Monopolization Part 4 (Exclusionary Conduct)

Antitrust
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Re-run

Monopolization elements

(1) monopoly power in a relevant market

(2) exclusionary conduct

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

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Monopolization elements

Re-run

"The offense of monopol[ization] under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in [a] 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)

Monopolization elements

Exclusionary conduct →

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What counts as exclusionary conduct?

From *Grinnell*:

"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"

What counts as exclusionary conduct?

- getting
- growing, or
- keeping

the monopoly (?)

What counts as exclusionary conduct?

- Must look to economic realities of the situation.
- Must be injury to competition. Injury to competitors is not enough.
- Note: Charging monopoly prices is not exclusionary conduct! (In fact, it's often the opposite.)

EXCLUSIONARY CONDUCT

What counts as exclusionary conduct?

"In short, under U.S. law, a monopolist's unilateral conduct is governed by the same rule of reason to judge whether it is anticompetitive as is concerted action by firms that lack monopoly power or any reasonable probability of acquiring it."

"General standards ... provide little guidance. To get a concrete sense of what conduct is deemed anticompetitive, one needs to examine the standards used to evaluate specific conduct."

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Intent requirement

Very weak. Some intent is required, but it can be inferred from actions. A purposeful act is required, but there is no need to show a specific intent to monopolize. "Moral wrong" on the part of the defendant is not required. But malicious intent can be evidence of the exclusionary nature of the conduct.

I/o/w, evidence of subjective intent is not necessary to prove a § 2 claim, but if available, it can help the plaintiff.

Specific examples of exclusionary conduct

- **Predatory pricing** (Brooke Group, AMR)
- **Refusals to deal with competitors** (Aspen Skiing)
- **Refusals to deal with those who deal with competitors** (Lorain Journal)
- **Denial of access to an essential facility** (Otter Tail)

EXCLUSIONARY CONDUCT

Specific examples of exclusionary conduct

- **Coercing a competitor's suppliers/partners** (Standard Oil, Microsoft)
- **Acquisition and retirement of assets** (American Tobacco, United Shoe)
- **Acquisitions of competitors** (Standard Oil)

EXCLUSIONARY CONDUCT

Specific examples of exclusionary conduct

- **Preventing formation of second-hand market** (United Shoe)
- **Tying arrangements** (United Shoe, Microsoft)
- **Setting and controlling standards** (Microsoft)
- **Raising competitor's costs**

Fallacious arguments sometimes asserted by defendants:

- Illusory choice
- Evils of competition

Predatory pricing

To count as exclusionary conduct under § 2:

- The conduct must discipline or eliminate a competitor
- Defendant's prices must be below an appropriate measure of defendant's costs
  - not enough to be below market
  - not enough to be below competitors' costs
- Defendant must have a dangerous probability of recoupment
  - "The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb."
  - Must assess extent and duration of predation, relative financial strengths of predator and victim, their incentives and will, the capacity of defendant to absorb rival's market share, the condition of the market incl. ease of new entry

(Brooke Group v. Brown & Williamson)

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← US v. AMR teaches us this is commonly average variable costs (AVC), functioning as a proxy for marginal costs (MC).

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Hypo: Dinoco and Aunt Glenda's Gas

Hypo: In Verdant Valley, a town of 50,000 people that is a three-hour drive from any other town, there are 12 gas stations, all owned by multi-billion-dollar behemoth Dinoco. Dinoco's costs are $1.00/gallon, and it sells retail for $4.59/gallon. Independent Aunt Glenda's Gas pops up, with costs at $1.50/gallon, and starts selling at $4.00/gallon. Dinoco lowers its price. Then Aunt Glenda does, all the way to $1.51/gallon. Then Dinoco goes down to $1.21/gallon, and it keeps that price for six months until Aunt Glenda goes out of business. ***Is Dinoco liable for monopolization?***

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(This is for discussion in class … There's no pre-prepared answer slide.)

Hypo: Dinoco and Aunt Glenda’s Gas

Let’s change the facts …

Hypo: In Verdant Valley, a town of 50,000 people that is a three-hour drive from [illegible] town, there are 12 [illegible] lti- bil[illegible] Dinoco’s costs are $1.[illegible] and it sells retail for $4.59/gallon. Independent Aunt Glenda’s Gas pops up, with costs at $1.50/gallon, and starts selling at $4.00/gallon. Dinoco lowers its price. Then Aunt Glenda does, all the way to $1.51/gallon. Then Dinoco goes down to <u>$0.90/gallon</u>, and it keeps that price for <u>four months</u> until Aunt Glenda goes out of business. ***Is Dinoco liable for monopolization?***

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