (1988).

298. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 335-36 (1963).

299. See *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 588, 607 (1957) (purchase of 23% of General Motors' stock by du Pont constituting a Clayton Act violation).

merger to create a monopoly. Suppose that a health food store in a Montana city, Healthy Hal's, has a significant number of customers who drive about fifty miles occasionally to go to that store because the only health food store in the smaller city in which they live, Frank's Foods, does not provide as satisfactory a level of products and services. The customers tell Hal that if they had a store like Hal's in their small city, they would purchase from that store much more frequently but, as it is, they do not use Frank's at all and only travel to Hal's infrequently.

Rather than attempting to open a new health food store in the small city, Hal buys Frank's, changes its name, and provides the same products and services as Hal provides in the larger city. A Clayton Act merger violation may have occurred.³⁰⁰ The geographic market may be defined to include both of these cities because customers traveled frequently enough across the territory.³⁰¹ If the geographic market is defined more narrowly to include only each store's city, the merger still creates a monopoly in one market. Either way, the Clayton Act may be implicated.³⁰²

C. *Enforcement Against Small Businesses Is Becoming a Growing Concern*

Given the number of potential antitrust violations committed by small businesses, for example in a state with the demography and geography of Montana, why has there been such sparse antitrust enforcement here? The two principal reasons for lack of enforcement, either by the government or by individuals, are lack of awareness and lack of motivation. Even though antitrust injuries are real and prevalent, many times the injured person is unaware that with better competition, the economic injury would not occur. Alternatively, some businesses would rather suffer an antitrust injury as a cost of doing business than attempt to redress the injury and chance raising the ire of a huge corporation.

First, many individuals are unaware of antitrust violations when they occur. For instance, in the auto repair price-fixing example, Mrs. S. Mith, or whoever goes to have a tune-up next and pays \$50, will probably be unaware that High and Low have combined to fix the price at \$50 for this particular service. But even if they are aware of the factual circumstance which would lead to

300. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 333 (1962).

301. See *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 902 (7th Cir. 1989) (monopoly created from an oligopoly).

302. *Id.* Assume that the volume of business and the values of the businesses are not enough to implicate the Hart-Scott-Rodino Act. See *supra* text accompanying notes 234-40.

antitrust liability, they probably are not aware of the legal ramifications of the action. In the computer software example, the customer may be aware that he purchased his computer³⁰³ because that purchase was tied to a product that he wanted, namely the computer software and service combination,³⁰⁴ but he may not be aware that it is potentially an antitrust violation. The customer also may not know enough to care.

Second, the scale on which Montana businesses may commit antitrust violations has been quite small compared to some of the national cases. For instance, market allocations by the grocery wholesalers may only cost the small grocery store in the small town a few pennies over the price it would pay in a truly competitive market. This price may or may not be passed on to the customers, who are already probably paying higher prices given the fewer market participants in the retail grocery market in their small town. Therefore, so long as the potential antitrust violations are committed locally, the awareness and motivation probably lead to a lack of enforcement.

However, the increasing global economy may lead to more extensive enforcement.³⁰⁵ For instance, when a national grocery distribution company courts the small Montana grocery store that has been served exclusively by the allocated local grocery wholesaler, the small grocery owner in the small town may become aware of the antitrust violation under which he has been suffering for many years. A small grocer made aware of his remedies may choose to seek damages for several years on several product lines against a local wholesaler, if the grocer can purchase from a national wholesaler without fear of retaliation.³⁰⁶

Many Montana businesses are attempting to expand into national markets. In doing so, the local business may be tempted to continue to engage in practices that are illegal but for which it has never been held accountable. For instance, suppose a local manufacturer of herbal tea has always sold that tea through small, independent grocery stores in Montana.³⁰⁷ The manufacturer wishes to compete with the national premium herbal tea brands and so engages in practices that could be described as vertical resale price maintenance by trying to force its local grocers to charge high

303. The tied product.

304. The tying product.

305. See Kincaid, *supra* note 241, at 194-97.

306. See, e.g., *Martin B. Glaiser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 74 (3d Cir. 1977) (involving a small auto dealer who brought suit against Chrysler Corporation).

307. Herbal tea may or may not be a relevant product market. See *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir. 1989).

prices and, therefore, make its tea appear exclusive. The manufacturer responds to complaints by independent grocers that other independent grocers are selling the tea at a discount by first threatening to refuse to deal with the discounters, and then by actually refusing to deal. The manufacturer then tells the complainers that they should feel vindicated.³⁰⁸

As the tea manufacturer's fame grows, a large national, discount grocer seeks to purchase the tea. That grocer maintains chain stores in Montana and wishes to use this tea as a discounted version of the national herbal tea brand. When the manufacturer is told that the national grocer is discounting the manufacturer's tea, the manufacturer may likely respond as it has been responding to the local independent grocers. If so, the odds are great that the national chain will enforce resale price maintenance law against the manufacturer.³⁰⁹

This discussion should not lead the practitioner to conclude that Montana businesses have no recourse against national businesses or that Montana businesses must cease seeking the same results. In many instances, a small business may need to change its methods to avoid antitrust liability, but it may still achieve the same results. As an example, the tea manufacturer need only follow the dictates of *Monsanto*.³¹⁰ First the manufacturer must make its employees aware of the sorts of statements that they may not make. A local sales representative may not say to the national business, "we have received many complaints from other grocers of your discounting and we are going to discontinue selling to you."³¹¹ According to *Monsanto*, the manufacturer may refuse to sell to anyone at any time for no reason, or for any lawful reason.³¹² Consequently, the manufacturer need only say that the manufacturer has unilaterally decided that it will not sell to this grocer.³¹³

Small businesses need not be afraid of antitrust enforcement against them. An awareness of the four most prevalent types of antitrust violations involving small businesses can keep those businesses safe. Additionally, the creative small business lawyer can as-

308. This would even be illegal under *Monsanto*. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

309. See *Socony-Vacuum v. Oil Co.*, 310 U.S. 150, 225-27 (1940).

310. See *Monsanto*, 465 U.S. at 761.

311. See *id.* at 768.

312. *Id.* at 766.

313. *Id.* at 763. Of course, this does not take into account the potential loss of business and loss of name recognition. The manufacturer may do well to realize that, while its pride of place may be bruised, it may do quite well as the lower priced alternative to the other national brand and could become quite happy as the second national brand.

sist small businesses in achieving positive business results without creating antitrust liability.

V. USING ANTITRUST LAWS TO BENEFIT A SMALL BUSINESS

The creative small business lawyer can also employ antitrust law as an offensive weapon to the benefit of small businesses. Active use of antitrust law does not mean that the small business must move immediately toward litigation on its own behalf against an antitrust violator. One of the many available options is negotiating with the alleged offender with an eye towards the potentiality of litigation.³¹⁴

Perhaps a more economical option is to seek enforcement against the violator,³¹⁵ or investigation of the violator by a federal agency such as the Federal Trade Commission.³¹⁶ The following two examples show how each of these alternatives, negotiating with a potential violator and seeking United States' enforcement, are used to the benefit of the small Montana business.³¹⁷

A. *Antitrust Laws Help Small Businesses Enter Markets Dominated by Monopolists*

A monopolist has a clear and definite advantage over a business that wishes to enter a particular product or geographic market.³¹⁸ The established monopolist probably has a great deal of customer loyalty, name recognition, community ties, and capital with which to keep the potential entrant off balance.³¹⁹ The potential entrant, on the other hand, has a difficult task even on a level playing field. The antitrust laws provide some relief for the potential market entrant, so that it need not sit blithely by should the monopolist attempt to continue its monopoly by foreclosing the market to that potential entrant.

Suppose that in a small Montana city supporting one ready-mix concrete company (C&W Supply), Mr. E decides to open a second ready-mix concrete company. The only site for Mr. E's ready-mix plant, properly located in the geographic market and

314. Typically, litigation is brought under 15 U.S.C. § 15 (1988) or MONT. CODE ANN. § 30-14-222 (1991).

315. See 15 U.S.C. § 21 (1988). (The United States government bears most of the cost of enforcement or investigation.)

316. See 15 U.S.C. § 46 (1988).

317. These examples are drawn from the author's experience but the identity of the industry in each case has been changed.

318. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 333 (1962).

319. *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1283-84 (7th Cir.), cert. denied, 111 S.Ct. 295 (1990).

meeting necessary specifications, however, has no water. C&W is the only seller of water in the geographic water market. Mr. E can acquire all other necessary ingredients for his concrete except water.³²⁰ Mr. E, uncharacteristically, visits his attorney prior to making his final decision on whether to enter the ready-mix business.

From a business standpoint, Mr. E has two problems. First, he must determine whether he can acquire a necessary ingredient, water, to actually produce ready-mix concrete. Second, Mr. E must determine whether he can stay in business against a pre-existing monopolist.

Mr. E's first problem is easy to resolve in his favor. C&W must sell water to Mr. E at the same price that it charges other industrial purchasers.³²¹ Two antitrust doctrines provide this relief for Mr. E. The Essential Facility Doctrine³²² states that a monopolist may not utilize its control over an "essential facility" to foreclose competitors.³²³ A "facility" need not be a physical place but can be anything that is essential for the competitor.³²⁴

Mr. E must establish four things to prevail against C&W should C&W refuse to sell him water.³²⁵ First, Mr. E must establish that C&W has control over the essential facility, the water.³²⁶ Second, Mr. E must show he is a competitor and is practically incapable of duplicating water access because water is not available elsewhere in the same relevant water market.³²⁷ Third, Mr. E must establish that C&W refused to allow him to purchase the water.³²⁸ Finally, Mr. E must show that C&W had sufficient water to sell to Mr. E.³²⁹ If C&W routinely sells water, Mr. E should be able to prove the existence of sufficient water.

The Ninth Circuit has interpreted the Essential Facility Doctrine in such a way that the competitor seeking use of the monopo-

320. Assume that Mr. E performs significant market research and determines that on a level field with C&W he can enter the market and survive.

321. See *Fishman v. Estate of Wirtz*, 807 F.2d 520, 540 (7th Cir. 1986).

322. *Id.* at 539.

323. *Id.*

324. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973) (holding that the essential facility was electricity). See also *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-01 (1985) (reviewing the court of appeals' discussion that advertising could be an essential facility).

325. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir. 1982), *cert. denied*, 464 U.S. 891 (1983).

326. See *id.*

327. See *id.*

328. See *id.* at 1133.

329. See *id.*

list's essential facility is greatly favored.³³⁰ For instance, in *Oahu Gas*, the court held that the antitrust laws impose a special affirmative duty on a monopolist due to its special position in the market.³³¹ "These duties are not absolute, however; they arise only when there is no justification for refusing to aid a competitor."³³² Mr. E would like to argue that C&W has no legitimate justification for refusing to sell him water.³³³

Before Mr. E must prove these four elements and seek some sort of antitrust enforcement or damages, Mr. E and his attorney should negotiate with C&W and its attorney. A knowledge of the Essential Facility Doctrine is critical for Mr. E's attorney since C&W would likely otherwise refuse to sell water to Mr. E. C&W's potential liability might be sufficiently clear that C&W would agree grudgingly to sell water to Mr. E.

Mr. E's attorney then should address the sale of water to Mr. E at the same price that C&W sells water to other industrial users.³³⁴ If C&W's sale of water falls within interstate commerce for the Robinson-Patman Act,³³⁵ then C&W's attorney may simply point to illegal price discrimination and suggest that C&W not violate that law.³³⁶ Even if the Robinson-Patman Act does not apply in this case, Mr. E's attorney can rely on the Montana antitrust laws and the unfair price discrimination clause in those laws.³³⁷ Even though the Montana antitrust laws have not been litigated frequently, section 30-14-104 of the Montana Code, which provides for interpreting Montana's antitrust laws under federal law,³³⁸ could very well lead to Robinson-Patman-type interpretations of the Montana law, without the necessity of the interstate commerce

330. *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 369 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988).

331. *Id.* at 368.

332. *Id.*

333. Perpetuating a monopoly is *not* a legitimate justification for refusing to supply a necessary facility. *See id.* at 368-69.

334. Assume that C&W wishes to sell its water to Mr. E at a higher price than C&W sells its water to other industrial users for the purpose of driving Mr. E's costs higher to obtain a competitive advantage.

335. This sale may not fall within the Robinson-Patman Act because of the interstate commerce requirement, since C&W probably does not sell water outside Montana. *See H.E. Reeves, Inc. v. Laredo Ready Mix, Inc.*, 589 F. Supp. 132, 135 (S.D. Tex. 1984).

336. *See Dean Milk Co. v. FTC*, 395 F.2d 696, 705 (7th Cir. 1968). It is assumed in this entire example that Mr. E's attorney will follow all applicable rules of ethics in discussions with C&W or its attorneys.

337. MONT. CODE ANN. § 30-14-205(2)(b) (1991).

338. MONT. CODE ANN. § 30-14-104 (1991). *See Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311 (8th Cir. 1986) (illustrating the use of federal law to interpret South Dakota's state antitrust law).

requirement.³³⁹ Based simply on the fact that Mr. E is a competitor, this price discrimination would likely be illegal under Montana law.³⁴⁰

Consequently, Mr. E should be able to enter the ready-mix business in town. However, his most difficult hurdle is the second issue—whether he will be able to survive in the ready-mix business competing with a former market monopolist. The answer depends to a great extent on his business skills and on his ability to weather some lean years.³⁴¹ The antitrust laws can provide some help to Mr. E so that he can achieve some sort of parity with C&W and, in some ways, level the playing field. For instance, if C&W attempts to lower its prices below its costs of production, Mr. E would have a viable predatory pricing claim,³⁴² because it is unlikely that C&W would need to keep its prices at such low levels after driving Mr. E from the market.³⁴³

Mr. E also has available to him the typical state “business torts.” Additionally, some courts have held that pricing behavior that is the subject of a business tort can also lead to antitrust liability.³⁴⁴ In *Associated Radio Service Co. v. Page Airways, Inc.*, one manufacturer attempted to drive a competitor from the market by bribing that competitor’s employees, stealing its trade secrets, and filing frivolous lawsuits.³⁴⁵ The court held that while none of these activities alone constituted antitrust liability, the combination was sufficient for antitrust liability.³⁴⁶ Since the time of *Associated Radio*, courts have held that single actions, which otherwise would simply be business torts, when used as an attempt

339. See MONT. CODE ANN. § 30-14-104 (1991).

340. MONT. CODE ANN. § 30-14-205(2)(b) (1991).

341. Assume that Mr. E has the proper business skills and capitalization to withstand the first few years of business losses. Assume further that Mr. E is aware of his need to fight C&W’s name recognition and the other intangibles that will hinder his efforts to achieve a viable market share.

342. See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1399 (7th Cir. 1989). See also MONT. CODE ANN. § 30-14-209 (1991) (providing lower standards).

343. Mr. E must be prepared, however, for the possibility that C&W’s cost of producing concrete is lower than Mr. E’s. In that case, C&W would not be engaging in predatory pricing for selling its concrete at a lower price than it had previously charged, and at a price lower than Mr. E’s costs, but higher than its own costs. Mr. E would then need to show a classic Sherman Act, Section Two, attempted monopolization case by establishing specific intent to monopolize, exclusionary conduct, and a dangerous probability of success. See A.B.A. ANTITRUST SEC., *Antitrust Law Developments* 139-40 (2d ed. 1984). The courts could tell Mr. E that C&W’s price reduction is exactly the benefit consumers should expect in a competitive market. See *id.*

344. *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1355 (5th Cir. 1980).

345. *Id.* at 1354.

346. *Id.* at 1357.

to monopolize, can lead to antitrust liability.³⁴⁷

Mr. E may not be able to survive in the ready-mix market in this small city. Nevertheless, the antitrust laws do provide him with some assistance in dealing with C&W's conduct. Mr. E's attorney should make it clear to C&W and its attorney that Mr. E will be vigilant in monitoring C&W's conduct. If C&W violates the antitrust laws to Mr. E's detriment, Mr. E should not hesitate to seek antitrust enforcement.³⁴⁸

B. Antitrust Laws Help Small Businesses Defend Their Market Positions Against Large Businesses

Large national businesses may have clear advantages over small local businesses. They may be more diversified and better able to enter new ventures and absorb losses. They may have more extensive marketing networks and a better ability to generate capital. However, the antitrust laws can be used in some instances to

347. See *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 811 (3d Cir. 1984) (holding that harassment constituted an antitrust violation); *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 992-93 (5th Cir. 1983) (holding that commercial disparagement constituted an antitrust violation); *W.H. Brady Co. v. Lem Prods., Inc.*, 659 F. Supp. 1355, 1371 (N.D. Ill. 1987) (holding that the defendant failed to prove the plaintiff brought an antitrust action for the purpose of harming the defendant as its competitor).

348. Rule 11 of the Federal Rules of Civil Procedure is not enforced against antitrust plaintiffs very frequently so long as there is any sort of colorable claim. See *Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.*, 118 F.R.D. 45, 50 (S.D.N.Y. 1987) (finding sanctions not appropriate against plaintiff where information available prior to filing complaint formed colorable claim); *Norton Tire Co. v. Tire Kingdom Co.*, 116 F.R.D. 236, 240 (S.D. Fla. 1987) (finding no Rule 11 sanctions because counsel was entitled to file his antitrust claims hoping for a favorable market definition or that discovery would support his claim). *But see Danik, Inc. v. Hartmarx Corp.*, 120 F.R.D. 439, 445 (D.D.C. 1988) (involving a failure to conduct adequate prefiling inquiry); *Colorado Chiropractic Council v. Porter Memorial Hosp.*, 650 F. Supp. 231, 239-40 (D. Colo. 1986) (plaintiffs did not even attempt to seek right to practice their profession at defendant's hospital, therefore, could not possibly have had standing for antitrust action, and sanctions under Rule 11 were appropriate). The courts have held that the actual behavior and motives of the alleged offender are solely within its knowledge and the plaintiff cannot be expected to know whether the overt actions are a true violation until well into the discovery process. See *Norton Tire*, 116 F.R.D. at 239-40. Furthermore, while attorney fees are granted to prevailing plaintiffs under the federal antitrust laws, the defendant is not entitled to such fees. 15 U.S.C. § 15 (1988); *Byram Concretanks, Inc. v. Warren Concrete Prods. Co.*, 374 F.2d 649, 651 (3d Cir. 1967) (quoted with approval in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 n.13 (1978)). See also *Koratron Co. v. Lion Uniform, Inc.*, 409 F. Supp. 1019, 1030 (N.D. Cal. 1976) (holding that defendant may not recover attorney fees). The author is aware of only one reported case where the defendant was awarded attorney fees in an antitrust action. See *Syufy Enter's v. American Multicinema, Inc.*, 602 F. Supp. 1466, 1472 (N.D. Cal. 1983) (involving defendant who had also brought a counterclaim against the plaintiff, for which the attorney fees were awarded), *aff'd*, 793 F.2d 990 (9th Cir. 1986). If the attorney believes that an antitrust violation has occurred, Rule 11 and the award of attorney fees should not prevent the filing of a suit.

help the small business achieve some measure of parity with the national giants. This Section explores one situation in which creative lawyering can help achieve such parity.

For example, one Montana city contains two manufacturers of bicycle bells.³⁴⁹ The two Montana manufacturers of bicycle bells, Montana Bells and Biff's Bells, account for a total market share of about fifteen percent of the national market.³⁵⁰ The sole shareholder of Montana Bells wants to retire, and Biff wants to buy it and expand, in effect practically doubling its market share. The largest national competitor, Hells Bells, which holds approximately seventy percent of the market share, also wants to purchase Montana Bells.

Hells Bells intends immediately upon purchase to close Montana's plant merely to acquire more market share. Given the fact that Hells Bells probably can pay a much higher price to purchase the business, Biff may feel powerless. Furthermore, even if a potential Clayton Act merger violation may occur, Biff probably cannot bring a private lawsuit.³⁵¹

Even though Biff may not have standing to bring a private antitrust action under the Clayton Act,³⁵² Biff is not completely without recourse. The Federal Trade Commission exists for just such occasions.³⁵³ A person may request an FTC investigation of a potential merger whether or not a Hart-Scott-Rodino filing was required.³⁵⁴ This request should be sent to the regional FTC office³⁵⁵

349. Assume for purposes of this hypothetical example these facts: the geographic market is worldwide due to the light weight of the bicycle bells; bicycle bells are a distinct, relevant product market, defined as devices to be affixed to the handle bars of young children's bicycles, which ring mechanically; cross-elasticity studies show that bicycle horns and other noisome devices are not substitutable for bicycle bells; and there are a total of five bicycle bell manufacturers in the United States, two of which are in Montana, and four additional bicycle bell manufacturers in other parts of the world. Further assume the bells manufactured in the United States wholesale for approximately \$2 each, and the bells manufactured in other parts of the world wholesale at a price which is so close to \$2 each that consumers will pay the additional amount for the American-made bicycle bells made from superior steel and with a superior design. While this example may seem fanciful, it is identical to a real fact situation except that the product, in reality, was not bicycle bells.

350. Each has an equal seven and one-half percent share of the product market.

351. See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 (1986). Biff will not have standing because it has not suffered an antitrust injury yet. *Id.* First, Biff has not yet suffered any actual damages. Second, Biff is a competitor, not a customer of the monopolist. See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337 (1990) (evidencing the Rehnquist Court's attempt to dilute the federal antitrust laws).

352. See *Cargill*, 479 U.S. at 111, 116.

353. See 15 U.S.C. §§ 41-77 (1988). See also discussion of Federal Trade Commission Act, *supra* notes 222-53 and accompanying text.

354. 16 C.F.R. § 2.1 (1992).

355. The regional office for Montana is at 1405 Curtis Street, Suite 2900, Denver, Colorado 80202.

and should be sent by the business itself, rather than by the attorney.

The attorney, however, should expend significant effort helping the client prepare this letter. The FTC will investigate the proposed merger using a standard Clayton Act analysis.³⁵⁶ Consequently, if the request for an investigation can provide information to the FTC in the light least favorable to the merger, the FTC's first understanding of the case may lead it to give greater scrutiny to the merger.

The person making the request may wish to help the FTC define the relevant market.³⁵⁷ If trade organizations or publications that help define either this market or the product, these publications should be supplied to the FTC. Justice Department merger guidelines consider such factors as transportation costs, shipment patterns, and costs of distribution.³⁵⁸ If the product market definition³⁵⁹ and the geographic market definition³⁶⁰ are provided to the FTC at the outset, the FTC will more likely agree on those definitions most favorable to the client.³⁶¹

If the requestor of the investigation can access the market shares and concentration in the product market as defined directly through its own knowledge, or indirectly through trade industry sources,³⁶² the investigation will be expedited. The practitioner should provide as much information as possible to ascertain both the four-firm concentration ratio³⁶³ and the Herfindahl-Hirschman Index before and after the proposed merger.³⁶⁴ If this information is not available, that fact should be given to the FTC as how to gather this information.

356. *Brown Shoe*, 370 U.S. at 333.

357. The definition of one of the participants is usually accepted. See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953) (Times-Picayune Company was able to convince the Court that advertising in the evening newspaper is the same product as advertising in the morning newspaper); *Lorain Journal Co. v. United States*, 342 U.S. 143, 147 n.4 (1951) (involving market definitions in a judicial setting).

358. 1984 MERGER GUIDELINES, *supra* note 167 § 2.32, at 9.

359. *Id.* § 2.1, at 4-6.

360. *Id.* § 2.3, at 8-11.

361. For instance, in *R.C. Bigelow*, the court accepted a national geographic market and the herbal tea product market but commented that a better product market might have been all hot beverages. *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 110 (2d Cir. 1989). It would seem that someone was successful at selling a product market definition to the court.

362. These sources should be disclosed to the FTC for its own independent investigation.

363. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 331 (1963).

364. 1984 MERGER GUIDELINES, *supra* note 167 § 3.11, at 14-15. These guidelines, published by the United States Justice Department, are also used by the Federal Trade Commission.

Any of the additional issues that the FTC may consider in the particular investigation should also be addressed in the requesting letter. For instance, if significant barriers to entry in the bicycle bell industry such as excessive costs of equipment exist, these factors may be quite important.³⁶⁵ If the person requesting the investigation can anticipate that certain defenses will be raised, the letter requesting the investigation should address these defenses.³⁶⁶ The more issues that can be anticipated and addressed in the initial request for an investigation, the better the chances are that the FTC's investigation will be beneficial to Biff.

Being the target of an FTC investigation may be sufficient to cause Hells Bells to decide not to pursue the purchase. Hells Bells may desire to remain out of the sights of the FTC. In a case such as the bicycle bell manufacturing case, the market concentration alone should be high enough to cause the FTC to intervene.³⁶⁷ The FTC may well decide, however, that intervention is not advisable because the barriers to entry in the bicycle bell industry are so low.³⁶⁸ Should the FTC decide to intervene, it can seek an injunction halting the merger or divestiture if the merger has already occurred.³⁶⁹

Biff may be reluctant to request an investigation by the FTC for fear of retaliation by Hells Bells. FTC investigations are, however, exempted from Freedom of Information Act (FOIA) disclosure by the trade secret and investigative exemptions to the FOIA.³⁷⁰ Consequently, unless the business or its employees disclose that it sought an investigation, the FTC ought not disclose either the identity of a person seeking the investigation or whether

365. *Id.* at 18. See also *United States v. Sybron Corp.*, 329 F. Supp. 919, 929 (E.D. Pa. 1971).

366. For instance, the Failing Firm Defense is quite often raised. This defense is treated in 1984 MERGER GUIDELINES, *supra* note 167 § 5.1, at 31. See also *Brown Shoe*, 370 U.S. at 346; *United States v. General Dynamics Corp.*, 415 U.S. 486, 507 (1974). In *General Dynamics*, the Court explains the Failing Firm Defense as the lesser of two evils. *Id.* Two interest must be balanced. On one hand, the community has an interest in keeping people employed. On the other hand, the community has an interest in avoiding the adverse impact on competition of a firm's going out of business entirely coupled with the potential threat to competition caused by the prospective merger. *Id.*

367. The 77 ½% that Hells Bells would have would be well in excess of the market share necessary to demonstrate "dangerous probability of success," *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 490 (5th Cir. 1984), and is a postmerger HHI of at least 6062.5. 1984 MERGER GUIDELINES, *supra* note 167 § 3.1, at 13-14. Consequently, the merger should elicit a great deal of scrutiny.

368. See, e.g., *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1339 (7th Cir. 1986).

369. 15 U.S.C. § 41 (1988).

370. 5 U.S.C. §§ 552(b)(4), (b)(7) (1988).

it initiated the investigation on its own initiative.³⁷¹ Furthermore, the FTC may not divulge any information provided by the requester that could identify the requester in any way.³⁷²

Whether the FTC investigation leads to further Commission action or not, Biff may be able to chill Hells Bells' zeal to acquire Montana Bells or slow the process enough to make other business adjustments. The antitrust laws can be used in this proactive way to help Montana businesses compete with national corporations on a more level playing field.

VI. CONCLUSION

Lack of awareness of antitrust law among lawyers for small businesses is dangerous because of increasing enforcement against small businesses and the need of those businesses to creatively use every tool available, even antitrust law, to maintain their market positions and to grow while competing with national giants. The business lawyer must be aware of potential antitrust violations as small businesses become more visible in national and international markets. Perhaps most important, however, the alert business lawyer will find many opportunities to use antitrust law for the benefit of the business client trying to compete with national companies for market share and, in some instances, for survival. The creative use of antitrust law may provide one of the few little-used advantages for a small business in competition today. This Article provides a beginning for the practitioner to become more aware of antitrust issues in small business practice. The practitioner should not hesitate to enter this field of business law too often overlooked by small business lawyers.

371. 5 U.S.C. §§ 552(b)(4), (b)(7) (1988).

372. 5 U.S.C. §§ 552(b)(4), (b)(7) (1988).

