

Attempt and Conspiracy to Monopolize

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.

Attempt to monopolize requires:

- (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, Inc. v. McQuillan, 506 U.S. 447, 456 (1993)

Conspiracy to monopolize requires:

- (1) the existence of a combination or conspiracy to monopolize;
- (2) an overt act in furtherance of the conspiracy;
- (3) the specific intent to monopolize; and
- (4) causal antitrust injury

Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145 (9th Cir. 2003)

Conspiracy to monopolize does not require:

Dangerous probability of success.

Specific Intent:

Specific intent to monopolize must be shown.

Needed both for conspiracy and attempt liability.

Compare the offense of monopolization, for which non specific intent need be shown.

Monopolization requires:

- 1) Monopoly power
- 2) Exclusionary conduct

Monopoly power not required

Monopoly power is not required for either attempt or conspiracy liability.

But, for attempt liability, there must be a dangerous probability of success.

For conspiracy, no probability of success need be shown.