



# Monopolization Part 1

Antitrust  
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## Sherman Act § 2

Every person who shall 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, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

## **Mode of analysis**

Monopolization claims proceed under a rule-of-reason sort of analysis, but courts tend not to use the label “rule of reason” for § 2 claims like they do for § 1 claims.

## **Monopolization elements**

“The offense of monopoly under § 2 of the Sherman Act has two elements: (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)

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  - a/k/a “anticompetitive conduct,”  
“predatory conduct,” “monopoly  
conduct”

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1. monopoly power
2. a relevant market
  - a) product market
  - b) geographic market

(2) exclusionary conduct

## **Monopoly power**

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**IMPORTANT NOTE:** What U.S. antitrust law means by “monopoly power” is different from what economists mean by that term (including as presented in our econ slides)!

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## Monopoly-level market share

The law doesn't say exactly what market share constitutes monopoly power (MP), but some flags have been planted:

- 87% “leaves no doubt” that MP exists
- 80-95% is enough for  $\Pi$  to survive summary judgment on MP issue
- 75% means MP “may be assumed”
- >66% might be MP
- 50% is the bare minimum for MP for many lower courts
- 30% is insufficient even for § 1 market power

(See p. 226 of Elhauge, 3d ed.)