## Chapter 26

**ANTITRUST LAW**

*Is competition really important?*

**I. Overview**

 Most people do not think of the trust device as a business tool. In another era the business trust was notoriously used as a device to eliminate competition. In the late 1800s, it was common to have key commodities and the industries related to those products controlled by large corporate enterprises. These entities would band together into a form of common trust ownership. The trustee, in turn, was able to control the prices, territories of distribution, and the like of the product. For example, prior to the enactment of antitrust laws, industries like oil, cotton, sugar, and whiskey were all dominated by such trusts. Probably the best known of these trusts was Standard Oil. In 1890 the Standard Oil Trust controlled over ninety percent of the market for oil products in the U.S. By the time the trust was “busted” in 1911, over thirty companies were ordered separated from the parent firm. This sort of monopolization of the marketplace led to the landmark antitrust legislation in 1890, the Sherman Antitrust Act. The act has two main objectives:

 1. To prevent combinations in trust or otherwise, which act in restraint of trade, i.e., illegal joining together to restrain trade.

 2. To control markets thought to have a monopoly, i.e., illegal domination so strong as to *ipso facto* restrain trade.

 These objectives are set out in Sections 1 and 2 of the Act and will be described in more detail below. What is interesting about this act is that Congress used very broad language to give the Justice Department maximum latitude in seeking enforcement of its provisions. This latitude has, in turn, not been consistently used. There appears to have been a constant shift in the enforcement strategies used by various administrations over the years. Those who favor strict enforcement essentially adhere to the notions originally proffered by Senator John Sherman and his cohorts. Under this traditional philosophy, competition is best served by having as many players in the arena of commerce as possible. Conversely, large concentrations of power in commerce are thought to be inherently bad.

 On the other side of the enforcement spectrum, the more modern view says that large concentrations of economic power are not evil *per se* as long as they are efficient and are still fighting for a competitive position on a world-based economic playing field. Relatively recent administrative decisions have clearly favored this more lenient view as evidenced by the large number of mergers, acquisitions, leveraged buyouts, and consolidations that have taken place on Wall Street without objection.

 The federal courts, in turn, have taken the middle road. Under their rules of interpretation, two main classifications of offenses have evolved. The *Per se Rule* is used to strike down restraints that courts deem to be so inherently anticompetitive that they cannot be allowed as a matter of law, regardless of any claimed justifications. On the other hand, the *Rule of Reason* has given courts latitude to accept restraints of trade on a case-by-case basis where legitimate concerns are overriding.

 As strong and powerful a tool in the fight against monopolization and restraints of trade as the Sherman Act is, it has proven to be only a partial remedy to the problem. The Sherman Act sets the basic goals and objectives of keeping marketplaces open to competition. The Clayton Act and the Federal Trade Commission Act are designed to provide tools of implementation to those basic public policy objectives. As compared to the almost philosophical tenor of Sections 1 and 2 of the Sherman Act, the Clayton Act and more particularly, the Robinson-Patman Amendment to it, speak to much more specific objectives. These objectives arose out of discriminatory practices aimed at getting the little guy.

 The biggest problem with the Clayton Act, and to a lesser extent with the FTC, is the government's commitment to enforcement combined with some very problematic aspects of the statutes themselves. On the issue of governmental level of commitment to enforcement, there is no question that things have changed in the geo-global scheme of economic competition. The market factors that were sought to be protected in the early part of the Twentieth Century are different as we have entered the Twenty-First Century. A free and open market is not measured now on regional or even national scales, but rather on worldwide competitive position. These changes have provided the philosophical underpinnings for the much more tolerant view taken by the government towards mergers, acquisitions, combinations, and the like. Yet the basic economic principles of monopolization, restraint of trade, and unfair trade practices have not changed. So government finds itself in a dilemma. It is trying to recognize the need to allow our economy to stay competitive on a worldwide playing field, but it must continue to keep the rules fair in that game.

 The second factor involves questions that have been raised about the economic sense of the Clayton Act itself. Many critics of the act have argued that while provisions seeking to prevent price discrimination look good on the sheet music, they flop in the concert hall. The reason these particular measures have failed to live up to their billing is that some price volume cost incentives are all part of the competitive edge that all players are constantly looking for. To deny the reality of those competitive needs not only frustrates real competition, it may give noncompetitive parties an unwarranted edge against more efficient competitors by way of officious intermeddling on the part of government.

 Where antitrust laws do not work, they actually become part of the problem. No one really wants to go back to the bad old days of robber barons and unmitigated jungle warfare in our economic system. Yet the time has probably come for a wholesale reexamination of our antitrust laws. This examination should focus on two main goals: (1) rewrite the laws so as to really provide a level playing field for all competitors and (2) get the government to act when needed.

 All in all, antitrust law is still in a state of flux. Out of this debate, many are now arguing that the time has come for an overhaul of the entire antitrust law structure. Given the sporadic history of enforcement, who will enforce the law as intended no matter how it may be rewritten?

**II. Hypothetical Multi-issue Essay Question**

 Spookey's Scareys specializes in Halloween costumes in Salem, Mazazona. Spookey's has 11 percent of a declining market. Its competitors are Ghosts and Goblins with 29 percent, Witches and Wanderers with 31 percent, Midnight Costumes with 20 percent, and several other Mom and Pop operations with the remaining 9 percent. On an average costume selling for $100, Spookey's has an overall cost of $90, including $75 paid to its main supplier, Bad Taste Haberdashery.

 Because the market has been bad, Spookey's is looking for a buyer. It entered into a deal with Ghost and Goblins to sell a 51 percent interest in the store. Ghosts and Goblins would continue to operate both stores under their separate names. In addition, because of its combined buying power, the newly merged company is now able to get costumes from Bad Taste at $50 apiece and pass on the savings with lowered retail prices. Are there any antitrust problems with the above transactions?

##### III. Outline

# Antitrust Laws

#  A series of laws enacted to limit anticompetitive behavior in almost all industries,

#  businesses and professions operating in the United States.

#  Enforced by the Justice Department and the FTC.

#  Penalties for violation include criminal sanctions, government sought civil

#  damages (including treble damages).

 Section 4 of the Clayton Act permits private civil action with a possibility of treble damages.

# The Sherman Act—certain monopolistic acts and restraints of trade are illegal

##  Section 1

### Prohibits contracts, combinations, and conspiracies in restraint of trade. To violate Section 1, the restraint must be found to be unreasonable under either of two tests:

#### Rule of reason—only unreasonable restraints are illegal

#### Per se rule—inherently anticompetitive

### Requires the concerted action of two or more parties

##  Section 2

### Prohibits the act of monopolizing, and attempts and conspiracies to monopolize.

# Restraints of Trade

##  Section 1 of the Sherman Act outlaws certain anticompetitive activities

### It outlaws contracts, combinations, and conspiracies in restraint of trade

### It applies to two or more parties

# **Horizontal Restraint of Trade—between two or more competitors**

**Violation Explanation Analysis**

Price-fixing competitors agreement to set prices Per Se

 🡪 include quantity limitations and

 minimum/maximum prices

Division of Markets competitors agreement to split a Per Se

(market sharing) market

Group Boycotts competitors agreement not to deal Rule of

 with others at another level of Reason/

 distribution Per Se

Other Horizontal competitors agreements at the same Rule of

Agreements level 🡪 e.g., trade associations Reason

# **Vertical Restraint of Trade—between customer/supplier**

Resale Price price schedule to set or stabilize prices Per Se

Maintenance

Nonprice Restraints example 🡪 franchises Rule of

 Reason

# **Defenses to Section 1 of the Sherman Act**

##  Unilateral refusal to deal—choice made by one party – Colgate Doctrine

##  Conscious parallelism—same act but no concerted action-be careful

##  Noerr doctrine—petition of government by two or more people if not a sham

# Monopolization

## Section 2 of the Sherman Act prohibits the act of monopolization and attempts or conspiracies to monopolize trade—monopoly power is power to control prices or exclude competition

##  Can be violated by the conduct of one firm

#  Must review relevant product and geographic markets 🡪 includes interchangeable

#  substitute products.

#  Acts of monopolizing or attempts to monopolize are unlawful, not monopolies 🡪

#  e.g., predatory pricing or pricing intended to drive out competition.

#  Defenses 🡪 innocent acquisition, natural monopoly

# Mergers

## Section 7 of the Clayton Act provides that it is unlawful for a person or business to acquire the stock or assets of another “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly”

#  Look to relevant market→includes substitutes. Must look at relevant geographical markets.

# Pre merger notification rule requires notice to FTC

# Types of Mergers

##  Horizontal—competitors-presumptive illegality test🡪30% share and 33% concentration

## Vertical—customer/supplier-courts review market trends and conditions and possible foreclosing of competition

##  Backward vertical—customer acquires supplier

##  Forward vertical—supplier acquires supplier

##  Market Extension – two companies in similar fields whose sales do not overlap

##  Conglomerate—no real relationship

Reviewed under:

 Unfair Advantage Theory – acquiring firm gets unfair advantage

 over customers.

 Potential Competition Theory – eliminates perception of

 competition.

 Potential Reciprocity Theory – merger can force action on

 innocent third party.

 Defenses to Section 7

 Failing Company Doctrine – no other way to save company

 Small Company Doctrine – small companies

# Tying Arrangements

## A tying arrangement is a restraint of trade where a seller refuses to sell one product to a customer unless the customer agrees to purchase a second product from the seller

## Section 1 of the Sherman Act prohibits tying arrangements involving goods, services, intangible property, and real property. Sections of the Clayton Act prohibits tying with sales and leases of goods

#  Sufficient economic power is needed for violation

 Rule of reason is applied

# Price Discrimination – section 2 of the Clayton Act (Robinson – Patman Act)

## Price discrimination is charging different prices to different customers for the same product without any justification

##  Direct Price Discrimination

#  Sales to two or more purchasers

#  Like grade and quality

#  Injury

#  Indirect Price Discrimination 🡪 e.g., favorable credit terms

Defenses

#  Cost Justification Defense – price due to cost difference

#  Changing Conditions Defense

#  Meeting the Competition Defense – meeting a competitor’s price

# FTC Act 🡪 Created FTC

## Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition and unfair and deceptive acts or practices

# Exemptions from Antitrust Laws

#  Statutory – provided in statutes 🡪 e.g., labor unions

#  Implied – implied by federal courts 🡪 baseball

#  State Action

**IV. Objective Questions**

**Terms:**

1. Three times the actual damages ordinarily awarded is called \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

2. The rule that holds that only unreasonable restraints of trade violate Section 1 of the Sherman Act is called the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

3. The standard that is applicable to those restraints of trade that are considered inherently anticompetitive is called the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ rule.

4. A restraint of trade that occurs when two or more parties on different levels of distribution enter into a contract, combination, or conspiracy to restrain trade is called a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

5. The doctrine that 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 is called \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

6. A merger between two or more companies that compete in the same business and geographical market is called a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ merger.

7. The test for determining the lawfulness of horizontal mergers which finds horizontal mergers presumptively illegal under Section 7 if (1) the merged firm would have thirty percent or more market share in the relevant market and (2) the merger would cause an increase in concentration of thirty- three percent or more in the relevant market is called the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ test.

8. A merger that does not fit into any other category or a merger between firms in totally unrelated businesses is a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ merger.

9. A defense to a Section 7 action that says a competitor may merge with a failing company if (1) there is no other reasonable alternative for the failing company and (2) no other purchaser is available is called the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

10. A form of price discrimination that is less readily apparent than direct forms of price discrimination is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

**True/False:**

1. \_\_\_\_ All of the major federal antitrust acts have both civil and criminal sanctions.

2. \_\_\_\_ Under the *per se* standard of determining whether the Sherman Act prohibits conduct,

 there is no balancing of pro- and anticompetitive effects.

3. \_\_\_\_ Whether price fixing is a violation of Section 1 of the Sherman Act is determined by the Rule

 of Reason.

4. \_\_\_\_ To show a violation of the Sherman Act, two or more firms acting the same way must be

 acting in concert. That is, if each firm independently reaches the same decision, there is no

 violation.

5. \_\_\_\_ Under Section 2 of the Sherman Act, a plaintiff must show a defendant's specific intent to

 monopolize a market; the showing of mere deliberate or purposeful conduct is not sufficient

 to support a Section 2 action.

6. \_\_\_\_ A natural monopoly is a defense to the charge of monopolizing even if the natural monopoly

 operates in a predatory way.

7. \_\_\_\_ Under Section 7 of the Clayton Act, there must be proof of an actual decrease in competition

 for the court to forbid a merger.

8. \_\_\_\_ Franchises are always illegal as a form of vertical restraints.

9. \_\_\_\_ Conglomerate mergers are always legal since they involve mergers between firms that

 conduct totally unrelated business.

10. \_\_\_\_ Under the meeting the competition defense to a Section 2(b) of the Robinsion-Patman Act

 charge, a seller can lower his selling price below that of his competitor to be competitive in a

 market.

**Multiple Choice:**

1. Elvira, Inc., sells various interrelated automotive products that it manufactures. One of the items, an antilock braking system, was manufactured almost exclusively by Elvira, Inc. Elvira, Inc. realized the importance of the product to its purchasers and decided to capitalize on the situation by requiring all purchasers to take at least two of its other automotive brake products if they wished to obtain the antilock braking system over which it has almost complete market control. Which of the following best describes the situation?

 A. The plan is both ingenious and legal and should have been resorted to long ago.

 B. The arrangement is an illegal tying agreement and is *per se* illegal.

1. Since Elvira, Inc., did not have complete market control over the unique product in question, the arrangement is legal.
2. As long as the other products which must be taken are sold at a fair price to the buyers, the

 arrangement is legal.

2. The Hilmer Duck Decoy Company entered into an agreement with retail merchants whereby they agreed not to sell beneath Hilmer Duck Decoy’s minimum suggested retail price in exchange for Hilmer’s agreeing not to sell its duck decoys at retail in their respective territories. The agreement does not preclude the retail merchants from selling competing duck decoys. What is the legal status of the agreement?

 A. It is legal if the product is sold under a trade name or is trademarked.

 B. It is legal if the power to fix maximum prices is not relinquished.

1. It is illegal unless it can be shown that the parties to the agreement were preventing cutthroat

 competition.

 D. It is illegal even though the price fixed is reasonable.

3. Sharlene's Firm and Bob's Firm, who have been competitors for years, contract to restrain trade so as to increase their own profits. Which of the following is correct?

 A. The behavior of these two firms is governed by the National Labor Relations Act.

 B. To be liable under the Sherman Act, the contract must be in writing.

 C. The two firms have engaged in a horizontal restraint of trade.

 D. All of the above.

4. High Tech Sound (HTS) and Super Sonics (SS) are both producers of stereo equipment. HTS conducts a market research study and decides to set the prices of its stereos at $200, $300, and $400 according to the various levels of quality. SS is located in a different state and does its own market research study. SS also decides, without knowledge of HTS' prices, to set its stereo prices at $200, $300, and $400 depending on the quality of the stereo. Which of the following is correct?

 A. This is price fixing and therefore, a *per se* violation of Section 1 of the Sherman Act.

 B. This is price fixing and will be examined under the Rule of Reason.

 C. This is price fixing and therefore, a *per se* violation of Section 2 of the Sherman Act.

1. Under the doctrine of conscious parallelism, this conduct is permitted and there is no violation of the Sherman Act.

5. Superior Systems (SS) has devoted an enormous amount of resources to research and development of its product, water purification systems. In doing this, SS has clearly developed a superior product and, consequently, a monopoly in the purification market. Which of the following is correct?

 A. SS has violated Section 2 of the Sherman Act.

 B. SS has violated Section 1 of the Sherman Act.

 C. SS has not violated the Sherman Act since its monopoly is a result of a superior product.

 D. SS has not violated the Sherman Act because a single firm cannot be considered a monopoly.

6. Fantastic Feet and Showtime Shoes, both shoe retailers, have proposed a merger. Both companies sell nationwide. What type of merger is this?

 A. A vertical merger.

 B. A conglomerate merger.

 C. A horizontal merger.

 D. None of the above.

7. Assume the same facts as in question 6. How is this proposed merger likely to be treated under Section 7 of the Clayton Act?

1. Nothing will happen until the merger has taken place since there must be actual proof of a

 lessening of competition under Section 7.

1. Nothing will happen under Section 7 since mergers between the same types of companies are

 always permitted if they both conduct business on a national level.

1. The merger will be subjected to strict review under Section 7 since this will certainly increase the

 concentration in the relevant market.

 D. None of the above.

8. Assume the same facts as in question 6 except that now instead of merging with Showtime Shoes, Fantastic Feet wants to merge with National Shoe Manufacturers. This merger would allow the newly formed company to both produce and sell the shoes. What type of merger is this for Fantastic Feet?

 A. A forward vertical merger.

 B. A backward vertical merger.

 C. A conglomerate merger.

 D. None of the above.

9. Assume the same facts as in question 8. How is this proposed merger likely to be treated under Section 7?

1. Nothing will happen until the merger has taken place since there must be actual proof of a

 lessening of competition under Section 7.

1. Nothing will happen under Section 7 since mergers between two companies which are not in the

 same market are always permitted if they both conduct business on a national level.

1. The merger will be subjected to strict review under Section 7 since this will certainly increase the

 concentration in the relevant market.

 D. None of the above.

10. Technophonics, a large manufacturer of car phones, has proposed a merger with Traveling Talkers, another car phone manufacturer. Though Technophonics is successful in this competitive market, Traveling Talkers is on the verge of collapse. In an effort to salvage what it can, Traveling Talkers has sought other companies with which to merge, but Technophonics is the only interested firm. A merger between these two companies would violate Section 7 of the Clayton Act. What is Technophonic's best defense?

 A. The Small Company Doctrine.

 B. The Failing Company Doctrine.

 C. The Potential Reciprocity Theory.

 D. None of the above.

**V. Answers to Objective Questions**

**Terms:**

1. *Treble damages.* Under Section 4 of the Clayton Act, single damages found by a jury are tripled in amount for antitrust violations.

2. *Rule of Reason.* If Section 1 of the Sherman Act were literally applied, it would prohibit many business contracts. In order to mitigate against that literal interpretation, the Rule of Reason is designed to allow the courts to weigh a number of factors when deciding if a contract question is in restraint of trade.

3. *Per se.* No balancing is required if the restraint is considered to be inherently anticompetitive. If so determined, a court will not permit any defenses or justifications to save it.

4. V*ertical restraint.* This restraint can take the form of a contract, combination, or conspiracy between the parties and is subject to the scrutiny of both the Rule of Reason and the *per se* rule interpretations of Section 1 of the Sherman Act.

5. *Conscious parallelism.* It must be shown that the parties acted independently of each other and arrived at their decisions separately.

6. *Horizontal.* This can involve a merger of one company with another company producing a similar product and selling it in the same geographic market.

7. *Presumptive illegality.* This test was adopted by the U.S. Supreme Court in the landmark antitrust case of *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

8. *Conglomerate.* Where the merger may not fit into any other category, it may still be a violation of Section 7 of the Clayton Act if it creates an unfair advantage, hurts potential competition, or creates potential reciprocity between competitors.

9. *Failing company doctrine.* Unfortunately, there are far too many examples of this defense on the economic landscape in a period of prolonged recession.

10. *Indirect price discrimination.* Any number of methods have been devised to favor certain customers. They can include favorable credit terms, freight charges, and the like.

**True/False:**

1. False. The Sherman Act is the only federal antitrust act that has criminal sanctions. The other federal antitrust acts allow only civil sanctions.

2. True. The balancing of pro- and anticompetitive effects is used in the Rule of Reason test, not the *per se* standard of determining whether conduct is prohibited by the Sherman Act.

3. False. Price fixing is a *per se* violation of the Sherman Act.

4. True. Under the doctrine of conscious parallelism, two or more firms must be acting in concert to be in violation of the Sherman Act.

5. False. The showing of deliberate or purposeful conduct is sufficient to support a Section 2 action. Showing a defendant's actual specific intent to monopolize a market is not required.

6. False. Innocent acquisition and natural monopoly are defenses to the charge of monopolizing. These defenses are lost if the firm acts in a predatory or exclusionary way.

7. False. Under Section 7 of the Clayton Act, if a merger is likely to substantially lessen competition, the court may prevent the merger. Actual showing of the lessening of competition is not required.

8. False. They are judged under the rule of reason.

9. False. Conglomerate mergers are not always permitted under the Clayton Act. The lawfulness of such mergers are examined under several different factors.

10. False. Under the meeting the competition defense, a seller can lower his selling price to match that of his competitor. However, the seller cannot set his price below that of his competitor.

**Multiple Choice:**

1. B. The situation described here is a tying arrangement and is *per se* illegal. A is incorrect because the plan is illegal and definitely not ingenious. C is incorrect because tying arrangements are illegal even if the seller does not have complete market control over the unique product. D is incorrect because tying arrangements are *per se* illegal even if the other products are sold at a fair price. Elvira, Inc., cannot use market dominance of antilock braking systems in this illegal manner.

2. D. The situation described here is a price fixing arrangement and is illegal even though the price is reasonable. A is incorrect because price fixing is illegal whether the product is trademarked or sold under a trade name. B is incorrect because price fixing is illegal whether it is for a minimum or maximum price. C is incorrect because there is no defense for price fixing. Thus, the Hilmer Duck Decoy Company has to shoot down this bad idea.

3. C. When two or more firms at the same level of distribution contract for such an arrangement, this is horizontal restraint of trade. A is incorrect because the behavior of these two firms is governed by Section 1 of the Sherman Act. B is incorrect because such a contract is illegal whether it is oral, written, or implied from the circumstances.

4. D. Since there was no intentional effort by these firms, nor did they even know of the other's pricing system, there was no intent to fix prices. Therefore, under the doctrine of conscious parallelism, this conduct is not prohibited under the Sherman Act. A, B, and C are incorrect because since neither firm knew of the other, there is no price fixing and this activity is not a violation of the Sherman Act.

5. C. A company that acquires a monopoly because of superior business acumen, skill, and foresight has an innocent acquisition of a monopoly. This is a defense to the charge of monopolizing. Therefore, SS has not violated the Sherman Act. A and B are incorrect for the reason discussed above. D is incorrect because a single firm can be considered a monopoly.

6. C. A merger where both companies are in the same level of distribution is a horizontal merger. Here, both companies are shoe retailers. A is incorrect because a vertical merger involves an integration of the operations of a supplier and a customer. B is incorrect because a conglomerate merger is between two companies in unrelated businesses.

7. C. Where two companies that compete in the same geographical market merge in a horizontal merger, the merger is subjected to strict review under Section 7 because it will clearly result in an increase in concentration in the relevant market. A is incorrect because Section 7 actions may be brought based on the probability of a lessening of competition. Actual proof is not necessary. B is incorrect because horizontal mergers of this type are almost always strictly scrutinized under

 Section 7.

8. B. Where a retailer merges with a producer, this is a backward vertical merger. A is incorrect because a forward merger would involve a company lower on the chain of distribution merging with a company higher on the chain of distribution. C is incorrect because a conglomerate merger is a merger between two companies in unrelated fields.

9. D. A is incorrect because actual proof of a lessening of competition is not required since Section 7 actions are based on the probability of a lessening in competition. B is incorrect because such mergers are not always automatically permitted. C is incorrect because such mergers do not increase the concentration in the relevant market since there are different markets involved. Vertical mergers will be examined considering such factors as the past history of the firms, the trend toward concentration in the industries involved, the barriers to entry, the economic efficiencies of the merger, and the elimination of potential competition caused by the merger.

10. B. The Failing Company Doctrine is a defense to Section 7 actions if (1) there is no other reasonable alternative for the failing company and (2) no other purchaser is available. Here, both these requirements are met. A is incorrect because the Small Company Doctrine is a defense to Section 7 actions for two or more small companies which wish to merge to compete more effectively with a large company. C is incorrect because it is a theory for enjoining mergers, not a defense to Section 7 actions.

**VI. Answers to Essay Question**

 The basic policy presumes that competition is best protected in an open and fair marketplace. Monopolization and concentrations of economic controls are contrary to an open and fair marketplace and may be anticompetitive.

 The main statutes that may be used are the Sherman Act of 1890, the Clayton Act of 1914, and the Robinson-Patman Act of 1930. In this case, the second two acts provide the best possibility for putting the actions of Spookeys and Ghost and Goblins to the antitrust law litmus test.

 The partial acquisition of a competitor in the same geographical area may injure competition. In examining this horizontal merger, the Justice Department will use its Herfindal-Hirshman guidelines to see if the new arrangement will create an illegal concentration of costume sales in Salem in one controlled company. As a defense to this possible challenge, Ghost and Goblins can raise the argument that Spookey's was a failing company. That defense appears weak because there was no evidence of it losing money or that it was about to go bankrupt. Thus the merger could most likely be disallowed under Section 7 of the Clayton Act.

 With regard to the new pricing arrangement with Bad Taste, the problems with Robinson-Patman become more apparent. Here the ultimate price charged to the consumer is lower and it would appear on its face (mask?) that competition is actually fostered by the new arrangement. The other costume stores in Salem might argue, however, that they have been discriminated against by predatory pricing. The best defense here would be to show that the new prices reflect efficiencies realized from higher volume purchases, i.e., lower costs. In addition, if Bad Taste can show that any buyer who purchased the higher volume would get that same lower price, price discrimination would be much more difficult to prove. From the problem as presented, it appears that no unfair trade practices were used.