



Attempted Monopolization and Monopolization Review

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.

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↑ intent can be inferred from conduct
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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.



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

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

Re-run

- (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

Product market definition

Re-run

“In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that ‘part of the trade or commerce’, monopolization of which may be illegal.”

U.S. v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395 (“The Cellophane Case”) (1956)

Re-run

Elasticity

- Elasticity can be read as “responsiveness” or “sensitivity” to change.
- If it’s “relatively elastic,” then it’s pretty responsive.
- If it’s “relatively inelastic,” then it’s pretty unresponsive.
- **Price elasticity of demand** is how responsive demand is to changes in price.

Re-run

Substitution Effect

- The more prices go up, the more consumers will tend to avoid those goods by purchasing substitutes.
- The closer the substitutes, the greater the tendency for prices to make people jump ship and buy the substitutes instead.

Re-run

Cross-Price Elasticity of Demand

- Cross-price elasticity of demand brings into consideration two different goods.
- Cross-price elasticity of demand is how responsive demand for one good is to changes in the price of another good.
- If the price of blueberries goes way up, then probably the demand for strawberries will increase.

Consider a town with two gas stations:

- If the price of Shell gasoline goes way up, then the demand for Sinclair gasoline is going to go way up.

Re-run

Cross-Price Elasticity of Demand

$$\text{CPED} = (\% \Delta Q_d \text{ of B}) / (\% \Delta P \text{ of A})$$

If the price of a jumbo roll of cellophane goes from \$100 to \$110, then the quantity demanded of glassine goes up 50%. What is the CPED?

$$\text{CPED} = (50\%) / (10\%) = 5$$

A positive CPED means the goods are substitute goods.

Re-run

Cross-Price Elasticity of Demand

The Cellophane Case says high cross-elasticity of demand suggests the two goods are part of the same product market.

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Re-run

Cross-Price Elasticity of Demand

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A positive substitute

But what magnitude of CPED is legally significant? It's hard to say ...

Re-run

Using cross-price elasticities of demand

- You can't take anything from high CPED at current price levels, since the defendant may already be at the profit-maximizing monopoly price.
- You can conclude from a high CPED at competitive price levels that there's a single market.
 - But buyer-substitution rates in a competitive market aren't observable in a non-competitive market, where market power is already being brought to bear.
- You can conclude from low cross-price elasticities of demand that there are separate markets (whether the current market is competitive or not).

Re-run

FTC/DOJ merger guidelines' Hypothetical Monopolist Test

A "relevant product market" is one where, if one firm was the only seller of that product, they would be able to impose a small but significant and non-transitory increase in price (SSNIP). "Small but significant" is quantified at at least 5%.

Consider:

- All paper manufactured from trees felled on a Tuesday in Klamath County, Oregon.
- All wine manufactured from grapes grown in Napa County, California.
- All blueberries never exposed to chemical herbicides and insecticides and therefore certifiable as "organic."

Geographic market

Re-run

A geographical market is the geographical area in which customers are willing to go to find substitutes in response to an increase in price and where suppliers are willing to come in response to an increase in price.

Monopoly power

Re-run

Monopoly power is “the power to control prices or exclude competition.”

United States v. E. I. du Pont De Nemours & Co., 351 U.S. 377, 391 (“*The Cellophane Case*”) (1956)

Monopoly power

Re-run

Monopoly power is “the power to control prices or exclude competition.”

- “Monopoly power” is more than “market power” under § 1.
 - But how much more, we can’t say.
- Theoretically, monopoly power can be proved by direct evidence.
 - But this is rarely available, so ...
- Generally, courts look to market share.

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 by various courts:

- 90% is enough for MP (L. Hand, J., in *Alcoa*)
- 87% “leaves no doubt” that MP exists
- 80-95% is enough for Π to survive sum. j’ment on MP
- 75% means MP “may be assumed”
- min. 70-80% is what lower courts “generally require”
- >66% might be MP
- 60-64% is doubtful for MP (L. Hand, J., in *Alcoa*)
- 50% is the bare minimum for MP for many lower courts
- 30% is insufficient even for § 1 market power

(from p.21 of DOJ’08 report; p. 226 of Elhauge, 3d ed.)

Monopoly power

Re-run

It's mostly about market share ...

But also relevant are:

- barriers to entry
- future capacity constraints
- changing consumer demand
- demand elasticity

Barriers to entry

Re-run

Barriers to entry are things that stop market entrants. If there are no barriers to entry, then it is easy for competitors to spring up.

Examples of barriers to entry:

- huge fixed costs, start-up costs
- government regulations
- patents, other IP rights
- lack of access to needed inputs or essential resources
- network effects

Barriers to entry

Re-run

Barriers to entry are things that stop market entrants to entry, then it spring up.

But note: The Chicago School, which is very influential in the courts, says huge fixed costs / start-up costs don't count if the alleged monopolist has the same costs.

Examples of barriers to entry:

- huge fixed costs, start-up costs
- government regulations
- patents, other IP rights
- lack of access to needed inputs or essential resources
- network effects

Monopoly power: future capacity constraints, changing consumer demand, demand elasticity

Re-run

future capacity constraints

- If an alleged monopolist won't be able to produce in the future, then it may have no monopoly power, such as a coal company that is out of coal reserves.

changing consumer demand

- If consumers no longer want the alleged monopolist's product going forward, than past dominant market share may not be probative.

demand elasticity

- Even with overwhelming market share, if consumers can very easily do without the product, then an alleged monopolist may not have monopoly power.

Monopolization analysis to-do list

- (1) monopoly power in a relevant market
 1. figure out a relevant product market
 2. figure out a relevant geographical market
 3. look at the market share
 4. consider barriers to entry
 5. consider whether future capacity constraints, changing consumer demand, or demand elasticity might let an alleged monopolist off the hook
- (2) exclusionary conduct
[for this analysis, you'll use what we cover next ...]

Monopolization elements

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

Monopolization elements

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EXCLUSIONARY ACT

Re-run

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.

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

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- X100 has 90% share of 12-25 year-olds for Top-40 radio in San Frangeles 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 Frangeles 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 Frangeles. 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?



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Okay, let's add some facts! Let's say there are many advertisers (concert promoters with Taylor Swift tickets, e-scooter services, gum manufacturers, etc.) for whom advertising on classic rock or country is not a substitute for Top 40 radio for reaching their youthful customers. Could X-100 have monopoly power then?

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Okay, let's add some facts! Let's say there are many concert promoters with Taylor Swift in San Francisco, gum manufacturers, etc. Country is not a substitute for youthful customers. Could KZZI have more power then?


Great! Let's stipulate that Top-40 radio is a relevant market!

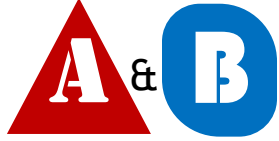
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Is there a good § 2 monopolization claim against A?



Analysis: The market for Product 1 is likely a relevant market because Product 2 does not seem to be a reasonable substitute for most consumers. Also, Townsville would seem to be a relevant geographic market, because the facts make it appear that even though people would drive to Cityburg for many things, few would leave Townsville to buy Product 1. The percentage of A's market share for Product 1 in Townsville is a kind of market share that has long been associated with with monopoly power in the case law. And the facts disclose high barriers to entry. Thus, there appears to be monopoly power. As to anticompetitive conduct, the monopolization claim would appear to fail here, because the kind of pricing A was doing, even if it was with the purpose of driving B out of the market, was not the kind that would qualify as predatory pricing under Brooke Group.