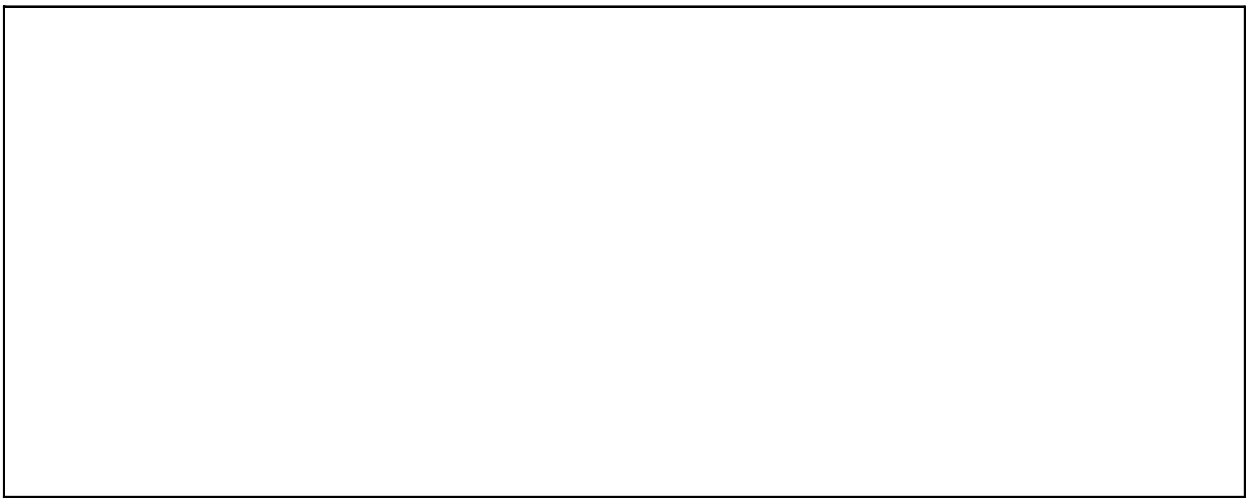

2. Cases Involving Agreements In Restraint of Trade

4. Section 1 of the Sherman Act prohibits concerted action that unreasonably restrains trade. Some agreements, especially those supporting cartel activity, are deemed unreasonable *per se* because they "always or almost always tend to restrict competition and decrease output."[4] For these types of

3. Cases Involving Single-Firm Exclusionary Conduct

11. Section 2 of the Sherman Act prohibits monopolization[18] and attempted monopolization.[19] In evaluating a claim of either offense, it is necessary to inquire into whether the defendant possesses monopoly power or is in a position to obtain monopoly power. The courts have traditionally examined the monopoly power issue in the context of a relevant market.[20]

12. Some modern decisions invite the use of direct evidence of monopoly power and suggest that such evidence could eliminate the need to define the relevant market.[21] Nevertheless, the courts have not relied on direct evidence of monopoly power to a significant extent, and analytical tools provided by economics are not extensively used in proving or disproving monopoly power. One reason may be that monopoly power is a legal concept, and economics does not offer a test for when the degree of market

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relevant . . . market."); *Eastern Food Services, Inc. v. Pontifical Catholic University Services Ass'n*, 357 F.3d 1, 5 (1st Cir. 2004). ("[T]he identification of market power is ordinarily the first step in any rule of reason claim under section 1."); *Menasha Corp. v. News America Marketing In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004) ("The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws.").

18 The elements of the monopolization offense are: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U. S. 563, 570-71 (1966). Note that the mere possession of a monopoly is not a violation of antitrust law; it must be obtained or maintained through anticompetitive conduct. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth.")

19 The elements of the attempt to monopolize offense are: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

20 The Supreme Court found it essential to define a relevant market because "[w]ithout a definition of that market there is no way to measure [the defendant's] ability to lessen or destroy competition." *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965).

21 *See, e.g., Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 n.3 (3d Cir. 2007) ("The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output."); *Harrison Aire, Inc. v. Aerostar International, Inc.*, 423 F.3d 374, 381 (3d 2005); ("Monopoly power can be demonstrated with either direct evidence of supracompetitive pricing and high barriers to entry, or with structural evidence of a monopolized market.") (citation omitted); *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, 386 F.3d 485, 500 (2d 2004) ("Monopoly power . . . can be proven directly through evidence of control over prices or the exclusion of competition, or it may be inferred from a firm's large percentage share of the relevant market."); *Re/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1018 (6th Cir. 1999) ("[A]n antitrust plaintiff is not required to rely on indirect

Evanston Northwestern Healthcare Corporation's 2000 acquisition of Highland Park Hospital.[39] The FTC

5. Challenging Market Definition Issues

5.1 The Cellophane Fallacy

26. One persistent market definition challenge is the "*Cellophane* fallacy," named for the 1956 case in which the Supreme Court addressed whether duPont's control over the transparent wrapping material, Cellophane, was sufficient to confer monopoly power.[44] The Court addressed the issue by defining a relevant market "composed of products that have reasonable interchangeability for the purposes for which they are produced."[45] The Court found other flexible wrapping materials reasonably interchangeable with

in this context. In the *Microsoft* case, the two-sidedness of the market was important to the competitive analysis but not to market definition.[52] Two-sidedness of markets can present an issue for market

access to the MLS were at a disadvantage relative to brokers with MLS listings, and MLS rules excluding certain types of limited service listing illegally harmed competition.