

# Monopolization

## Antitrust

Eric E. Johnson

eejlaw.com



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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.

## 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 requires:

- 1) Monopoly power  
(covered separately)
- 2) Exclusionary conduct

## Intent requirement

Very weak. Some intent is required, but it can be inferred from actions. A purposeful act is required, but there is no need to show a specific intent to monopolize. The defendant may be "Moral wrong" is not required. (United Shoe) But malicious intent can be evidence of the exclusionary nature of the conduct. (Microsoft)

## What counts as exclusionary conduct?

- getting
  - growing, or
  - keeping
- the monopoly

EXCLUSIONARY CONDUCT

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From Grinnell (p. 393):

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#### EXCLUSIONARY CONDUCT

### 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.)

#### EXCLUSIONARY CONDUCT

### Examples of exclusionary conduct

- Predatory pricing (Standard Oil)
- Acquisitions of competitors (Standard Oil)
- Acquisition and retirement of assets (American Tobacco, United Shoe)

EXCLUSIONARY CONDUCT

## Examples of exclusionary conduct

- Refusals to deal with competitors (Aspen Skiing)
- Coercing competitor's suppliers/partners (Standard Oil, Microsoft)
- Denial of access to an essential facility (Otter Tail)

EXCLUSIONARY CONDUCT

## 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

## Fallicious arguments asserted by defendants:

- Illusory choice
- Evils of competition

## Injunctive remedies

*Courts have broad powers ...*

- Can refashion contracts and eliminate restrictions (United Shoe)
- Can order break-up of company (AT&T, American Tobacco, Standard Oil)
- Can order defendant to deal (Otter Tail, Aspen Skiing)
- And more ...