



Monopolization: Exclusionary Conduct

Antitrust
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Monopolization elements

Re-run

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

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

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“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 →

of the acquisition 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."

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EXCLUSIONARY CONDUCT

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?

- 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.)

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.”

- Elhauge 3d. ed., p. 276-277.

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Intent requirement

Some intent is required, but only objective intent that can be inferred from actions. A purposeful act is required, but there is no need to show a specific, subjective 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 definitely help the plaintiff.

“Defendant having willed the means, has willed the end.”

- Judge Charles Edward Wyzanski, Jr. in *U.S. v. United Shoe*, 110 F.Supp. 295 (D. Mass 1953)

EXCLUSIONARY CONDUCT

Some specific examples of exclusionary conduct (1/3)

- **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)**

Some specific examples of exclusionary conduct (2/3)

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

Some specific examples of exclusionary conduct (3/3)

- **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

**A couple more
nice quotes from
United Shoe**

“[I]t is delusive to treat opinions written by different judges at different times as pieces of a jig-saw puzzle which can be, by effort, fitted correctly into a single pattern.” - Judge Charles Edward Wyzanski, Jr. in *U.S. v. United Shoe*, 110 F.Supp. 295 (D. Mass 1953)

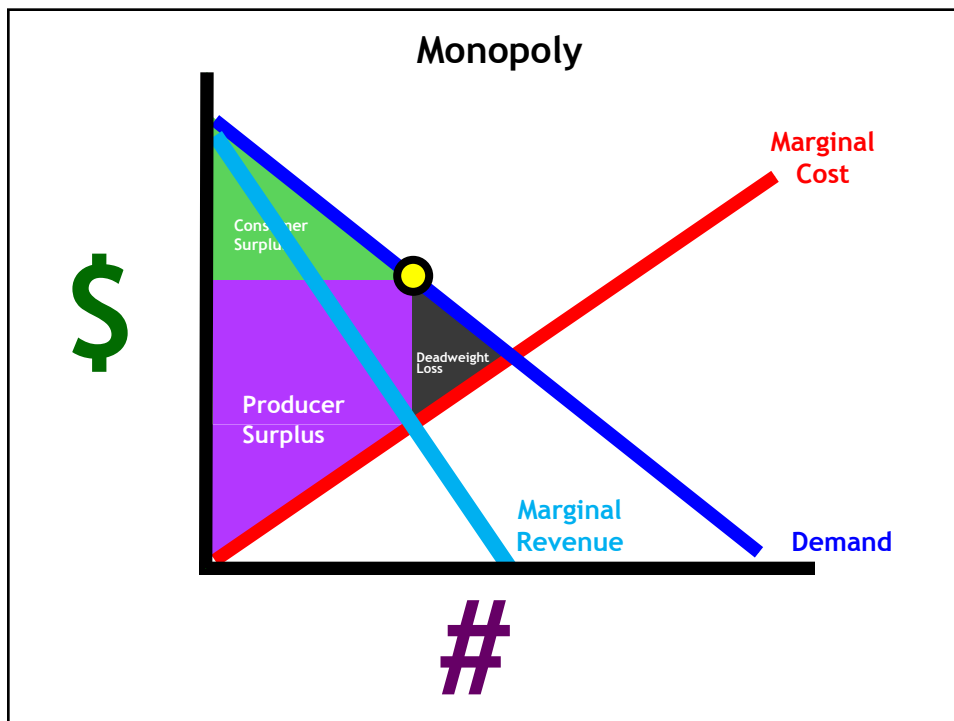
“[O]ne of the dangers of extraordinary experience is that those who have it may fall into grooves created by their own expertness. They refuse to believe that hurdles which they have learned from experience are insurmountable, can in fact be overcome by fresh, independent minds.” - Judge Charles Edward Wyzanski, Jr. in *U.S. v. United Shoe*, 110 F.Supp. 295 (D. Mass 1953)

FIRST BANK OF
RURAL
KANBRASKA 

First Bank of Rural Kanbraska

Hypo: Family-owned First Bank of Rural Kanbraska has been the only bank in the small rural town of Oak Corner for more than a century. When a new bank opens up, First Bank sends them a relentless stream of black faxes to run down their toner supply, tells local businesses they will delay clearing checks for any firm opening an account at the new bank, and tells individual customers they can't have accounts at both banks. Eventually, the new bank gives up and leaves town. **Has First Bank's engaged in exclusionary conduct?**

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



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
 - it's not enough for prices to be below market
 - it's not enough for prices 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."
 - Court 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, and the condition of the market incl. ease of new entry

(Brooke Group v. Brown & Williamson)

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← This is commonly average variable costs (AVC), functioning as a proxy for marginal costs (MC).

(Brooke Group v. Brown & Williamson)



HexOil and Aunt Glenda's Gas

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 HexOil. HexOil's average variable 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. HexOil lowers its price. Then Aunt Glenda does, all the way to \$1.51/gallon. Then HexOil goes down to \$1.21/gallon, and it keeps that price for six months until Aunt Glenda goes out of business. *Is HexOil liable for monopolization?*

(For discussion in class ... There's no pre-prepared answer slide.)



HexOil and Aunt Glenda's Gas

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Let's change the facts ...



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