



Monopolization Part 6 (Attempted Monopolization plus Review Problem)

Antitrust
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Attempted monopolization elements

“[I]t is generally required that to demonstrate attempted monopolization a plaintiff must prove (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 v. McQuillan (U.S. 1993)

Attempted monopolization elements

- (1) Defendant has engaged in predatory or anticompetitive conduct with
- (2) a specific intent to monopolize and
- (3) a dangerous probability of achieving monopoly power.

Intent – attempted monopolization vs. monopolization

With monopolization, intent requires only a deliberate and purposeful act - something that's not an accident.

Attempted monopolization requires more, "specific intent," but it still can be inferred.

Attempted monopolization elements

- (1) Defendant has engaged in predatory or anticompetitive conduct with
- (2) a specific intent to monopolize and
↑ intent can be inferred from conduct
- (3) a dangerous probability of achieving monopoly power.

But it's no defense that the plan would have been impossible to execute!
(American Airlines)



Monopolization elements

Re-run

- (1) monopoly power in a relevant market
- (2) exclusionary conduct
 - a/k/a “anticompetitive conduct,”
“predatory conduct,” “monopoly
conduct”

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)

Monopoly-level market share

Re-run

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 Π 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.)

Specific examples of exclusionary conduct

EXCLUSIONARY CONDUCT

Re-run

- **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)

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)

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**

Attempted monopolization elements

Re-run

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- X100 has 90% share of 12-25 year-olds for Top-40 radio in San Francisco and 40% of 12-25 year-olds for all radio in the metro.
 - Upstart KZZI has 10% share of 12-25 year-olds for Top-40 radio in San Francisco and 4% of 12-25 year-olds for all radio in the metro.
 - Ad buys and ad dollars have corresponded closely to listener share.
 - Radio gets 50% of ad dollars for 12-25 year-olds in San Francisco. Online/mobile gets 40%. Billboards get 10%.
 - X100 has always accepted ads no matter who produced or voiced them.
 - KZZI, to get more advertisers, has begun offering free production for radio ads run on KZZI, voiced by KZZI on-air personalities. This has proved very popular and gained KZZI many new advertisers. Now advertisers want to run these KZZI-produced/voiced ads on X100.
- You represent X100. As far as antitrust liability ...**
- Can X100 refuse to take KZZI-voiced ads?
 - Can X100 start offering free production with X100 voices to advertisers?



- Can KZZI start monitoring X100 in order to time commercial breaks so that KZZI is taking its commercial breaks right before X100 does?
- Can X100 start monitoring KZZI in order to time commercial breaks so that X100 is taking its commercial breaks right before KZZI does?
- Can X100 reduce the number of commercials it accepts per hour and the number of commercial breaks it has per hour in order to retain listeners who tend to switch during commercials?