New York State Bar Association Annual Meeting

I. Section 2 of the Sherman Act

a. Generally

i. Section 2 of the Sherman Act prohibits both unilateral activity (*e.g.*, monopolization and attempted monopolization) as well as certain coordinated activity (*e.g.*, joint monopolization and conspiracy to monopolize).[1]

ii. Potential Punishments: $100mm fine for corporation, $1mm fine for individuals, and 10 years in prison (felony violation).[2] Although Section 2 authorizes criminal remedies, the Justice Department has not sought criminal relief in a Section 2 case for many years.

II. Proving Monopolization

a. To prove monopolization the plaintiff must establish that the defendant:

i. Possesses monopoly power in the relevant market;

ii. Has acquired, enhanced, or maintained that power by the use of exclusionary conduct "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident";[3] and

iii. Has caused antitrust injury by its conduct.[4]

b. Possession of Monopoly Power in the Relevant Market

i. Monopoly Power

---

[1] 15 U.S.C. § 2 ("[e]very 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…").

[2] 15 U.S.C. § 2 ("…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.").

[3] *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

[4] 15 U.S.C. § 15. Notably, antitrust injury is only required in private actions.

- Monopoly power under Section 2 has traditional been defined as "the power to control prices or exclude competition."[5]

- The first element of a monopolization claim requires only that monopoly power exists,[6] not that it be exercised.

- "[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so."[7]

- However, short-term monopoly power may not be sufficient to satisfy the first element.[8] Indeed, "the opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[9]

ii. Relevant Market

- Plaintiffs bear the burden of defining the relevant market,[10] which has both product and geographic dimensions.[11]

- The boundaries of the relevant market are determined by the reasonable interchangeability of use of the products; to determine this, courts will look at the cross-elasticity of demand—the rate at which

---

[5] *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

[6] *McWane, Inc. v. FTC*, 783 F.3d 814, 826 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1452 (2016).

[7] *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).

[8] *See, e.g., Colorado Interstate Gas v. Nat. Gas Pipeline Co.*, 885 F.2d 683, 695-96 & n.21 (10th Cir. 1989) (holding that temporary ability to charge monopoly prices will not support a § 2 claim); *Deauville Corp. v. Federated Dep't Stores*, 756 F.2d 1183, 1191 & n.4 (5th Cir. 1985) (finding that short-run control over price of first mall in area did not constitute monopoly power); *Apex Oil Co. v. DiMauro*, 713 F. Supp. 587, 600-01 (S.D.N.Y. 1989) (finding that power over price for a few days is insufficient).

[9] *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

[10] *JetAway Aviation v. Bd. of Cnty. Comm'rs.*, 754 F.3d 824, 850 (10th Cir. 2014).

[11] *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

consumers will switch to one product in response to a price increase in another product.[12]

- The relevant geographic market consists of all physical territories in which actual or potential producers are located ant to which customers can reasonably turn for sources of supply.[13] To determine this, courts look at the elasticity of supply—the rate at which competitors or potential competitors increase their output in response to a price increase.[14]

iii. Evidence of Monopoly Power

- Direct Evidence of Monopoly Power
  - Although generally not available, monopoly power can be proven with direct evidence of the actual exercise of control over prices and/or the actual exclusion of competition from the relevant market.[15]
  - Notably, direct evidence of supracompetitive pricing generally must be accompanied by evidence of restricted output,[16] as well as an analysis of the defendant's costs showing "an 'abnormally high price-cost margin.'"[17]
  - Using direct evidence to show the exclusion of a particular competitor also requires evidence of the power "to exclude all competition generally" from the relevant market.[18]
- Indirect/ Circumstantial Evidence of Monopoly Power

---

[12] *Mylan Pharms. v. Warner Chilcott Pub. Co.*, 838 F.3d 421, 437 (3d Cir. 2016).

[13] *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *Standard Oil Co. v. United States*, 337 U.S. 293, 299 n.5 (1949).

[14] *See Gulf States Reorg. Grp. v. Nucor Corp.*, 721 F.3d 1281, 1286 (11th Cir. 2013).

[15] *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 477-478 (1992).

[16] *Mylan Pharms. v. Warner Chilcott Public Co.*, 2015 U.S. Dist. LEXIS 50026, at *22 (E.D. Pa. 2015).

[17] *Geneva Pharms. Tech Corp. v. Barr Labs.*, 386 F.3d 485, 500 (2d Cir. 2004); *McWane, Inc. v. FTC*, 783 F.3d 814, 830-32 (11th Cir. 2015).

[18] *PNY Techs. Inc. v. SanDisk Corp.*, 2012 U.S. Dist. LEXIS 55965, at *26-27 (N.D. Cal. 2012).

- Market Share as an Indicator

    i. In *United States v. Aluminum Co. of America (Alcoa)*, Judge Learned Hand opined that controlling 90% of supply is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."[19]

    ii. When relying on market share as a proxy for monopoly power, plaintiffs must plead evidence of (1) a relevant product market, (2) a dominant share of the relevant market, and (3) high barriers to entry.[20] Modern courts may require consideration of market factors in addition to dominant market share.[21]

    iii. A market share in excess of 70 percent generally establishes a prima facie case of monopoly power,[22] at least with evidence of substantial barriers to entry[23] and evidence that existing competitors could not expand output.[24] However, courts rarely find monopoly power when market share is less than 50 percent.[25]

- Other Indirect/ Circumstantial Evidence

    i. Barriers to Entry

        1. Absence of meaningful barriers to entry may indicate a defendant lacks monopoly power.[26] Barriers to entry have been defined as either a cost that would have to be borne by an entrant

[19] *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

[20] *McWane, Inc. v. FTC*, 783 F.3d 814, 830-32 (11th Cir. 2015).

[21] *K.M.B. Warehouse v. Walker Mfg. Co.*, 61 F.3d 123 (2d Cir. 1995).

[22] *See, e.g., United States v. Dentsply Int'l*, 399 F.3d 181, 187 (3d Cir. 2005).

[23] *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

[24] *See, e.g., Townshend v. Rockwell Int'l Corp.*, 2000 U.S. Dist. LEXIS 5070, at *36 (N.D. Cal. 2000).

[25] *See, e.g., Prime Healthcare Servs. v. SEIU*, 642 F. App'x 665, 667 (9th Cir. 2016).

[26] *See, e.g., United States v. Dentsply Int'l*, 399 F.3d 181, 187 (3d Cir. 2005).

that was not and is not borne by the incumbent or any condition that is likely to inhibit other firms from entering the market on a substantial scale in response to an increase in the incumbent's prices.[27]

2. Examples include legal requirements,[28] control of natural advantages or suppliers,[29] markets too small for more firms,[30] intellectual property rights,[31] exclusivity arrangements,[32] large capital outlays,[33] economies of scale,[34] and brand name or reputation.[35]

ii. Market Structure and Performance

1. Courts consider other structural characteristics of markets when determining whether a firm has monopoly power, including the relative size and strength of competitors, economies of scale and scope, probable development of the industry, the elasticity of consumer demand, the homogeneity of products, dwindling market demand, and potential competition.[36]

---

[27] *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986).

[28] *See, e.g, Major Mart v. Mitchell Distrib. Co.*, 46 F. Supp. 3d 639, 661 (S.D. Miss. 2014).

[29] *See, e.g., United States v. United Shoe Mach. Co.*, 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

[30] *See, e.g., Union Leader Corp. v. Newspapers of New Eng.*, 284 F.2d 582, 583-84 (1st Cir. 1960).

[31] *See, e.g., Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1207-08 (9th Cir. 1997).

[32] *See, e.g., United States v. Dentsply Int'l*, 399 F.3d 181, 189 (3d Cir. 2005).

[33] *See, e.g., McWane, Inc. v. FTC*, 783 F.3d 814, 831-32 (11th Cir. 2015).

[34] *See, e.g., Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997).

[35] *See, e.g., Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1207-08 (9th Cir. 1997).

[36] *See, e.g., McWane, Inc. v. FTC*, 783 F.3d 814, 830 (11th Cir. 2015).

2. Monopoly power may also be demonstrated by a firm's ability to maintain market share with products or services of comparable or inferior quality.[37]

iii. Regulation

1. When the defendant operates in a highly regulated industry, the nature and scope of the existing regulatory control over the defendant or the market may also be relevant in evaluating the significant of market shares and barriers to entry.[38]

c. **Acquiring, Enhancing or Maintaining Monopoly Power through Exclusionary Conduct**

i. Anticompetitive Conduct Requirement

- In *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, the Supreme Court explained that the mere possession of monopoly power and the accompanying charging of monopoly prices is not only not unlawful, but is in fact "an important element of the free-market system" and that "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place…"[39] In order to safeguard the incentive to innovate, the Supreme Court held that "possession of monopoly power will not be found to be unlawful unless it is accompanied by an element of anticompetitive conduct."[40]

- Anticompetitive conduct may also be called "exclusionary conduct," "deliberateness," or "willfulness."

- 'Exclusionary' conduct encompasses "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further

[37] *See United States v. Eastman Kodak Co.*, 63 F.3d 95, 104 (2d Cir. 1995).

[38] *See, e.g., RSA Media v. AK Media Grp.*, 260 F.3d 10, 15 (1st Cir. 2001).

[39] *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

[40] *Id.*

competition on the merits or does so in an unnecessarily restrictive way."[41]

- Furthermore, it is well established that the anticompetitive conduct must harm more than just a competitor; it must harm the competitive process thereby harming consumers.[42]

ii. Evaluating Anticompetitive Conduct

- Courts have had a difficult time agreeing on any general standards to determine anticompetitive conduct. However, three factors frequently appear in the courts' analyses.

  - Intent of the Defendant

    i. Only a "general intent" to do the act is required for a monopolization claim.[43]

  - The Defendant's Justification

    i. Courts may consider a defendant's "business justification" for its conduct focusing on the justifications significance or magnitude, its relation to the specific conduct in question, and the availability of alternative courses of action with less competitively restrictive results to achieve the same goals.[44]

    ii. However, a monopolist acting "in furtherance of its own economic interests does not constitute the type of business justification that is an acceptable defense to § 2 monopolization."[45]

---

[41] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 & n.39 (1985) (citing 3 P. Areeda & D. Turner, Antitrust Law 78 (1978)).

[42] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001)

[43] *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953).

[44] *See, e.g., United States v. Dentsply Int'l*, 399 F.3d 181, 189 (3d Cir. 2005).

[45] *LePage's Inc. v. 3M Co.*, 324 F.3d 141, 163 (3d Cir. 2003); *see also Del. & Hudson Ry. V. Consol. Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990) ("A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.").

- Effect of the Conduct and the Sufficiency of the Evidence that it has Caused or is Likely to Cause Monopoly Power to be Acquired, Enhanced, or Maintained[46]

    i. Courts may analyze this on an aggregated basis; meaning that even if no single act alone would constitute a violation, taken together, all of the defendant's actions do.[47]

III. Attempt to Monopolize

a. An attempt to monopolize claim requires proof "(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."[48]

i. Exclusionary or Anticompetitive Conduct

- "'Exclusionary' conduct is conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power."[49]

- Anticompetitive conduct injures "competition in the market as a whole," not merely individual competitors.[50]

ii. Specific Intent

- Unlike monopolization claims, attempted monopolization claims require that the defendant had the "specific intent to destroy competition or build a monopoly."[51]

iii. Dangerous Probability of Success

- The Supreme Court has explained that attempted monopolization requires that the challenged conduct, along with the defendant's

---

[46] *McWane, Inc. v. FTC*, 783 F.3d 814, 821 (11th Cir. 2015).

[47] *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 689-99 (1962).

[48] *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993).

[49] *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 475 (5th Cir. 2000).

[50] *Spanish Broad. Sys. v. Clear Channel Communs.*, 376 F.3d 1065, 1075 (11th Cir. 2004).

[51] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 & n.39 (1985).

market position, create a dangerous probability of achieving monopoly power.[52] Accordingly, this prong "requires inquiry into the relevant product and geographic market and the defendant's economic power in that market."[53]

- Courts generally have held that a market share under 30% is presumptively insufficient to satisfy the requirements of an attempted monopolization claim.[54] Additionally, a defendant with a market share between 30 to 50 percent is also unlikely to be found to have the requisite market power to satisfy a claim for attempted monopolization "except when conduct is very likely to achieve monopoly power or when conduct is invidious" (*i.e.*, barriers to entry exist).[55] A market share above 50 percent, however, would support an attempted monopolization claim if the other elements of the offense have been satisfied.[56]

IV. Conspiracy to Monopolize

a. A conspiracy to monopolize claim requires (1) the existence of a combination or conspiracy, (2) an overt act in furtherance of the conspiracy, and (3) the specific intent to monopolize.[57]

i. Existence of a Combination or Conspiracy

- The plaintiff is required to present evidence tending to show that the alleged conspirators in their individual capacities consciously committed themselves to a common scheme designed to achieve an

[52] *American Tobacco Co. v. United States*, 328 U.S. 375, 396 (1905).

[53] *Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993).

[54] *M&M Med. Supplies & Serv. v. Pleasant Valley Hosp.*, 981 F.2d 160, 168 (4th Cir. 1992) (citing IIIA P. Areeda & H. Hovenkamp, Antitrust Law ¶ 807e2, at 359 (1996)).

[55] *Id.*

[56] *M&M Med. Supplies & Serv. v. Pleasant Valley Hosp.*, 981 F.2d 160, 168 (4th Cir. 1992) (citing IIIA P. Areeda & H. Hovenkamp, Antitrust Law ¶ 807e2, at 359 (1996)).

[57] *United States v. Yellow Cab Co.*, 332 U.S. 218, 225 (1947); *American Tobacco Co. v. United States*, 328 U.S. 781, 788, 809 (1946).

unlawful objective.[58] The agreement may be established through direct or indirect evidence.[59]

- However, in *United States v. American Airlines*, the Fifth Circuit held that an unsuccessful solicitation to participate in a price fixing and monopolization conspiracy could form the basis of an attempted conspiracy to monopolize claim.[60]

ii. Overt Act in Furtherance of the Conspiracy

- Acts themselves that are violations of Section 1 of the Sherman Act or that are otherwise unlawful will suffice to establish an overt act in furtherance of a conspiracy. However, the overt act need not be unlawful and may be found in almost any type of activity or practice.[61]

iii. Specific Intent to Monopolize

- Specific intent to achieve monopoly power may be shown by either direct evidence of the defendant's state of mind or inferred from the defendant's conduct.[62]

V. Overview of Market Manipulation under the Commodity Exchange Act (CEA)

a. Manipulation of Commodity Price

i. The CEA prohibits any person from "manipulat[ing] or attempt[ing] to manipulate the price of any commodity."[63]

ii. The statute doesn't define "manipulation," but a court will find manipulation where

- Defendant possesses an ability to influence market prices;

- An artificial price existed;

---

[58] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 760-64 (1984).

[59] *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

[60] *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984).

[61] *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

[62] *Howard Hess Dental Labs. V. Dentsply Int'l*, 602 F.3d 237, 254-58 (3rd Cir. 2010).

[63] 7 U.S.C. § 13(a)(2).

- Defendant caused the artificial price; and
- Defendant specifically intended to cause the artificial price.[64]

iii. The CEA creates a private right of action for a plaintiff injured by a defendant's manipulation of a futures market or organized exchange.[65]

iv. There is also a private right of action for aiding and abetting the prohibited manipulation.[66]

b. **Standing**

i. A plaintiff must have suffered "actual damages," meaning (straightforwardly) economic injury caused by the manipulation.[67]

ii. Only a person who traded in a "contract of sale of any commodity for future delivery" or certain options, swaps, or types of standardized contracts may sue.[68]

iii. Therefore, a plaintiff that does not allege it purchased financial instruments (such as derivatives), the underlying commodity, or another product subject to or affected by the alleged price manipulation lacks standing.[69]

iv. By contrast, a plaintiff that alleges it transacted in derivatives "directly impacted by" the allegedly manipulated index price or other market benchmark can satisfy standing requirements.[70]

---

[64] *Gracey v. J.P. Morgan Chase & Co. (In re Amaranth Natural Gas Commodities Litig.)*, 730 F.3d 170, 173 (2d Cir. 2013).

[65] 7 U.S.C. § 25(a). *See also Thompson's Gas & Elec. Serv. v. BP Am., Inc.*, 691 F. Supp. 2d 860, 871 (N.D. Ill. 2010) (citing 7 U.S.C. § 25(a), and *Three Crown Ltd. P'ship v. Caxton Corp.*, 817 F. Supp. 1033 (S.D.N.Y. 1993)).

[66] 7 U.S.C. § 25(b)(3).

[67] *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 962 F. Supp. 2d 606, 620 (S.D.N.Y. 2013) (citing *Ping He (Hai Nam) Co. Ltd. v. NonFerrous Metals (U.S.A.) Inc.*, 22 F. Supp. 2d 94, 107 (S.D.N.Y. 1998)).

[68] 7 U.S.C. § 25(a)(1).

[69] *Harry v. Total Gas & Power N. Am., Inc.*, 244 F. Supp. 3d 402, 413–14 (S.D.N.Y. 2017).

[70] *See In re Commodity Exch. Inc.*, 213 F. Supp. 3d 631 (S.D.N.Y. 2016) (plaintiffs bought gold on spot market impacted by manipulated Fix Price); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44 (S.D.N.Y. 2016) (plaintiffs bought derivatives tied to manipulated ISDAfix rate); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 2016 U.S. Dist. LEXIS

c. **Antitrust Standing**

i. A plaintiff bringing antitrust claims in addition to CEA market manipulation claims must also satisfy the requirements of antitrust standing / antitrust injury.

ii. In the market manipulation context, this means that—even if a plaintiff did not trade in the market allegedly manipulated—it alleges losses in a market caused by anticompetitive, artificial market conditions in the closely related, allegedly manipulated market.[71]

iii. In other words, the plaintiff's losses must "stem[ ] from a competition-reducing aspect or effect of the defendant's behavior."[72]

iv. Plaintiffs "within the target area of the defendants' alleged anticompetitive behavior" will be able to demonstrate their antitrust standing.[73]

d. **Sufficiency of the Allegations**

i. Because of the scienter element of a CEA market manipulation claim, the heightened pleading requirements of Fed. R. Civ. P. 9(b) may apply.[74]

- Thus, merely alleging that the defendant knew its massive short-term trading would cause artificial price changes does not suffice.[75]

- Nor can a plaintiff survive a motion to dismiss by alleging that it paid artificial prices that were merely foreseeable, unintended consequences of the defendants' efforts to manipulate another price.[76]

- Where a plaintiff's allegations about "the timing of the orders, the conduct of the traders, and [a defendant's] swap holdings strongly

---

128237 (S.D.N.Y. Sept. 20, 2016) (plaintiffs bought forex futures and options impacted by manipulated forex spot market).

[71] *In re Crude Oil Commodity Futures Litig.*, 913 F. Supp. 2d 41, 57 (S.D.N.Y. 2012).

[72] *Id.* (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990)).

[73] *Pollock v. Citrus Assocs. of N.Y. Cotton Exch., Inc.*, 512 F. Supp. 711, 719 (S.D.N.Y. 1981).

[74] *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 535–36 (S.D.N.Y. 2008). You may want to look at the 2d Cir *Silver* case for the proposition that the pleading standard is not settled.

[75] *Id.* at 541-44.

[76] *Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 249 (5th Cir. 2010).

suggest an improper motive," the scienter pleading requirement has been met and dismissal is improper.[77]

- Similarly, allegations that defendants submitted false pricing information on spot trades to affect futures prices survived a motion to dismiss.[78]

ii. Allegations about the defendant's building of large open positions create nothing more than "a very weak inference" of manipulative intent, since "large positions do not necessarily imply manipulation. A trade may indeed acquire a large position in order to manipulate prices. But a trader may also acquire a large position in the belief that the price of the future will, for reasons other than the trader's own activity, move in a favorable direction."[79]

e. **Market Manipulation as a Species of Section 2 Monopolization**

i. A plaintiff could bring claims for CEA manipulation and Sherman Act § 2 monopolization by alleging, *e.g.*, that the defendant acquired and maintained monopoly power in the relevant market and "squeezed" the plaintiff out of that market as part of the defendant's price manipulation scheme.[80]

ii. Put another way, as part of its price manipulation scheme, the defendant may have used its dominant position to "succeed[ ] in excluding competitors from taking a meaningful position in the [relevant] market."[81]

iii. A plaintiff in such a case should allege that the defendant successfully captured market share sufficient to move prices in its favor and engaged in "conduct without a legitimate business purpose that makes sense only because it eliminates competition."[82] Such conduct might include the defendant's payment of supracompetitive prices to benefit its financial swap positions.[83]

---

[77] *Id.* at 541.

[78] *In re Natural Gas Commodity Litig.*, 337 F. Supp. 2d 498, 502 (S.D.N.Y. 2004).

[79] *Gracey*, 730 F.3d at 184.

[80] *See Levy v. BASF Metals Ltd.*, 2017 U.S. Dist. LEXIS 89098, at *21–22 (S.D.N.Y. June 9, 2017).

[81] *Ploss v. Kraft Foods Grp., Inc.*, 197 F. Supp. 3d 1037, 1072 (N.D. Ill. 2016).

[82] *Merced Irrigation Dist. v. Barclays Bank plc*, 165 F. Supp. 3d 122, 142 (S.D.N.Y. 2016) (quoting *In re Adderall XR Antitrust Litig.*, 754 F.3d 128, 133 (2d Cir. 2014)).

[83] *Merced Irrigation*, 165 F. Supp. 3d at 142.

iv. An exchange itself, however, cannot monopolize or attempt to monopolize the market.[84]

VI. Economic Considerations (Weglein)

a. Common denominators in Section 2 financial market manipulation cases

i. Manipulation occurs in one market; incentive derives from another market

- Cases where alleged manipulation is in physical market; incentive derives from positions held in financial market.
  - *e.g.*, Merced – plaintiff alleged that Barclays traded electricity contracts at noncompetitive prices that purposely or depressed daily index prices in the direction that benefited Barclays' swap contracts.[85]
  - *e.g.*, Brent Crude – plaintiffs allege that misreported prices of OTC physical trades of Brent Crude oil to Platts, which had ripple effects "throughout the Brent Crude Oil and futures market, impacting a wide variety of derivatives and futures contracts on NYMEX and ICE."[86]
- Examples of cases where alleged manipulation is in financial market; incentive derives from positions held in physical markets.
  - *e.g.*, Silver futures - "one of JP Morgan's primary possible motives for manipulating the spreads to artificial levels was to benefit itself in the context of physical transactions with its silver counterparties, which were based on COMEX silver futures price settlements." [87]

ii. Manipulation takes the form of "uneconomic" prices

---

[84] *Grosser v. Commodity Exch., Inc.*, 639 F. Supp. 1293, 1310 (S.D.N.Y. 1986) (citing *Strobl v. N.Y. Mercantile Exch.*, 561 F. Supp. 379, 383 n.5 (S.D.N.Y. 1983)).

[85] *See Merced Irrigation District v. Barclays Bank PLC, NYSD 1:15cv4878*

[86] *See In Re: Brent Crude Oil, Trader SAC, ¶126, Landowner SAC ¶142*

[87] See, e.g., *Shak Wacker Grumet v. JPMC, Opinion and Order, June 29, 2016, p.20.*

- In other words, buying, or offering to buy, at a *higher* price than currently prevails in the market; or selling, or offering to sell, at a *lower* price than currently prevails in the market.[88]

- In each case, will need to examine and understand trading strategies in order to assess whether the behavior is uneconomic, or whether there is there some justification that does not relate to exclusion of competitors.

- In each case, will also need to assess whether the uneconomic behavior equates to anticompetitive exercise or acquisition of market power. This discussed in further detail below.

iii. Often involve allegations of impact on market benchmarks

- *e.g.*, Merced – Intercontinental Exchange (ICE) financial swap contracts settled based on a Daily Index; Barclays' swap positions alleged to have benefited from movements in ICE Daily Index that were caused by Barclays' "uneconomic" prices in the physical market.

- *e.g.*, Crude Oil – Prices of "Dated Brent" contracts are incorporated into the pricing assessments published by Platts, which, the plaintiffs alleged, are directly linked to Brent crude oil futures and prices of other derivative contracts.

b. **Economic consideration #1: Are "uneconomic prices" and the ability to impact prices indicative of the existence and exercise of market power?**

i. Economists generally define "market power" as "the ability of a firm or group of firms within a market to profitably charge prices above the competitive level for a sustained period of time."[89]

ii. In typical Section 1 and Section 2 cases, firms collectively or singularly act to achieve market power so as to charge a *higher* price than would otherwise prevail (or, in monopsonization cases, to pay a lower price than would otherwise prevail).

[88] "[P]rices would be either artificially high, if Barclays held a 'long' swap contract as a buyer and bought a high volume of daily contracts at inflated prices to raise the index price, or artificially low, if Barclays held a 'short' swap contract as a seller and sold daily contracts at less-than-market prices to drive down the index price on the settlement date." (*Merced Irrigation District v. Barclays Bank*, Decision and Order, February 29, 2016, pp. 5-6.)
[89] ABA Section of Antitrust Law, Market Power Handbook, American Bar Association, (2005), p. 1.

iii. Here, the conduct alleged often involves the opposite – i.e., charging lower prices than they could command, or paying higher prices than the sellers require.

- Potential asymmetry – charging above-market price will have no impact; charging below-market price will have impact. Does the latter imply market power, in the face of the former?

- Can market power be transitory? Can market structure be transitory, when the factors of production and preferences do not seem to change meaningfully?

- Do institutional features in the determination of benchmarks and their applications factor into the market power determination?

iv. Can transitory market power harm the competitive process? Is any sort of displacement equate to competitive harm?

v. Should incentives/intent matter? Can the same trading behavior be anticompetitive one day and pro-competitive the next?

vi. Can a "predatory" framework be applied, and does it depend on what the purpose of the predation is?

c. **Economic consideration #2: Is reliance on correlations of prices or price benchmarks appropriate?**

i. Many Section 2 market manipulation cases (as well as Sherman Act Section 1 cases) assert correlations to establish that prices were manipulated and/or to establish harm

- *e.g.,* Merced – alleged co-movement of Dow Jones Daily Index and ICE Daily Price Index

- *e.g.,* Brent Crude – alleged correlation of Brent crude and WTI and LLS

- *e.g.,* Silver Futures – alleged correlation between OTC silver market and the silver spreads

ii. Dislocations in financial markets are not uncommon; where de-coupling of prices is asserted, must be shown that these are unrelated to market fundamentals.

iii. Where co-movements are asserted to establish harm, it must be shown that changes in prices in one market *caused* changes in the other market.

VII. Case law supporting application of Sherman Act to financial manipulation by unilateral actors (Kovel)

a. ***Strobl v. New York Mercantile Exch.*, 768 F.2d 22 (2d Cir. 1985)**

i. "Plainly, Congress had the issue of the applicability of the antitrust laws to commodities trading squarely before it. It was aware that the antitrust laws had historically been applied in that context and expressly rejected attempts to change that scheme. Significantly, Congress adopted language that had been proposed to insure that the antitrust laws would remain applicable to commodities trading and preserved the jurisdiction of the federal courts in the commodities field. All of this points inescapably to the conclusion that it was part of Congress's fixed purpose to have the antitrust laws apply in a case such as the instant one. We therefore hold that enactment of the Commodity Exchange Act did not effect a repeal of the antitrust laws."[90]

b. ***Wacker v. JP Morgan*, 678 F. Appx. 27 (2d Cir. 2017)**

i. Holding that plaintiffs adequately pled monopolization of long-dated silver futures contracts by alleging that defendants "submitted bid/asks that exceeded the alleged value of the silver futures' economic outputs" in an attempt to "influence the price settlement committee[.]"[91]

c. ***In re Crude Oil Commodity Futures Litig.*, 913 F. Supp. 2d 41 (S.D.N.Y. 2012)**

i. Sustaining allegations that defendants monopolized WTI calendar spreads by "intentionally acquir[ing] substantial positions in WTI calendar spreads that it knew would respond favorably to its [uneconomic] activities in the physical market."[92]

d. ***Merced Irrigation District v. Barclays Bank PLC*, 165 F. Supp. 3d 122 (S.D.N.Y. 2016)**

i. Holding that plaintiffs adequately pled that Barclays' achieved and used monopoly power to manipulate prices through the "payment of supra-competitive prices to benefit its financial swaps" with the intention to

[90] *Strobl v. New York mercantile Exch.*, 768 F.2d 22, 29 (2d Cir. 1985).

[91] *Wacker v. JP Morgan Chase & Co.*, 678 F. Appx. 27, 30 (2d Cir. 2017).

[92] *In re Crude Oil Commodity Futures Litig.*, 913 F. Supp. 2d 41, 52 (S.D.N.Y. 2012).

"artificially inflate or deflate market prices and constrain the market for other buyers and sellers of electricity."[93]

e. ***In re Term Commodities Cotton Futures Litig.*, No. 12 Civ. 5126, 2013 WL 9815198 (S.D.N.Y. 2013)**

i. Holding that plaintiffs adequately pled defendants monopolized cotton futures by "intentionally acquir[ing] large long positions and add[ing] to them, knowing that if they stopped the contracts, there would not be adequate deliverable supplies and prices would rise accordingly" despite the availability of "cheaper, higher quality cotton in the cash market[.]"[94]

f. **But *See Harry v. Total Gas & Power North America, Inc.*, 889 F.3d 104 (2d Cir. 2018)**

i. Rejecting plaintiffs' assertion that defendants' alleged monopolization and manipulation at regional natural gas hubs sent "shockwaves" that "reverberated through" to trading at the major hub, which in turn harmed plaintiffs.[95] The court further noted that "the more different the contracts and the more distant the places the contracts are traded, the more work a plaintiff will need to do to make the connection between a defendant's manipulation and a plaintiff's actual injury plausible."[96]

VIII. Case law rejecting Sherman act application to financial manipulation by unilateral actors (Prewitt)

a. **Generally**

i. Where there exists a specific regulatory framework carefully tailored to address a particular economic context, recovery under the Sherman Act may be precluded for cases involving market manipulation.[97]

ii. In addition, lack of antitrust injury may preclude recovery under the Sherman Act for cases involving market manipulation by unilateral actors.

iii. Further, antitrust plaintiffs may not be efficient enforcers.

iv. Finally, it may be difficult to establish the requisite proof of exclusionary conduct for market manipulation cases brought under Section 2.

---

[93] *Merced Irrigation*, 165 F. Supp. 3d at 142-143.

[94] *In re Term Commodities Cotton Futures Litig.*, No. 12 Civ. 5126, 2013 WL 9815198, at *25-26 (S.D.N.Y. Dec. 20, 2013).

[95] *Harry* v. *Total Gas & Power North America, Inc.*, 889 F.3d 104, 109 (2d Cir. 2018).

[96] *Harry*, 889 F.3d at 113-114.

[97] *See Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007)*; Verizon Commc'ns. Ins. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004)

b. Implied immunity
    i. Applies where two statutes are inconsistent; the doctrine seeks to reconcile and preserve the aims and objectives of each to the greatest extent possible.
    ii. Historical evolution of implied antitrust immunity in the financial sector (securities).
        - *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963)
            - Antitrust laws and securities laws have different goals,[98] and there exists a "potential incompatibility between antitrust and specific regulatory schemes that might arise due to the different perspectives of competition."[99]
        - *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659 (1975)
            - Application of the Sherman Act would "unduly interfere" with the "operations of the Securities Exchange Act."[100]
        - *U.S. v. Nat'l Ass'n of Secs. Dealers, Inc.*, 422 U.S. 694 (1975).
            - Allowing an "antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger" of subjecting businesses "to duplicative and inconsistent standards."[101]
    iii. Modern Supreme Court jurisprudence on implied immunity
        - *Verizon Commc'ns. Ins. v. Trinko, LLP*, 540 U.S. 398 (2004).
            - Holding that the doctrine of implied immunity barred recovery under § 2 where "the enforcement scheme" (Telecommunications Act) presented a "good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme that might be voiced by courts exercising jurisdiction under the antitrust laws."[102]
        - *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007)
            - The Supreme Court held that doctrine of implied immunity barred application of Section 1 of the Sherman Act to investment banks that allegedly conspired to restrict the sale of IPOs, highlighting the negligible benefits of antitrust litigation where (i) a regulator "actively enforces the rules and regulations that forbid the conduct in

[98] *See Silver*, 373 U.S. at 359 ("[T]he antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable.").

[99] BARAK ORBACH, The IMPLIED ANTITRUST IMMUNITY 10 (citing *Trinko*, 540 U.S. at 408).

[100] *Gordon*, 422 U.S. at 685-86.

[101] *Nat'l Ass'n of Secs. Dealers*, 422 U.S. at 735.

[102] *Trinko*, 540 U.S. at 406 (citations omitted).

question[,]"[103] (ii) investors can sue for damages under the non-antitrust laws, and (iii) the regulator is required to account for "competitive considerations when it creates securities-related policy and embodies it in rules and regulations."[104]

iv. Policy implications
    - Potential for low benefits, incorrect results, and inconsistent judgments
        - When a regulatory scheme intends to deter and remedy anticompetitive harm, the benefits of additional antitrust enforcement are relatively low.[105]
    - As Justice Breyer expressed in *Billing*, regulation diminishes the likelihood of antitrust harm,[106] and observed that, "antitrust courts are likely to make unusually serious mistakes."[107] Regulated and partially regulated industries tend raise problems that traditional antirust policy cannot resolve.[108]
    - Application of antitrust laws may run afoul of the specific remedy rule.
        - The specific remedy rule, like the doctrine of implied immunity, holds that antitrust laws should not apply where a more "specific" statue or regulation offers an avenue for recovery.

[103] *Billing*, 551 U.S. at 276-77.

[104] *Id*. at 283.

[105] *Trinko*, 540 U.S. at 412-14 ("[where] the existence of a regulatory structure designed to deter and remedy anticompetitive harm[,] . . . the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. . . . [a]gainst the slight benefits of antitrust intervention . . .we must weigh a realistic assessment of its costs.").

[106] *Billing*, 551 U.S. at 283 ("[A]ny enforcement-related need for an antitrust lawsuit is unusually small.")

[107] *Id.* at 282.

[108] BARAK ORBACH, THE IMPLIED ANTITRUST IMMUNITY n.116 (citing STEPHEN BREYER, REGULATION AND ITS REFORM 159-61 (1982); Stephen Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CAL. L. REV. 1005 (1987*); Pacific Bell Telephone Co. v. Linkline Communications, Inc*., 555 U.S. 438, 459 (2009) (Breyer, J., concurring) ("When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits.")).

c. Lack of antitrust injury can be fatal to many cases involving market manipulation by unilateral actors.[109]
    i. Antitrust injury can be very difficult to establish in the market manipulation context for two reasons.[110]
        - It may be difficult to establish that the injury was "caused by" the challenged conduct due to complex market relationships and causal dynamics.
        - The challenged conduct may not be "type of injury contemplated by the statute" because rate-setting for financial instruments may involve collaborative, as opposed to competitive, processes.
    ii. *Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104, 116 (2d Cir. 2018)
        - "Set aside whether [Plaintiffs] were part of the same market as Defendants (they were not) or whether they have shown that Plaintiffs' alleged injuries were the fulcrum for Defendants' scheme (they were not); Plaintiffs do not even present evidence that they traded at artificial prices. There is no actual injury the Plaintiffs allege, let alone a connection between Defendants' unlawful conduct and that non-injury."
        - "Similarly, there is no reason to examine whether Plaintiffs are efficient enforcers; they cannot be."
    iii. *In re LIBOR-BASED Financial Instruments Antitrust Litigation*, 962 F.Supp.2d 606 (S.D.N.Y. 2013).
        - Court denied plaintiffs' motion to amend their antitrust claims because plaintiffs had "failed to plead antitrust injury and thus lacked standing.[111]
    iv. *In re Zinc Antitrust Litig*., 155 F. Supp. 3d 337 (S.D.N.Y. 2016)
        - "The injury resulting from monopolization (or attempted monopolization) is higher prices for output or reduced output; the 'output' here is LME Zinc Warehouse Services. 'Higher prices' would reference prices for such services; restrictions in output would relate to restrictions in availability of such services. Plaintiffs' claim is quite different: that they purchase the good that is stored and pay higher prices for that good—the physical zinc—itself."
    v. *In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419 (S.D.N.Y. 2015)
        - Plaintiffs' "injuries come[] from a combination of actions relating to warehouse load-out delays and warrant trading—not solely the one and not solely the other. This interaction is not part of the § 2 claim."

---

[109] *See In re LIBOR-BASED Financial Instruments Antitrust Litigation*, 962 F.Supp.2d 606, 624 (S.D.N.Y. 2016); *see also Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (requiring injury-in-fact which has been caused by the antitrust violation and is of the type contemplated by the Sherman Act).

[110] *Pueblo Bowl-O-Mat*, 429 U.S. at 489.

[111] *In re LIBOR-BASED Financial Instruments Antitrust Litigation*, 962 F.Supp.2d 606, 624 (S.D.N.Y. 2013).

- "It is only the combination of the coordinated actions of many different participants that spells out how plaintiffs' injury can be inextricably intertwined with the anticompetitive conduct . . . . There are others more appropriately situated to pursue a monopoly claim in this market. The [plaintiffs] are simply too remote from the market for LME-certified warehouse services for aluminum to have antitrust standing to pursue a claim based on anticompetitive conduct in that market."

d. Antitrust plaintiffs may not be efficient enforcers.
   i. Antitrust injury is "not always sufficient" to establish standing.
   ii. Other factors may indicate that a party who states an antitrust injury is nevertheless an improper antitrust plaintiff.
   iii. *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 443 (2d Cir. 2005)
      - Factors include: (1) "the directness or indirectness of the asserted injury"; (2) "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement"; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries."[112]
   iv. *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 778 (2d Cir. 2016)
      - Second Circuit remanded to district court to consider "whether the putative plaintiff is a proper party to 'perform the office of a private attorney general' and thereby 'vindicate the public interest in antitrust enforcement.'"
   v. *In re Zinc Antitrust Litig*., 155 F. Supp. 3d 337, 362 (S.D.N.Y. 2016)
      - "It is easy to see that the injury arising from monopolization of a service would be to buyers and sellers of that service. And plaintiffs were neither. For the same reason, plaintiffs would not be efficient enforcers—the efficient enforcers would be participants in that market."
   vi. *Harry v. Total Gas & Power N. Am., Inc*., 889 F.3d 104, 116 (2d Cir. 2018)
      - "There is no actual injury the Plaintiffs allege, let alone a connection between Defendants' unlawful conduct and that non-injury."
      - "Similarly, there is no reason to examine whether Plaintiffs are efficient enforcers; they cannot be."

e. Finally, the requisite proof of exclusionary conduct may be lacking.[113]

---

[112] *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 443 (2d Cir. 2005)

[113] *See Shak v. JPMorgan Chase & Co.*, S.D.N.Y., No. 1:15-cv-00992-PAE; *compare In re Term Commodities Cotton Futures Litig.*, 2013 WL 9815198 (S.D.N.Y. 2013) (concrete allegations of a dominant position combined with significant pricing anomalies); *In re Crude Oil Commodity Futures Litig.*, 913 F. Supp 2d 41 (S.D.N.Y. 2012) (same).

i. The unilateral behavior of a "rational, hard-nosed market actor" may not be sufficient to establish liability under the Sherman Act.[114]
ii. *Olde Monmouth Stock Transfer Co. v. Depository Tr. & Clearing Corp.*, 485 F. Supp. 2d 387 (S.D.N.Y. 2007)
    - Dismissal of monopolization claims where securities depository industry was distinct from the stock transfer agent industry in which defendant actually competed. *Id.*

[114] *Shak v. JPMorgan Chase & Co.*, S.D.N.Y., No. 1:15-cv-00992-PAE