



Structure of Federal Legal Actions Against Monopolization

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.”

Sherman Act § 2

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monopolize, or attempt to monopolize, or combine or conspire with one or more other persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, or with the District of Columbia, and every person who shall be engaged in such conduct (although it does not have to be unilateral)

corporation, or, if any such person, shall be fined not more than \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”

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We have three offenses under § 2:
(1) monopolization
(2) attempted monopolization
(3) conspiracy to monopolize

FTC Act § 5

“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”

Everything that violates § 2 for monopolization will also violate FTC Act § 5.

But, as we know, only the FTC can enforce FTC Act § 5.

We’ll be concentrating on just the monopolization claim for a while. After we’ve gone through it thoroughly, we’ll come back for a relatively quick look at attempted monopolization.

Monopolization elements

- (1) monopoly power in a relevant market
- (2) exclusionary conduct

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”

Monopolization elements

(1) monopoly power in a relevant market

1. What's a relevant market?

a) product market

b) geographic market

2. What constitutes monopoly power in that market?

(2) exclusionary conduct