

# The U.S. Antitrust System and Antitrust Litigation



Presentation to the U.S. Antitrust Seminar

Jonathan Rubin, Partner, MoginRubin LLP, Washington, D.C.

Young Competition Law Professionals, Dansk Forening for Konkurrenceret

28 June 2018 - Copenhagen, Denmark

# Agenda

- Legal framework
- Pre-trial procedure
  - Example: *Roxul USA, Inc. v Armstrong World Industries, Inc.*
- The discovery process
  - Example: *Roxul USA, Inc. v Armstrong World Industries, Inc.*
- Witness depositions
- Jury selection and instruction
  - Example: *GN Netcom, Inc. v. Plantronics, Inc.*

# Legal Framework - Three Categories

1. Restrictive Agreements
  - Concerted action
  - Sherman Act of 1890, Section 1
  - Article 101, TFEU
2. Monopolization or abuse by dominant firms
  - Unilateral conduct
  - Sherman Act, Section 2
  - Article 102, TFEU
3. Mergers that lessen or impede competition
  - Clayton Act of 1914, Section 7
  - EU Merger Regulation, Council Regulation 139/2004.



# Sherman Act, § 1

## Sherman Act, Section 1

- “Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal;”
  - Only “unreasonable” restraints. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911);
  - Established *per se* and Rule of Reason offenses.

# Sherman Act, § 1

## Per se:

- price fixing; market allocation; group boycott; bid rigging—always harmful, never justified.

## Rule of Reason:

- Vertical price agreements (resale price maint.), vertical distribution agreements, horizontal non-price agreements, e.g., joint research, joint marketing, standard setting organizations, trade associations, *etc.*



# Sherman Act, § 1

## Infringing agreement

- removes “independent centers of decision-making” from the market. *Am. Needle v. NFL*, 560 U.S. 183 (2010);
- Agreement: “Conscious commitment to a common scheme to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Service Corp*, 465 U.S. 752 (1984);
- Competition occurs when firms individually profit maximize; not jointly profit maximize.

# Sherman Act, § 1

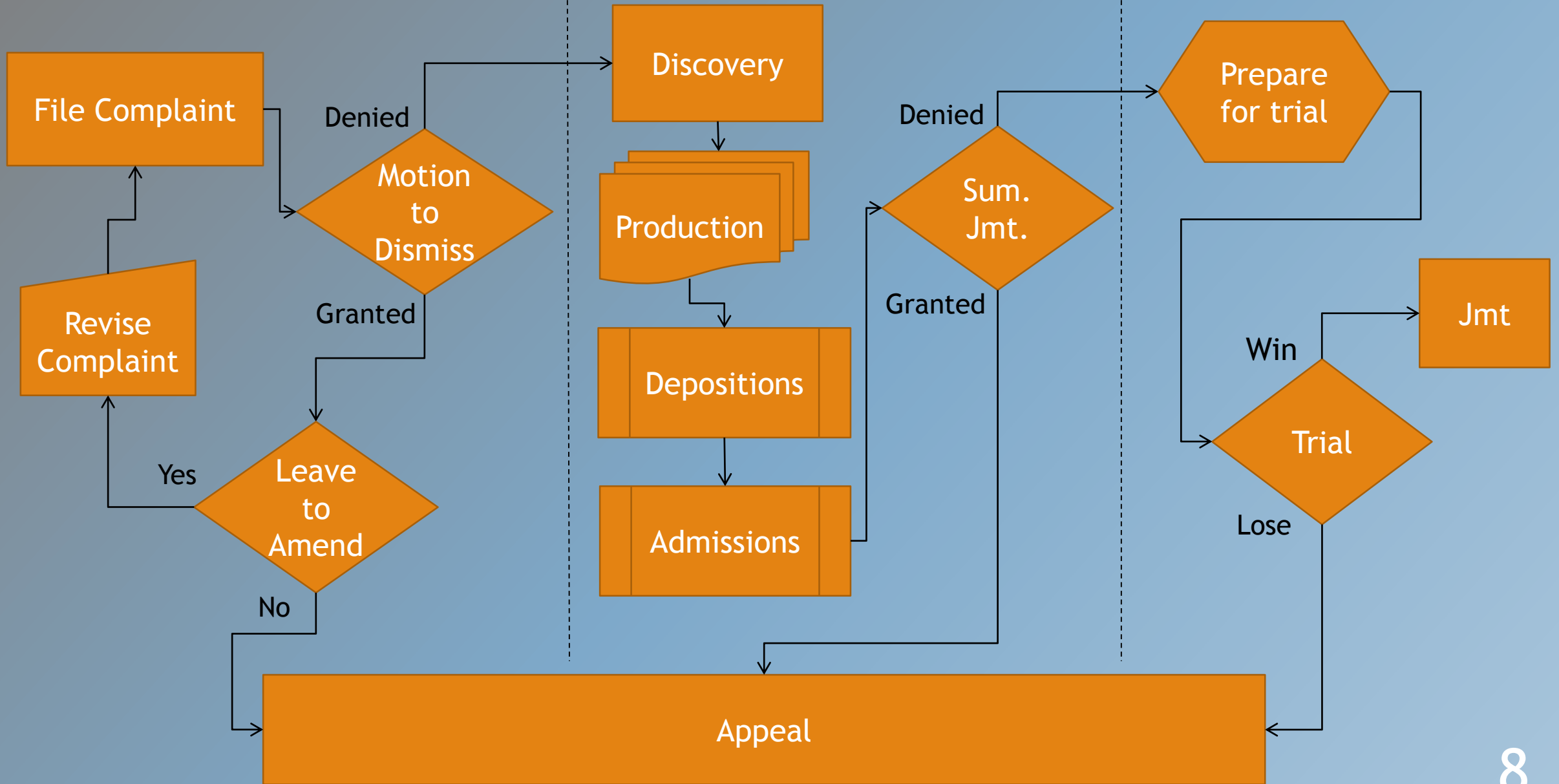
## Pleading

- Circumstantial allegations of agreement must be plausible, *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) (something beyond ‘conceivable.’)
  - Pleading stage standard
  - Opens the door to discovery = \$\$\$

Pleading Stage

Discovery Stage

Trial Stage





# Sherman Act, § 1

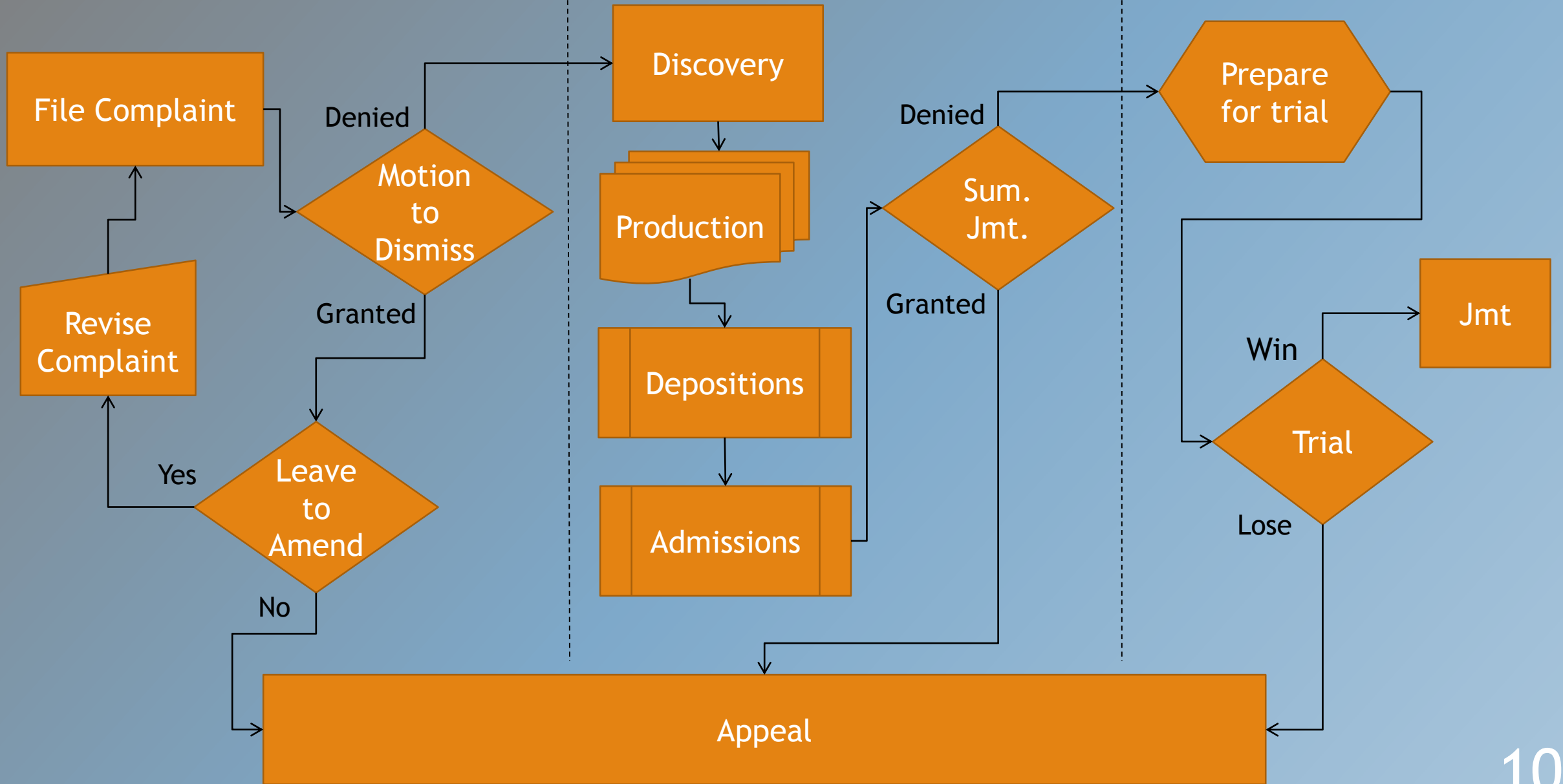
## Proof

- Evidence must rule out independent conduct: “conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.” *Matsushita Electric Industrial Co v. Zenith Radio Corp* 475 US 574 (1986).
  - Discovery stage standard
  - Summary Judgment: Are there material issues of facts for determination at trial?

Pleading Stage

Discovery Stage

Trial Stage



# Sherman Act, § 2



## Sherman Act, Section 2 (Unilateral conduct)

- Unlawful for any person to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . .;”
  - Not a “status” offense;



# Sherman Act, § 2

## Elements

1. “[t]he 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);
  - Acquire or maintain (but not misuse) monopoly power through improper means.

# Clayton Act, § 7

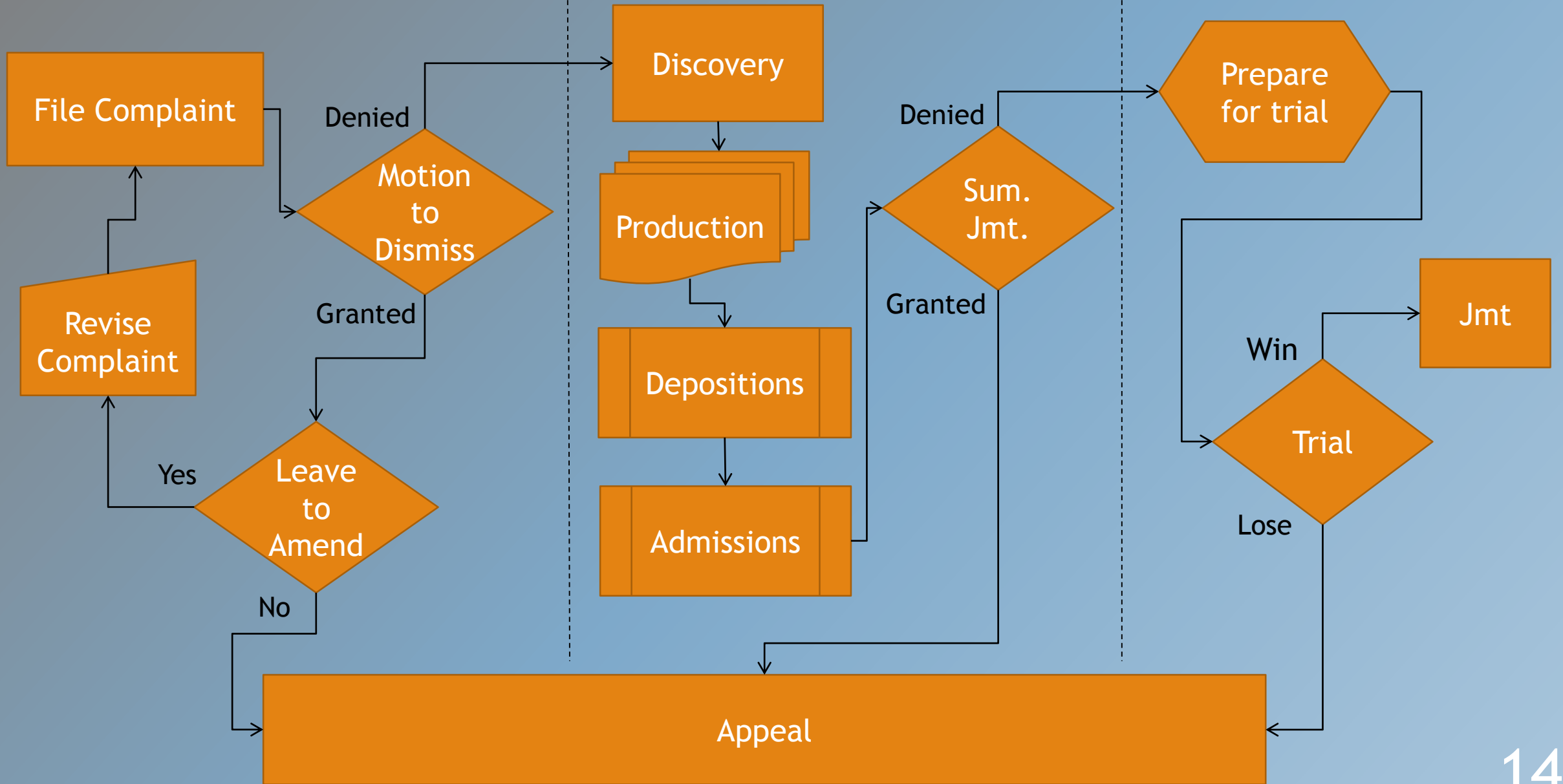
## Clayton Act, § 7

- Prohibits mergers and acquisitions where the effect “may be substantially to lessen competition, or to tend to create a monopoly.”
  - “May be,” asks court to assess the likelihood of anticompetitive effects;
  - “Incipiency” standard: to catch anticompetitive aggregation of economic power before it occurs.

Pleading Stage

Discovery Stage

Trial Stage





# Pre-trial procedure—Example: *Roxul USA, Inc. v Armstrong World Industries, Inc.*

- Document #1: Complaint:
  - Action is commenced with the filing of the Complaint (Sept. 1, 2017);
  - Count I: Sec. 2, Monopoly maintenance;
  - Count II: Sec. 2, Attempted monopolization;
  - Count III: Sec. 1, Unlawful vertical agreements with dealers;
  - “Pendant” State claim for tortious interference with business relationship.

Case 1:17-cv-01258-VAC-CJB Document 1 Filed 09/01/17 Page 1 of 21 PageID #: 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ROXUL USA, INC.,

Plaintiff,

v.

ARMSTRONG WORLD  
INDUSTRIES, INC.,

Defendant.

C.A. No. \_\_\_\_\_

JURY TRIAL DEMANDED

COMPLAINT

This is an action to restrain anticompetitive conduct by Armstrong World Industries, Inc. (“Defendant”) and to remedy the effect of its unlawful conduct. Plaintiff ROXUL USA, Inc. d/b/a ROCKFON (“ROCKFON”), by its attorneys, brings this action for relief against Defendant’s continued and ongoing violations of the Sherman Act, the Clayton Act, and Delaware common law.

# Pre-trial procedure—Example: *Roxul USA, Inc. v Armstrong World Industries, Inc.*



- Document #9: Motion to Dismiss
  - Fed.R.Civ.P. 12(b)(6)
  - The motion asks court to: “dismiss Plaintiff’s Complaint in its entirety with prejudice.”
  - With prejudice:
    - No amendment;
    - No re-filing;
    - Case over.

Case 1:17-cv-01258-MAK Document 9 Filed 11/10/17 Page 1 of 2 PageID #: 43

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ROXUL USA., INC.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC.,

Defendant.

C.A. NO. 17-CV-01258-VAC-CJB

**DEFENDANT ARMSTRONG WORLD INDUSTRIES, INC.’S MOTION TO DISMISS  
FOR FAILURE TO STATE A CLAIM PURSUANT TO RULE 12(b)(6)**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), and as more fully explained in its Memorandum in Support hereof, Defendant Armstrong World Industries, Inc. respectfully requests that the Court dismiss Plaintiff’s Complaint in its entirety with prejudice because Plaintiff has failed to state a claim upon which relief can be granted.

Dated: November 10, 2017

/s/ Kevin J. Mangan

Kevin J. Mangan (DE Bar No. 3810)



# Pre-trial procedure—Example: *Roxul USA, Inc. v Armstrong World Industries, Inc.*

## Motion to Dismiss—Briefing Schedule

- Document #10: Defendant’s Memorandum of Points and Authorities in Support of Motion to Dismiss
  - Due with Motion (Nov. 10, 2017)
- Document # 11: Plaintiff’s Memorandum of Points and Authorities in Opposition to Motion to Dismiss (entitled “Answering brief”)
  - Due 14 days after Motion served (here, Dec. 22, 2017, *i.e.*, extension negotiated)
- Document # 12: Defendant’s Reply in Support of Motion to Dismiss
  - Due 7 days after Opposition served (here, Jan.12, 2018)



# Pre-trial procedure—Example: *Roxul USA, Inc. v Armstrong World Industries, Inc.*

## Memorandum Order on Motion to Dismiss

- Documents #14 and #15: Order Granting in part and Denying in Part Defendant’s Motion to Dismiss
  - “We dismiss Roxul's claim for antitrust violations to the extent Roxul bases its claim on foreign trade in Canada and its claim for tortious interference with business relationships without prejudice should Roxul be able to plead facts consistent with this Memorandum under Fed. R. Civ. P. 11.”
  - Entered Feb. 9, 2018 (Sept - Feb, 5 months, relatively fast)

# Discovery

## Overcoming MTD is Door to Discovery

- Usually not available until after the Motion to Dismiss is decided or Answer is filed;
- Court will usually set a Scheduling Conference and issue a Scheduling Order (see Doc. # 25, Feb. 26, 2018);
- Parties propose a discovery plan for:
  - Initial disclosures
  - Protective order
  - ESI Protocol
  - Production of documents and things
  - Witness depositions



# Discovery

## Overcoming MTD is News:



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | [www.law360.com](http://www.law360.com)  
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | [customerservice@law360.com](mailto:customerservice@law360.com)

### **Building Supply Antitrust Suit Survives Dismissal Phase**

By **Bryan Koenig**

Law360 (February 9, 2018, 8:38 PM EST) -- Building-supply company Armstrong World Industries Inc. will have to face an antitrust suit after a Delaware federal judge refused Friday to dismiss most of the suit's claims that Armstrong established exclusive agreements with ceiling tile distributors that locked out competitors.

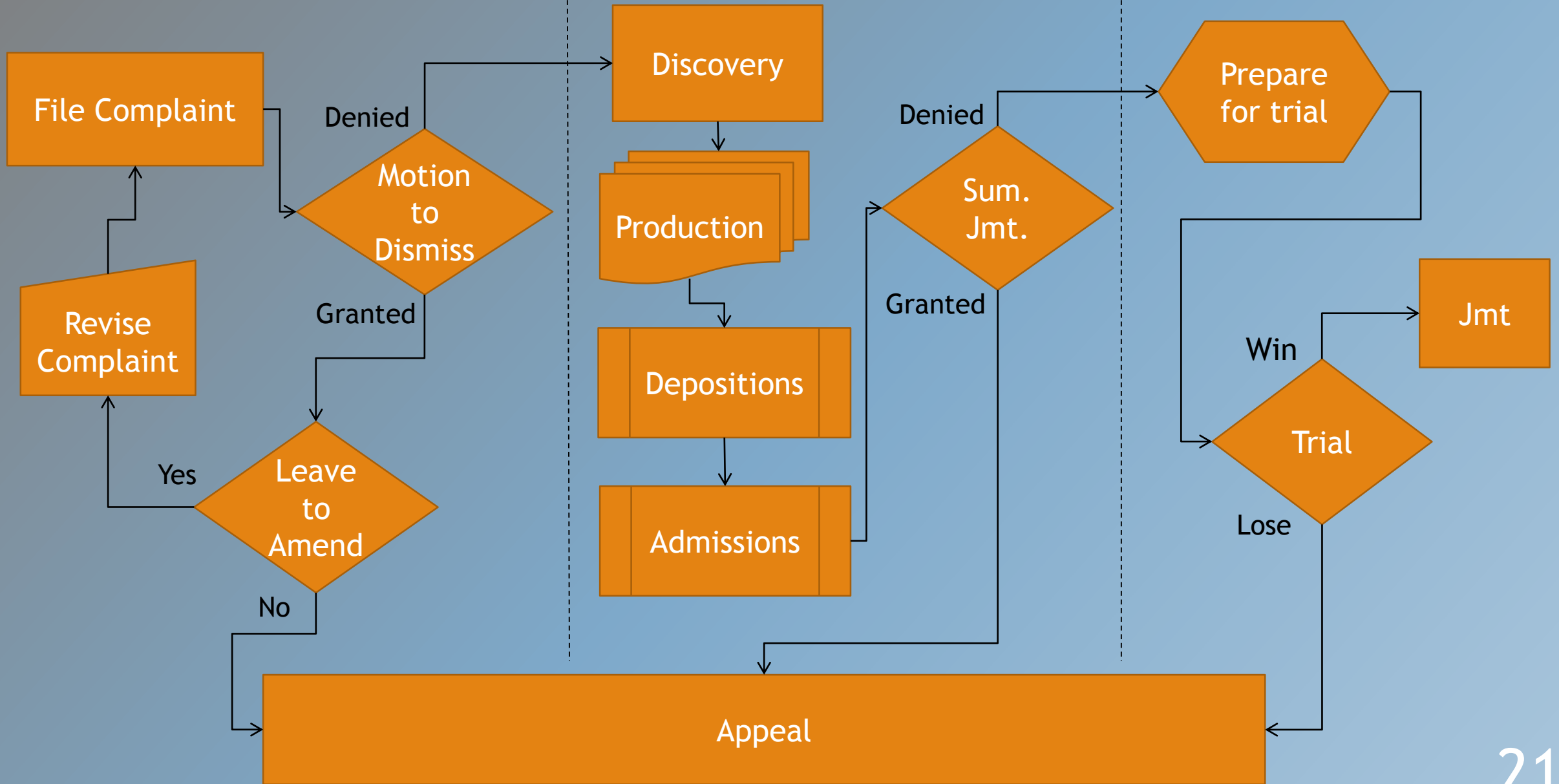
U.S. District Judge Mark A. Kearney only dismissed Roxul USA Inc.'s antitrust claims insofar as they tried to invoke foreign trade in Canada, and also tossed claims of tortious interference with business relationships, which were found lacking under Delaware law. The rest of the antitrust allegations survive, Judge Kearney said, because Roxul has adequately claimed attempted and actual monopolization as well as restraint of trade.



Pleading Stage

Discovery Stage

Trial Stage



# Discovery

## Protective order (Doc. # 50, June 7, 2018)

- Often several confidentiality designations:
  - “Confidential”
  - “Outside Counsel Eyes Only”

## ESI Protocol (ESI “Default Standard;” D.Del.)

- Usually negotiated
- Search methodology
- Format (PDF, TIFF, searchable)
- Native files (Excel, Access)
- Metadata - as maintained in the ordinary course
- Bates numbering

# Discovery

## Scope: Federal Rule Civil Procedure, Rule 26(b)

- Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.



# Discovery

## Document Production

- Identify custodians;
  - Organization chart/Job descriptions/Initial disclosures
    - local hard drives, shared drives and servers, email accounts, cloud storage, physical documents;
- Collect and Process; drive or server image; OCR and format (make searchable for reviewers and opponents)
- Search Terms;
- Review (privilege, relevancy) (1<sup>st</sup> Level, 2<sup>nd</sup> Level, etc.)
- Produce to opposing party

## Motion to Compel Production

- Defendant moved to designate three of Plaintiff's corporate executives located in Copenhagen as records custodians, including the CEO of Rockwool Int'l, and moved to compel production from them pursuant to negotiated search protocol (Doc. # 45, April 9, 2018);
- Court granted the motion and ordered production (Doc. # 47, May 14, 2018);
- Parties got serious about Protective Order! (Doc. #50, June 7, 2018)



# Discovery

## Oral Depositions (video)

- Logically follows document production;
  - Ask witnesses to explain documents and data;
- Parties compel attendance of non-parties through subpoena;
- Multiple purposes:
  - Discovery of admissible evidence;
  - Perpetuation of testimony;
  - Authentication of documents;
  - Assessment of trial witnesses.



# Discovery



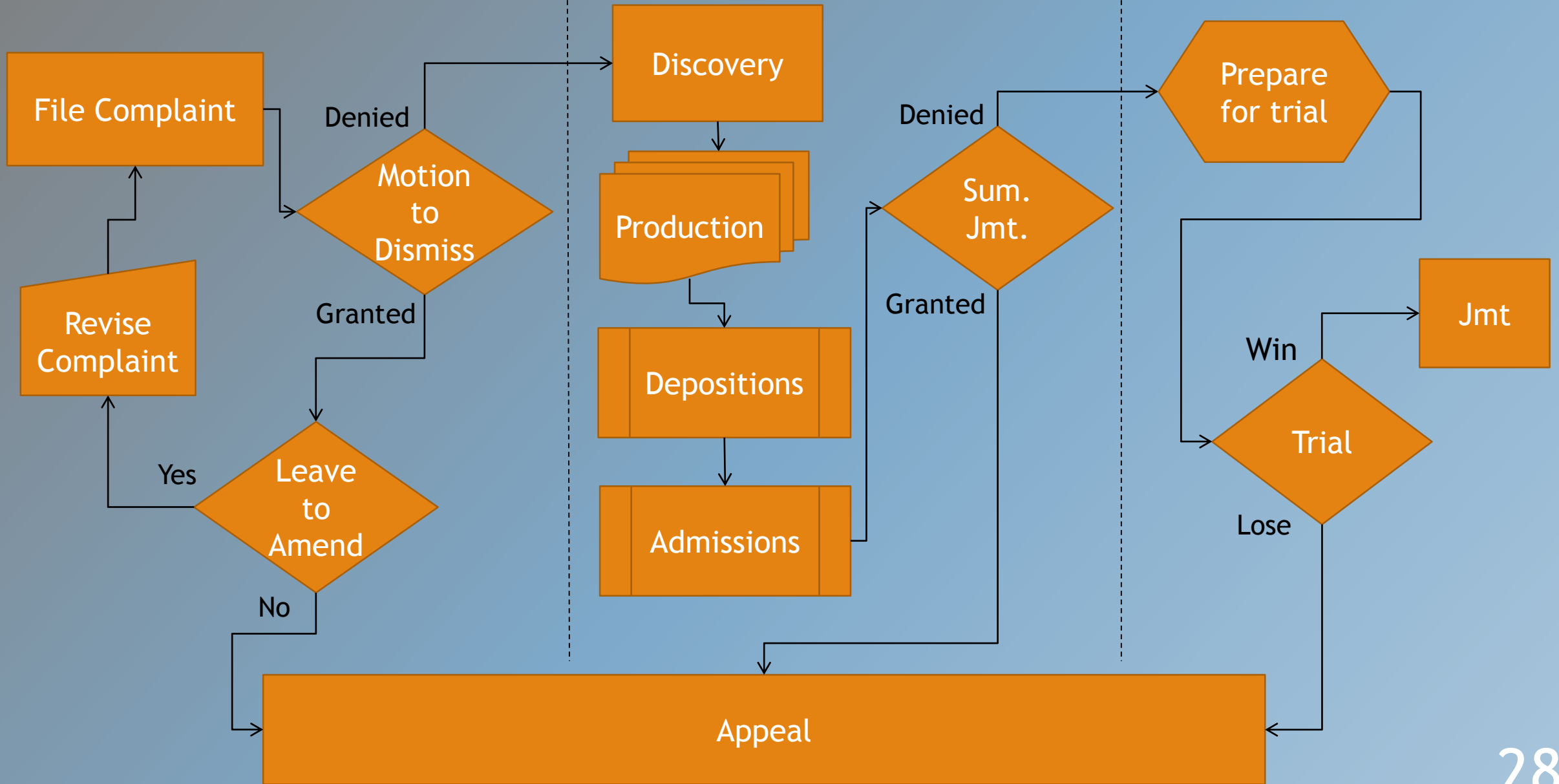
## Requests for Admissions

- Powerful tool to establish facts;
- Shifts costs to opponent for wrongful failure to admit;
- Crystallizes issues for Motion for Summary Judgment.

Pleading Stage

Discovery Stage

Trial Stage



# Expert Discovery

## Timing and disclosure

- Scheduling Order typically treats expert discovery on a separate track;
  - Expert report; opposing expert report; expert reply; expert depositions;
- *Daubert* motions: challenges whether expert's opinions are based on scientifically accepted theories and methods;



# Class Actions

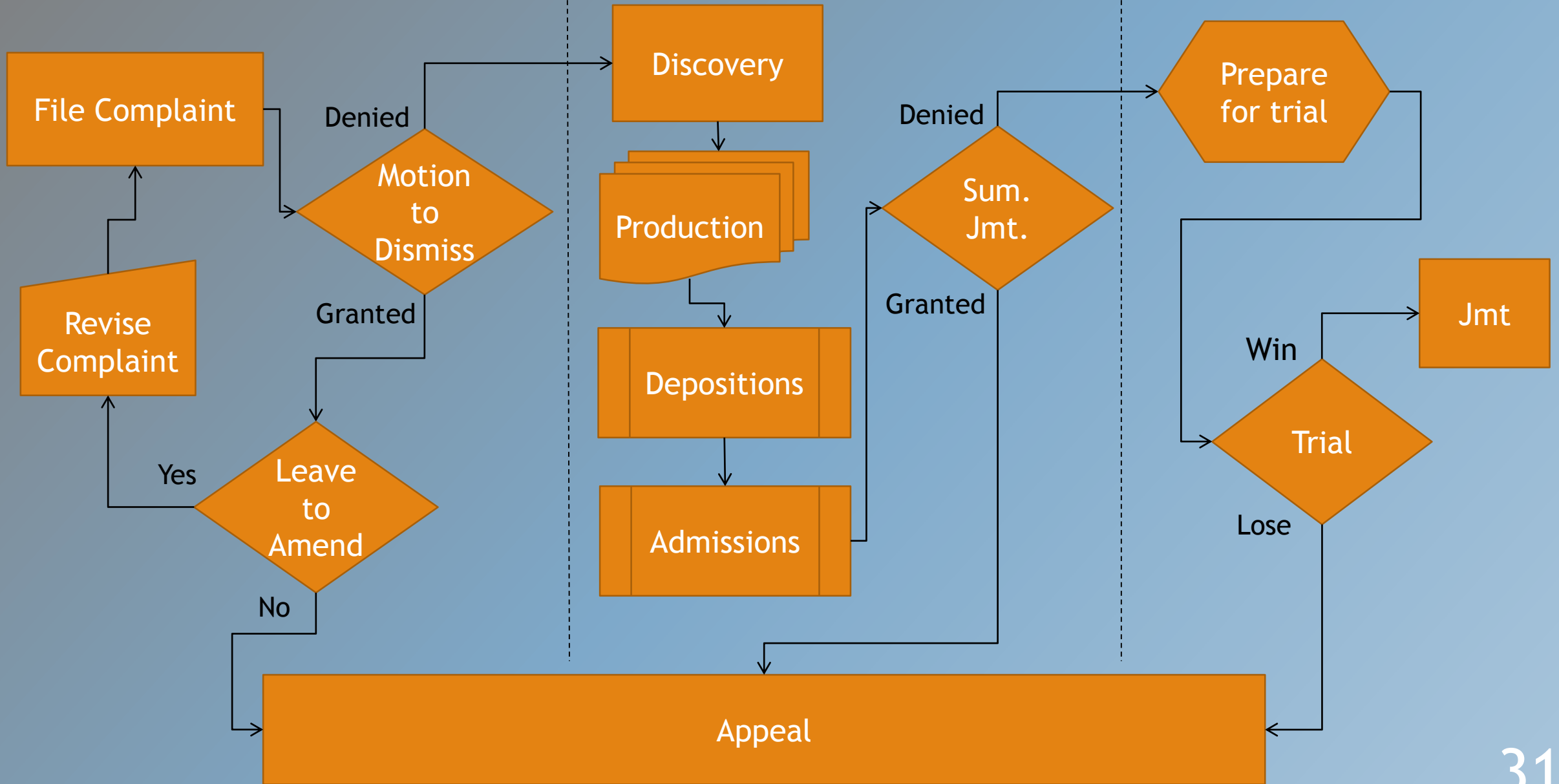
## Plaintiff's Motion for Class Certification

- Motion must be brought after fact discovery, expert reports and discovery, Daubert motions;
- Motion brought before Motion for Summary Judgment, with enough time for opposing and reply briefing;
- Not shown on flowchart; additional opportunity to appeal.

Pleading Stage

Discovery Stage

Trial Stage



# Trial

## Jury trial

- Jury is finder of fact; judge determines law;
- Jury instructions:
  - Court instructs lay jury about how to apply the evidence to the law (see Doc. # 532, Jury Instructions, *GT Netcom*)
  - Jury completes a Verdict Form to report findings (see Doc. # 531, Jury Verdict Sheet, *GT Netcom*).

## Bench trial

- Judge is both finder of fact and determines the law.



# The U.S. Antitrust System and Antitrust Litigation

