Question 1

the court will apply a rule of reason to determine whether the anticompetitive effects outweigh the procompetitive effects for setting the maximum resale price.

Nonprice Vertical Restraints

The legality of nonprice vertical restraints of trade under Section 1 of the Sherman Act is examined by using the rule of reason.[16] Nonprice restraints are unlawful under this analysis if their anticompetitive effects outweigh their procompetitive effects. Nonprice vertical restraints include situations in which a manufacturer assigns exclusive territories to retail dealers or limits the number of dealers that may be located in a certain territory.

nonprice vertical restraints Restraints of trade that are unlawful under Section 1 of the Sherman Act if their anticompetitive effects outweigh their procompetitive effects.

The following U.S. Supreme Court case involves the issue of defining concerted action for Sherman Act Section 1 purposes.

CASE 22.1 *U.S. SUPREME COURT Contract, Combination, or Conspiracy*

American Needle, Inc. v. National Football League

130 S.Ct. 2201, 76 L.Ed.2d 947, Web 2010 U.S. Lexis 4166 (2010)
Supreme Court of the United States

"Section 1 applies only to concerted action that restrains trade."

—Stevens, Justice

Facts

The National Football League (NFL) is an unincorporated association that includes thirty-two separately owned professional football teams. Each team has its own name, colors, logo, trademarks, and other intellectual property. Rather than sell their sports memorabilia individually, the teams formed National Football League Properties (NFLP) to market caps, jerseys, and other sports memorabilia for all of the teams. Until 2000, NFLP granted nonexclusive licenses to a number of vendors, including American Needle, Inc. In December 2000, the teams voted to authorize NFLP to grant exclusive licenses. NFLP granted Reebok International Ltd. an exclusive ten-year license to manufacture and sell trademarked caps and other memorabilia for all thirty-two NFL teams.

American Needle sued the NFL, the teams, and NFLP, alleging that the defendants engaged in an illegal contract, combination, or conspiracy, in violation of Section 1 of the Sherman Act. The defendants argued that they were a single economic enterprise and therefore incapable of the alleged conduct. The U.S. District Court held that the defendants were a single entity and granted summary judgment for the defendants. The U.S. Court of Appeals affirmed the judgment. The case was appealed to the U.S. Supreme Court

Issue

Are the NFL, the NFL teams, and the NFLP separate legal entities, capable of engaging in a contract, combination, or conspiracy, as defined by Section 1 of the Sherman Act?

Language of the U.S. Supreme Court

Section 1 applies only to concerted action that restrains trade. The teams compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel. Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that deprive the marketplace of independent centers of decision making, and therefore of actual or potential competition. Joint ventures have no immunity from antitrust laws. For that reason, decisions by the NFLP regarding the teams' separately owned intellectual property constitute concerted action.

Decision

The U.S. Supreme Court held that the NFL, the individual teams, and the NFLP were separate entities capable of engaging in concerted activity, in violation of Section 1 of the Sherman

(continued)

Question 1

Act. The Supreme Court remanded the case for a determination as to whether this concerted activity was an unreasonable restraint of trade that violated Section 1 of the Sherman Act.

Case Questions

Critical Legal Thinking
Do firms that enter into a joint venture avoid the reach of Section 1 of the Sherman Act?

Ethics
Do you think there was any unethical conduct in this case?

Contemporary Business
Does the decision in this case have any consequences in determining whether entities have engaged in a contract, combination, or conspiracy that violates Section 1 of the Sherman Act?

unilateral refusal to deal
A unilateral choice by one party not to deal with another party. This does not violate Section 1 of the Sherman Act because there is not concerted action.

Unilateral Refusal to Deal

The U.S. Supreme Court has held that a firm can unilaterally choose not to deal with another party without being liable under Section 1 of the Sherman Act. A **unilateral refusal to deal** is not a violation of Section 1 because there is no concerted action with others. This rule was announced in *United States v. Colgate & Co.*[17] and is therefore often referred to as the **Colgate doctrine**.

Example If Louis Vuitton, a maker of expensive women's clothing, shoes, handbags, and accessories, refuses to sell its merchandise to Walmart stores, this is a lawful unilateral refusal to deal.

conscious parallelism
A doctrine which states that if two or more firms act the same but no concerted action is shown, there is no violation of Section 1 of the Sherman Act.

The following feature discusses a defense to a charge of an illegal restraint of trade.

Contemporary Environment

Conscious Parallelism

Sometimes two or more firms act the same, but they have done so individually. If two or more firms act the same but no concerted action is shown, there is no violation of Section 1 of the Sherman Act. This doctrine is often referred to as **conscious parallelism**. Thus, if two competing manufacturers of a similar product both separately reach an independent decision not to deal with a retailer, there is no violation of Section 1 of the Sherman Act. The key is that each of the manufacturers acted on its own.

Example If Louis Vuitton, Gucci, and Chanel, makers of expensive women's clothing, shoes, handbags, and accessories, each independently make a decision not to sell their products to Walmart, this is lawful conscious parallelism. There is no violation of Section 1 of the Sherman Act because the parties did not agree with one another in making their decisions.

***Noerr* doctrine**
A doctrine which says that two or more persons can petition the executive, legislative, or judicial branch of the government or administrative agencies to enact laws or take other action without violating antitrust laws.

Noerr Doctrine

The *Noerr* doctrine holds that two or more persons may petition the executive, legislative, or judicial branch of the government or administrative agencies to enact laws or to take other action without violating antitrust laws. The rationale behind this doctrine is that the right to petition the government has precedence because it is guaranteed by the Bill of Rights.[18]

Example General Motors and Ford collectively petition Congress to pass a law that would limit the import of foreign automobiles into this country. This is lawful activity under the *Noerr* doctrine.

Question 2

Key Terms and Concepts

Adulterated food (478)
Annual percentage rate (APR) (486)
Bait and switch (483)
Caveat emptor (477)
Consumer financial protection (484)
Consumer Financial Protection Act of 2010 (485)
Consumer Financial Protection Bureau (CFPB) (484)
Consumer Leasing Act (CLA) (486)
Consumer Product Safety Act (CPSA) (480)
Consumer Product Safety Commission (CPSC) (480)
Consumer protection laws (477)
Credit report (486)
Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act) (488)
Debt collector (487)
Do-Not-Call Registry (483)
Dodd-Frank Wall Street Reform and Consumer Protection Act (484)
Door-to-door sales (483)
Drug Amendment to the FDCA (479)
Equal Credit Opportunity Act (ECOA) (487)
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Fair Credit Billing Act (FCBA) (486)
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Family Smoking Prevention and Tobacco Control Act (481)
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Federal Trade Commission (FTC) (482)
Federal Trade Commission Act (FTC Act) (482)
Food and Drug Administration (FDA) (477)
Food, Drug, and Cosmetic Act (FDCA or FDC Act) (477)
Health Care and Education Reconciliation Act (482)
Health Care Reform Act (482)
Medicinal Device Amendment to the FDCA (480)
Mortgage Reform and Anti-Predatory Lending Act (485)
Nutrition Labeling and Education Act (NLEA) (478)
Patient Protection and Affordable Care Act (PPACA) (482)
Product safety standards (480)
Regulation Z (486)
Section 4205 of the Patient Protection and Affordable Care Act (478)
Section 5 of the FTC Act (483)
Truth-in-Lending Act (TILA) (485)
Unfair and deceptive practices (483)
United Nations Biosafety Protocol for Genetically Altered Foods (479)
U.S. Department of Agriculture (USDA) (477)

Law Case with Answer

United States v. Capital City Foods, Inc.

Facts Capital City Foods, Inc., manufactured and distributed butter. The federal Food and Drug Administration (FDA) checked 9.1 pounds of butter produced by Capital City and found twenty-eight minuscule particles of insect parts, including twelve particles of fly hair, eleven unidentified insect fragments, two moth scales, two feather barbules, and one particle of rabbit hair. The overall ration was three particles of insect fragments per pound of butter. Evidence showed that some of these particles were visible to the naked eye, and some, such as the fly hair, would require a 30x microscope to see. The insect fragments were cooked and distributed in the finished butter. The federal Food, Drug, and Cosmetic Act, as interpreted by the FDA, provides that food is adulterated if it consists in whole or in part of any filthy substance or if is otherwise unfit for food. The U.S. government brought criminal charges against Capital City, based on alleged violations of the federal Food, Drug, and Cosmetic Act. Was the butter adulterated, in violation of the federal Food, Drug, and Cosmetic Act?

Answer No, the butter was not adulterated and therefore did not violate the federal Food, Drug, and Cosmetic Act. The federal Food, Drug, and Cosmetic Act, as interpreted by the FDA, provides that food is adulterated if it consists in whole or in part of any filthy substance or if is otherwise unfit for food. Insect fragments in other than infinitesimal quantity are filth. However, few fresh foods contain no natural or unavoidable defects. Even with modern technology, all defects in foods cannot be eliminated. Foreign material cannot be wholly processed out of foods, and many contaminants introduced into foods through the environment can be reduced only by reducing their occurrence in the environment. If the FDA required food to be entirely pure and free of foreign material, then almost every food manufactured in the United States could be criminally

Question 2

prosecuted. This would obviously be an undesirable result. Therefore, the presence of a miniscule amount of filth in a food is insufficient for its condemnation. The contamination of the butter in this case is trifle and does not warrant banning the product. Capital City Foods is not criminally liable. *United States v. Capital City Foods, Inc.*, 345 F.Supp. 277, Web 1972 U.S. Dist. Lexis 12796 (United States District Court for North Dakota)

Critical Legal Thinking Cases

23.1 Food Regulation Barry Engel owned and operated the Gel Spice Co., Inc. (Gel Spice), which specialized in the importation and packaging of various food spices for resale. All the spices Gel Spice imported were unloaded at a pier in New York City and taken to a warehouse on McDonald Avenue. Storage and repackaging of the spices took place in the warehouse. During three years, the McDonald Avenue warehouse was inspected four times by investigators from the Food and Drug Administration (FDA). The investigators found live rats in bags of basil leaves, rodent droppings in boxes of chili peppers, and mammalian urine in bags of sesame seeds. The investigators produced additional evidence which showed that spices packaged and sold from the warehouse contained insects, rodent excreta pellets, rodent hair, and rodent urine. The FDA brought criminal charges against Engel and Gel Spice. Are they guilty? *United States v. Gel Spice Co., Inc.*, 601 F.Supp. 1205, Web 1984 U.S. Dist. Lexis 21041 (United States District Court for the Eastern District of New York)

23.2 Regulation of Drugs Dey Laboratories, Inc. (Dey), was a drug manufacturer operating in the state of Texas. Dey scientists created an inhalant known as ASI. The only active ingredient in ASI was atropine sulfate. The inhalant was sold to physicians, who then prescribed the medication for patients suffering from asthma, bronchitis, and other pulmonary diseases. Dey filed a new drug application with the Food and Drug Administration (FDA). Four months later, Dey was advised that its application would not be approved. Despite the lack of FDA approval, Dey began marketing ASI. The United States filed a complaint for forfeiture of all ASI manufactured by Dey. The inhalant was seized, and Dey sued to have the FDA's seizure declared illegal. Who wins? *United States v. Atropine Sulfate 1.0 Mg. (Article of Drug)*, 843 F.2d 860, Web 1988 U.S. App. Lexis 5817 (United States Court of Appeals for the Fifth Circuit)

23.3 Cosmetics Regulation FBNH Enterprises, Inc. (FBNH), was a distributor of a product known as French Bronze Tablets. The purpose of the tablets was to allow a person to achieve an even tan without exposure to the sun. When ingested, the tablets imparted color to the skin through the use of various ingredients, one of which is canthaxanthin, a coloring agent. The Food and Drug Administration (FDA) had not approved the use of canthaxanthin as a coloring additive. The FDA became aware that FBNH was marketing the tablets and that each contained 30 milligrams of canthaxanthin. The FDA filed a lawsuit, seeking the forfeiture and condemnation of eight cases of the tablets in the possession of FBNH. FBNH challenged the government's right to seize the tablets. Who wins? *United States v. Eight Unlabeled Cases of an Article of Cosmetic*, 888 F.2d 945, Web 1989 U.S. App. Lexis 15589 (United States Court of Appeals for the Second Circuit)

23.4 Drug Regulation Joseph Wahba had a prescription filled at Zuckerman's Pharmacy (Zuckerman's) in Brooklyn, New York. The prescription was for Lomotil, a drug used to counteract stomach disorders. The pharmacy dispensed thirty tablets in a small plastic container unequipped with a "childproof" cap. Joseph took the medicine home, where it was discovered by Wahba's 2-year-old son, Mark. Mark opened the container and ingested approximately twenty pills before Mark's mother saw him and stopped him. She rushed him to a hospital but, despite the efforts of the doctors, Mark lapsed into a coma and died. The Wahbas sued H&N Prescription Center, Inc., the company that owns Zuckerman's, for damages. Who wins? *Wahba v. H&N Prescription Center, Inc.*, 539 F.Supp. 352, Web 1982 U.S. Dist. Lexis 12327 (United States District Court for the Eastern District of New York)

23.5 Federal Trade Commission Act The Colgate-Palmolive Co. (Colgate) manufactured and sold a shaving cream called Rapid Shave. Colgate hired Ted Bates & Company (Bates), an advertising agency, to prepare television commercials designed to show that Rapid Shave could shave the toughest beards. With Colgate's consent, Bates prepared a television commercial that included the sandpaper test. The announcer informed the audience, "To prove Rapid Shave's super-moisturizing power, we put it right from the can onto this tough, dry sandpaper. And off in a stroke."

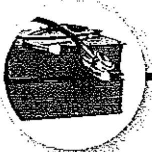
While the announcer was speaking, Rapid Shave was applied to a substance that appeared to be sandpaper, and immediately a razor was shown shaving the substance clean. Evidence showed that the substance

Question 3

resembling sandpaper was in fact a simulated prop, or "mock-up," made of Plexiglas to which sand had been glued. The Federal Trade Commission (FTC) issued a complaint against Colgate and Bates, alleging a violation of Section 5 of the Federal Trade Commission Act. Did the defendants act ethically in this case? Have the defendants acted ethically in this case? Have the defendants engaged in false and deceptive advertising, in violation of Section 5 of the FTC Act? *Federal Trade Commission v. Colgate-Palmolive Company*, 380 U.S. 374, 85 S.Ct. 1035, 13 L.Ed.2d 904, Web 1965 U.S. Lexis 2300 (Supreme Court of the United States)

23.6 Fair Credit Billing Oscar S. Gray had been an American Express cardholder. Gray used his card to purchase airline tickets costing $9,312. American Express agreed that Gray could pay for the tickets in twelve equal monthly installments. In January and February, Gray made substantial prepayments of $3,500 and $1,156, respectively. When his March bill arrived, Gray was surprised because American Express had converted the deferred payment plan to a currently due charge, making the entire amount for the tickets due and payable. Gray paid the normal monthly charge under the deferred payment plan and in April informed American Express in writing of its error. In the letter, Gray identified himself, his card number, and the nature of the error. Gray did not learn of any adverse action by American Express until almost one year later, on the night of his and his wife's anniversary. When he offered his American Express card to pay for their wedding anniversary dinner, the restaurant informed Gray that American Express had canceled his account and had instructed the restaurant to destroy the card. Gray sued American Express. Has American Express violated the Fair Credit Billing Act? Who wins? *Gray v. American Express Company*, 743 F.2d 10, Web 1984 U.S. App. Lexis 19033 (United States Court of Appeals for the Washington, DC, Circuit)

23.7 Fair Debt Collection Stanley M. Juras was a student at Montana State University (MSU). During his four years at MSU, Juras took out several student loans from the school, under the National Direct Student Loan program. By the time Juras left MSU, he owed the school over $5,000. Juras defaulted on these loans, and MSU assigned the debt to Aman Collection Services, Inc. (Aman), for purposes of collection. Aman obtained a judgment against Juras in a Montana state court for $5,015 on the debt and $1,920 in interest and attorneys' fees. Juras, who at the time lived in California, still refused to pay these amounts. Subsequently, a vice president of Aman, Mr. Gloss, telephoned Juras twice in California before 8:00 A.M. Pacific Standard Time. Gloss told Juras that if he did not pay the debt, he would not receive a college transcript. Juras sued Aman, claiming that the telephone calls violated the Fair Debt Collection Practices Act. Gloss testified at trial that he made the calls before 8:00 A.M. because he had forgotten the difference in time zones between California and Aman's offices in South Dakota. Who wins? *Juras v. Aman Collection Services, Inc.*, 829 F.2d 739, Web 1987 U.S. App. Lexis 12888 (United States Court of Appeals for the Ninth Circuit)



Ethics Cases

23.8 Ethics Charles of the Ritz Distributing Corporation (Ritz) was a New York corporation that engaged in the sale and distribution of a product called "Rejuvenescence Cream." The extensive advertising campaign that accompanied the sale of the cream placed emphasis upon the supposed rejuvenating powers of the products. The ads claimed that the cream would bring to the user's skin "quickly the clear radiance" and "the petal-like quality and texture of youth." Another advertisement claimed that the product would "restore natural moisture necessary for a live, healthy skin" with the result that "Your face need not know drought years." The Federal Trade Commission (FTC) learned of the ads and asked several experts to investigate the claimed benefits of Rejuvenescence Cream. The experts reported to the FTC that it is impossible for an external application of cosmetics to overcome skin conditions that result from physiological changes occurring with the passage of time. The FTC issued a cease-and-desist order with regard to the advertising. Ritz appealed the FTC's decision to a federal court. *Charles of the Ritz Distributing Corp. v. FTC*, 143 F.2d 676, Web 1944 U.S. App. Lexis 3172 (United States Court of Appeals for the Second Circuit)

1. Was does Section 5 of the Federal Trade Commission Act provide?
2. Did Ritz act ethically in making its advertising claims?
3. Who wins, and why?

23.9 Ethics Leon A. Tashof operated a store known as the New York Jewelry Company. The store was located in an area that served low-income consumers, many of whom had low-paying jobs and had no bank or

division of markets, in violation of Section 1 of the Sherman Act. Does the BRG–HBJ agreement constitute a division of markets and a *per se* violation of Section 1 of the Sherman Act?

Answer Yes, the BRG–HBJ agreement constitutes a division of markets and is therefore a *per se* violation of Section 1 of the Sherman Act. The revenue-sharing formula in the agreement between BRG and HBJ, coupled with the price increase that took place immediately after the parties agreed to cease competing with each other, indicates that this agreement was formed for the purpose and with the effect of raising the price of the bar review course. Here, HBJ and BRG had previously competed in the Georgia market; under their allocation agreement, BRG received the Georgia market, while HBJ received the remainder of the United States. Each agreed not to compete in the other's territories. Such agreements are *per se* anticompetitive. Thus, the agreement between HBJ and BRG is unlawful on its face. The agreement between BRG and HBJ is a division of markets and as such is a *per se* violation of Section 1 of the Sherman Act. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 111 S.Ct. 401, 112 L.Ed.2d 349, Web 1990 U.S. Lexis 5901 (Supreme Court of the United States)

Critical Legal Thinking Cases

22.1 Price Fixing The Maricopa County Medical Society (Society) is a professional association that represents doctors of medicine, osteopathy, and podiatry in Maricopa County, Arizona. The society formed the Maricopa Foundation for Medical Care (Foundation), a nonprofit Arizona corporation. Approximately 1,750 doctors, who represent 70 percent of the practitioners in the country, belong to Foundation. Foundation acts as an insurance administrator between its member doctors and insurance companies that pay patients' medical bills.

Foundation established a maximum fee schedule for various medical services. The member doctors agreed to abide by this fee schedule when providing services to patients. The state of Arizona brought this action against Society and Foundation and its members, alleging price fixing, in violation of Section 1 of the Sherman Act. Who wins? *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48, Web 1982 U.S. Lexis 5 (Supreme Court of the United States)

22.2 Division of Market Topco Associates, Inc. (Topco), was founded in the 1940s by a group of small, local grocery store chains to act as a buying cooperative for the member stores. In this capacity, Topco procured for and distributed to its members more than one thousand different food and related items. Topco did not itself own any manufacturing or processing facilities, and the items it procured were shipped directly from the manufacturer or packer to Topco members. Topco members agreed to sell only Topco brand products within an exclusive territory. The United States sued Topco and its members, alleging a violation of Section 1 of the Sherman Act. Who wins? *United States v. Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515, Web 1972 U.S. Lexis 167 (Supreme Court of the United States)

22.3 Tying Arrangement Mercedes-Benz of North America (MBNA) was the exclusive franchiser of Mercedes-Benz dealerships in the United States. MBNA's franchise agreements required each dealer to establish a customer service department for the repair of Mercedes-Benz automobiles and required dealers to purchase Mercedes-Benz replacement parts from MBNA. At least eight independent wholesale distributors, including Metrix Warehouse, Inc. (Metrix), sold replacement parts for Mercedes-Benz automobiles. Because they were precluded from selling parts to Mercedes-Benz dealers, these parts distributors sold their replacement parts to independent garages that specialized in the repair of Mercedes-Benz automobiles. Evidence showed that Metrix sold replacement parts for Mercedes-Benz automobiles of equal quality and at a lower price than those sold by MBNA. Metrix sued MBNA, alleging a tying arrangement, in violation of Section 1 of the Sherman Act. Who wins? *Metrix Warehouse, Inc. v. Mercedes-Benz of North America, Inc.*, 828 F.2d 1033, Web 1987 U.S. App. Lexis 12341 (United States Court of Appeals for the Fourth Circuit)

22.4 Resale Price Maintenance The Union Oil Company (Union Oil) was a major oil company that operated a nationwide network of franchised service station dealers that sold Union Oil gasoline and other products throughout the United States. The franchise dealers leased their stations from Union Oil; they also signed a franchise agreement to purchase gasoline and other products on assignment from Union Oil. Both the lease and the franchise agreement were one-year contracts that Union Oil could cancel if a dealer did not adhere to the contract. The franchise agreement provided that all dealers must adhere to the retail price of gasoline as set by Union Oil. The retail price fixed by Union Oil for gasoline during the period in question was 29.9 cents per gallon. Simpson, a franchised dealer, violated this

provision in the franchise agreement and sold gasoline at 27.9 cents per gallon to meet competitive prices. Because of this, Union Oil canceled Simpson's lease and franchise agreement. Simpson sued Union Oil, alleging a violation of Section 1 of the Sherman Act. Who wins? *Simpson v. Union Oil Company*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98, **Web** 1964 U.S. Lexis 2378 (Supreme Court of the United States)

22.5 Monopolization The International Business Machines Corporation (IBM) manufactured entire computer systems, including mainframes and peripherals, and provided software and support services to customers. IBM both sold and leased computers. Greyhound Computer Corporation, Inc. (Greyhound), was a computer leasing company that bought older computers from IBM and then leased them to businesses. Thus, Greyhound was both a customer and a competitor of IBM. Prior to 1963, IBM sold its older equipment at a 10 percent discount per year, up to a maximum of 75 percent. Thus, equipment on the market for several years could be purchased at a substantial discount from its original cost.

IBM's market share of this leasing market was 82.5 percent. The portion of the leasing market not controlled by IBM was dispersed among many other companies, including Greyhound. IBM officials became concerned that the balance between sales and leases was turned too heavily toward sales and that the rapid increase in leasing companies occurred because of their ability to purchase second-generation computers from IBM at a substantial discount. In 1963, IBM reduced the annual discount to 5 percent per year, with a maximum of 35 percent. In 1964, the discount was changed to 12 percent after the first year, with no further discounts. Greyhound sued IBM, alleging that IBM engaged in monopolization, in violation of Section 2 of the Sherman Act. Who wins? *Greyhound Computer Corporation v. International Business Machine Corporation*, 559 F.2d 488, **Web** 1977 U.S. App. Lexis 11957 (United States Court of Appeals for the Ninth Circuit)

22.6 Merger The Lipton Tea Co. (Lipton) was the second-largest U.S. producer of herbal teas, controlling 32 percent of the national market. Lipton announced that it would acquire Celestial Seasonings, the largest U.S. producer of herbal teas, which controlled 52 percent of the national market. R.C. Bigelow, Inc., the third-largest producer of herbal teas, with 13 percent of the national market, brought an action, alleging that the merger would violate Section 7 of the Clayton Act, and sought an injunction against the merger. What type of merger is proposed in this case? What is the relevant market? Should the merger be enjoined? *R. C. Bigelow, Inc., v. Unilever, N.V.*, 867 F.2d 102, **Web** 1989 U.S. App. Lexis 574 (United States Court of Appeals for the Second Circuit)

22.7 Antitrust Injury The Brunswick Corporation was the second-largest manufacturer of bowling equipment in the United States. In the late 1950s, the bowling industry expanded rapidly. Brunswick's sales of lanes, automatic pinsetters, and ancillary equipment to bowling alley operators rose accordingly. Because the equipment required a major capital expenditure by bowling center operators, Brunswick required a cash down payment and extended credit for the rest of the purchase price. It took a security interest in the equipment.

Brunswick's sales dropped in the early 1960s, when the bowling industry went into a sharp decline. In addition, many of the bowling center operators defaulted on their loans. By the end of 1964, Brunswick was in financial difficulty. It met with limited success when it foreclosed on its security interests and attempted to lease or sell the repossessed equipment and bowling centers. To avoid complete loss, Brunswick started running the centers that would provide a positive cash flow. This made Brunswick the largest operator of bowling centers in the country, with more than five times as many bowling centers as its next largest competitor. Because the bowling industry was so deconcentrated, however, Brunswick controlled fewer than 2 percent of the bowling centers in the country.

Pueblo Bowl-O-Mat, Inc., operated three bowling centers in markets where Brunswick had repossessed bowling centers and begun operating them. Pueblo Bowl sued Brunswick, alleging that Brunswick had violated Section 7 of the Clayton Act. Pueblo Bowl alleged that it had suffered injury in the form of lost profits that it would have made had Brunswick allowed the bowling centers to go bankrupt, and it requested treble damages. Is Brunswick liable? *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701, **Web** 1977 U.S. Lexis 37 (Supreme Court of the United States)

22.8 Price Discrimination Corn Products Refining Company (Corn Products) manufactured corn syrup, or glucose (a principal ingredient of low-priced candy), at two plants, one located in Chicago, Illinois, and the other in Kansas City, Missouri. Corn Products sold glucose at the same retail price to all purchasers but charged separately for freight charges. Instead of charging actual freight charges, Corn Products charged every purchaser the price it would have cost for the glucose to be shipped from Chicago, even if the glucose was shipped from its Kansas City plant. This "base point pricing" system created a favored price zone for Chicago-based purchasers and put them in a better position to compete for business. The Federal Trade Commission sued Corn Products, alleging that it was engaging

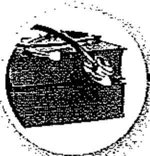
authorities, who referred the matter to the EPA. Investigation showed that the paint had contaminated the soil. The United States brought criminal charges against Hoflin for aiding and abetting the illegal dumping of hazardous waste. Who wins? *United States v. Hoflin*, 880 F.2d 1033, Web 1989 U.S. App. Lexis 10169 (United States Court of Appeals for the Ninth Circuit)

24.6 Nuclear Waste Metropolitan Edison Company owned and operated two nuclear-fueled power plants at Three Mile Island near Harrisburg, Pennsylvania. Both power plants were licensed by the NRC after extensive proceedings and investigations, including the preparation of the required environmental impact statements. When one of the power plants was shut down for refueling, the other plant suffered a serious accident that damaged the reactor. The governor of Pennsylvania recommended an evacuation of all pregnant women and small children, and many area residents did leave their homes for several days. As it turned out, no dangerous radiation was released.

People Against Nuclear Energy (PANE), an association of area residents who opposed further operation of the nuclear power plants at Three Mile Island, sued to enjoin the plants from reopening. They argued that the reopening of the plants would cause severe psychological health damage to persons living in the vicinity and serious damage to the stability and cohesiveness of the community. Are these reasons sufficient to prevent the reopening of the nuclear power plants? *Metropolitan Edison Company v. People Against Nuclear Energy*, 460 U.S. 766, 103 S.Ct. 1556, 75 L.Ed.2d 534, Web 1983 U.S. Lexis 21 (Supreme Court of the United States)

24.7 Endangered Species The red-cockaded woodpecker is a small bird that lives almost exclusively in old pine forests throughout the southern United States. Its survival depends on a very specialized habitat of pine trees that are at least thirty, if not sixty, years old, in which they build nests and forage for insects. The population of this bird decreased substantially as pine forests were destroyed by clear-cutting. The U.S. secretary of the interior has named the red-cockaded woodpecker an endangered species.

The U.S. Forest Service manages federal forests and is charged with duties to provide recreation, protect wildlife, and provide timber. To accomplish the charge of providing timber, the Forest Service often leases national forest lands to private companies for lumbering. When the Forest Service proposed to lease several national forests in Texas, where the red-cockaded woodpecker lives, to private companies for lumbering, the Sierra Club, an environmental organization, sued. The Sierra Club sought to enjoin the Forest Service from leasing these national forests for lumbering. Who wins? *Sierra Club v. Lyng, Secretary of Agriculture*, 694 F.Supp. 1260, Web 1988 U.S. Dist. Lexis 9208 (United States District Court for the Eastern District of Texas)



Ethics Cases

24.8 Ethics The state of Michigan owns approximately 57,000 acres of land that comprise the Pigeon River County State Forest in southwestern Michigan. Shell Oil Company applied to the Michigan Department of Natural Resources (DNR) for a permit to drill ten exploratory oil wells in the forest. Roads had to be constructed to reach the proposed drill sites. Evidence showed that the only sizable elk herd east of the Mississippi River annually used the forest as its habitat and returned to this range every year to breed. Experts testified that elk avoid roads, even when there is no traffic, and that the construction of the roads and wells would destroy the elk's habitat. Michigan law prohibits activities that adversely affect natural resources. The West Michigan Environmental Action Council sued the DNR, seeking to enjoin the DNR from granting the drilling permits to Shell. *West Michigan Environmental Action Council, Inc. v. Natural Resources Commission*, 405 Mich. 741, 275 N.W.2d 538, Web 1979 Mich. Lexis 347 (Supreme Court of Michigan)

1. What did the state of Michigan law provide?
2. Did Shell Oil Company act socially responsibly in this case?
3. Who wins, and why?

24.9 Ethics Riverside Bayview Homes, Inc. (Riverside), owned 80 acres of low-lying marshland—wetlands—near the shores of Lake St. Clair in Macomb County, Michigan. Riverside began to fill in the wetlands with hard materials as part of its preparations for construction of a housing development. Riverside did not notify the Army Corps of Engineers (Corps) nor obtain permit to fill in the wetlands. Upon discovery of Riverside's activities, the Corps sued, seeking

Critical Legal Thinking Cases

25.1 Adverse Possession Edward and Mary Shaughnessey purchased a 16-acre tract in St. Louis County, Missouri. Subsequently, they subdivided 12 acres into eighteen lots offered for sale and retained possession of the remaining 4-acre tract. Thirteen years later, Charles and Elaine Witt purchased lot 12, which is adjacent to the 4-acre tract. The Witts constructed and moved into a house on their lot. The next year, they cleared an area of land that ran the length of their property and extended 40 feet onto the 4-acre tract. The Witts constructed a pool and a deck, planted a garden, made a playground for their children, set up a dog run, and built a fence along the edge of the property line, which included the now-disputed property. Neither the Witts nor the Shaughnesseys realized that the Witts had encroached on the Shaughnesseys' property.

Twenty years later, the Shaughnesseys sold the 4-acre tract to Thomas and Rosanne Miller. When a survey showed the Witts' encroachment, the Millers demanded that the Witts remove the pool and cease using the property. When the Witts refused to do so, the Millers sued to quiet title. The Witts defended, arguing that they had obtained title to the disputed property through adverse possession. Have the Witts established the necessary requirements to acquire the disputed property by adverse possession? *Witt v. Miller*, 845 S.W.2d 665, Web 1993 Mo.App. Lexis 20 (Court of Appeals of Missouri)

25.2 Americans with Disabilities Act Title III of the Americans with Disabilities Act (ADA) requires that public accommodations must be "readily accessible to and usable by individuals with disabilities." The U.S. Department of Justice (DOJ) is empowered to adopt regulations to enforce the ADA. The DOJ adopted Standard 4.33.3 for movie theaters, which provides:

> *Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.*

Cinemark USA, Inc., owns and operates movie theaters throughout the United States. Cinemark has constructed "stadium-style" movie theaters. The theaters have stadium-style seating configuration, with the rows of seats rising at a relatively steep grade to provide better "sight lines" for movie patrons. The stadium-style seating is inaccessible for wheelchair-using patrons. For wheelchair-using patrons, the theaters provide a flat area in front of the screen where these patrons do not have the same sight line to the screen as non-wheelchair-using patrons. The United States sued Cinemark, alleging that the seating arrangement in Cinemark stadium-style theaters violated Standard 4.33.3 and Title III of the ADA. Does Cinemark's wheelchair seating arrangement in its stadium-style theaters violate Standard 4.33.3 and Title III of the ADA? *United States of America v. Cinemark USA, Inc.*, 348 F.3d 569, Web 2003 U.S. App. Lexis 22757 (United States Court of Appeals for the Sixth Circuit)

25.3 Life Estate and Remainder Baudilio Bowles died testate. His will devised to his sister, Julianita B. Vigil, "one-half of any income, rents, or profits from any real property located in Bull Creek or Colonias, New Mexico." The will contained another clause that left to his children "my interest in any real property owned by me at the time of my death, located in Bull Creek and/or Colonias, San Miguel County." The property referred to in both devises is the same property. Julianita died before the will was probated. Her heirs claim a one-half ownership interest in the real property. Bowles's children asserted that they owned all his property. Who wins? *In the Matter of the Estate of Bowles*, 107 N.M. 739, 764 P.2d 510, Web 1988 N.M.App. Lexis 93 (Court of Appeals of New Mexico)

25.4 Reversion W.E. and Jennie Hutton conveyed land they owned to the trustees of schools of District Number One of the Town of Allison, Illinois (School District), by warranty deed "to be used for school purpose only; otherwise to revert to Grantor." School District built a school on the site, commonly known as Hutton School. The Huttons conveyed the adjoining farmland and their reversionary interest in the school site to the Jacqmains, who in turn conveyed their interest to Herbert and Betty Mahrenholz (Mahrenholz). The 1.5-acre site sits in the middle of Mahrenhoz's farmland. Over thirty years after School District built the school, School District discontinued holding regular classes at Hutton School. Instead, it used the school building to warehouse and store miscellaneous school equipment, supplies, unused desks, and the like. Mahrenholz filed suit to quiet title to the school property to them. Who wins? *Mahrenholz v. County Board of School Trustees of Lawrence Country*, 188 Ill.App.3d 260, 544 N.E.2d 128, Web 1989 Ill.App. Lexis 1445 (Appellate Court of Illinois)

25.5 Adverse Possession Joseph and Helen Naab purchased a tract of land in a subdivision of Williamstown, West Virginia. At the time of purchase, there were both a house and a small concrete garage on the property. Evidence showed that the garage had been erected sometime prior to twenty years earlier by one of the Naabs' predecessors in title. Two years after the Naabs bought their property, Roger and Cynthia Nolan purchased a lot contiguous to that owned by the Naabs. The following year, the Nolans had their property surveyed. The survey indicated that one corner of the Naabs' garage encroached 1.22 feet onto the Nolans' property and the other corner encroached 0.91 feet over the property line. The Nolans requested that the Naabs remove the garage from their property. When the Naabs refused, a lawsuit ensued. Who wins? *Naab v. Nolan*, 174 W.Va. 390, 327 S.E.2d 151, Web 1985 W.Va. Lexis 476 (Supreme Court of Appeals of West Virginia)

25.6 Zoning The city of Ladue is one of the wealthy suburban residential areas of metropolitan St. Louis. The homes in the city are considerably more expensive than those in surrounding areas and consist of homes of traditional design such as colonial, French provincial, and English. The city set up an architectural board to approve plans for buildings that "conform to certain minimum architectural standards of appearance and conformity with surrounding structures, and that unsightly, grotesque, and unsuitable structures, detrimental to the stability of value and the welfare of surrounding property, structures, and residents, and to the general welfare and happiness of the community, be avoided." The owner of a lot in the city submitted a plan to build a house of ultramodern design. It was pyramid-shaped, with a flat top and triangular-shaped windows and doors. Although the house plans met other city zoning ordinances and building codes, the architectural board rejected the owner's petition for a building permit, based on aesthetic reasons. The owner sued the city. Who wins? *State of Missouri v. Berkeley*, 458 S.W.2d 305, Web 1970 Mo. Lexis 902 (Supreme Court of Missouri)

25.7 Implied Warranty of Habitability Sharon Love entered into a written lease agreement with Monarch Apartments for apartment 4 at 441 Winfield in Topeka, Kansas. Shortly after moving in, she experienced serious problems with termites. Her walls swelled, clouds of dirt came out, and when she checked on her children one night, she saw termites flying around the room. She complained to Monarch, which arranged for the apartment to be fumigated. When the termite problem persisted, Monarch moved Love and her children to apartment 2. Upon moving in, Love noticed that roaches crawled over the walls, ceilings, and floors of the apartment. She complained, and Monarch called an exterminator, who sprayed the apartment. When the roach problem persisted, Love vacated the premises. Has Love lawfully terminated the lease? *Love v. Monarch Apartments*, 13 Kan.App.2d 341, 771 P.2d 79, Web 1989 Kan.App. Lexis 219 (Court of Appeals of Kansas)

25.8 Lease Susan Nylen, Elizabeth Lewis, and Julie Reed, students at Indiana University, signed a rental agreement as cosigners to lease an apartment from Park Doral Apartments. The rental term was from August 26 until August 19 of the following year. The lessees agreed to pay a monthly rent for the apartment. The tenants paid a security deposit, constituting prepayment of rent for the last month of the lease term. At the end of the fall semester, Reed moved out of the apartment and refused to pay any further rent. Nylen and Lewis remained in possession of the apartment, paying only two-thirds of the total rent due for the month for several months. Nylen and Lewis made a full payment of the rent for March and then vacated the apartment. The landlord, who was unable to re-lease the apartment during the lease term, sued Reed, Nylen, and Lewis for the unpaid rent. Who wins? *Nylen v. Park Doral Apartments*, 535 N.E.2d 178, Web 1989 Ind.App. Lexis 185 (Court of Appeals of Indiana)

Ethics Cases

25.9 Ethics Victor and Phyllis Garber acquired a piece of real property by warranty deed. The deed was recorded. The property consisted of 80 acres enclosed by a fence that had been in place for over fifty years. The enclosed area was used to graze cattle and produce hay. Ten years later, William and Herbert Doenz acquired a piece of real property adjacent to the Garbers' and employed a surveyor to locate their land's boundaries. As a result of the survey, it was discovered that the shared fence was 20 to 30 feet inside the deed line on the Doenz property. The amount of property between the old fence and the deed line was 3.01 acres. The Doenzes removed the old fence and constructed a new fence along the deed line. The Garbers brought suit to quiet title. *Doenz v. Garber*, 665 P.2d 932, Web 1983 Wyo. Lexis 339 (Supreme Court of Wyoming)

1. What are the requirements of adverse possession?
2. Did the Doenzes act ethically in removing the fence? Did the Garbers act ethically in claiming

Question 4

in price discrimination, in violation of Section 2(a) of the Robinson-Patman Act. Has Corn Products acted ethically in adopting its base point pricing system? Why would the company adopt such a pricing system? Who wins? *Corn Products Refining Company v. Federal Trade Commission*, 324 U.S. 726, 65 S.Ct. 961, 89 L.Ed. 1320, Web 1945 U.S. Lexis 2749 (Supreme Court of the United States)

Ethics Cases

22.9 Ethics E. I. du Pont de Nemours & Co. (Du Pont) is a manufacturer of chemicals, paints, finishes, fabrics, and other products. General Motors Corporation is a major manufacturer of automobiles. During the period 1917–1919, Du Pont purchased 23 percent of the stock of General Motors. Du Pont became a major supplier of finishes and fabrics to General Motors.

Du Pont's commanding position as a General Motors supplier was not achieved until shortly after its purchase of a sizable block of General Motors stock in 1917. The company's interest in buying into General Motors was stimulated by John J. Raskob, Du Pont's treasurer, and Pierre S. du Pont, Du Pont's president, who acquired personal holdings of General Motors stock in 1914. General Motors had been organized six years earlier by William C. Durant to acquire the previously independent automobile manufacturing companies Buick, Cadillac, Oakland, and Oldsmobile. Durant later brought in Chevrolet, organized by Durant when he was temporarily out of power, during 1910–1915, and a bankers' group controlled General Motors. In 1915, when Durant and the bankers deadlocked on the choice of a board of directors, they resolved the deadlock by an agreement under which Pierre S. du Pont was named chairman of the General Motors board, and Pierre S. du Pont, Raskob, and two nominees of Mr. du Pont were named neutral directors. By 1916, Durant settled his differences with the bankers and resumed the presidency and his controlling position in General Motors. He prevailed upon Pierre S. du Pont and Raskob to continue their interest in General Motors's affairs, which both did as members of the finance committee, working closely with Durant in matters of finances and operations and plans for future expansion.

Raskob foresaw the success of the automobile industry and the opportunity for great profit in a substantial purchase of General Motors stock. On December 19, 1917, Raskob submitted a treasurer's report to the Du Pont finance committee, recommending a purchase of General Motors stock in the amount of $25 million. The report made it clear that more than just a profitable investment was contemplated. A major consideration was that an expanding General Motors would provide a substantial market needed by the burgeoning Du Pont organization. Raskob's summary of reasons in support of the purchase included this statement: "Our interest in the General Motors Company will undoubtedly secure for us the entire Fabrikoid, Pyralin (celluloid), paint and varnish business of those companies, which is a substantial factor."

General Motors was the colossus of the giant automobile industry. It accounted annually for upward of two-fifths of the total sales of automotive vehicles in the nation. Expressed in percentages, Du Pont supplied 67 percent of General Motors's requirements for finishes in 1946 and 68 percent in 1947. In fabrics, Du Pont supplied 52.3 percent of requirements in 1946 and 38.5 percent in 1947. Because General Motors accounted for almost one-half of the automobile industry's annual sales, its requirements for automotive finishes and fabrics must have represented approximately one-half of the relevant market for these materials.

In 1949, the United States brought an antitrust action against Du Pont, alleging violation of Section 7 of the Clayton Act and seeking the divestiture of Du Pont's ownership of stock in General Motors. The United States argued that Du Pont's ownership of 23 percent of the stock of General Motors constituted a vertical merger that gave Du Pont illegal preferences over competitors in the sale of finishes and fabrics to General Motors and therefore violated Section 7 of the Clayton Act. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057, Web 1957 U.S. Lexis 1755 (Supreme Court of the United States)

1. What is a vertical merger? What requirements must be proven to find a vertical merger illegal?
2. Did the du Ponts act ethically in this case?
3. Did Du Pont's ownership of 23 percent of the stock of General Motors constitute a vertical merger that gave Du Pont illegal preferences over competitors in the sale of finishes and fabrics to General Motors and therefore violate Section 7 of the Clayton Act?

22.10 Ethics Falls City Industries, Inc. (Falls City), was a regional brewer located in Nebraska. It sold its Falls City brand beer in thirteen states, including Indiana and Kentucky. In Indiana, Falls City sold its beer