Monopolization

Sherman Act Section 2

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Sherman Act § 2

Section 2 of the Sherman Act makes it unlawful for any person to "**monopolize**, or **attempt** to monopolize, or . . . **conspire** . . . to monopolize . . ." 15 U.S.C. § 2.

- A Section 2 violation requires:
  1. Possession of **monopoly power** in a **relevant market**, AND
  2. **Exclusionary conduct**.
- Possessing monopoly power or a very high market share is not, by itself, unlawful.

✓ Permissible	✗ Impermissible
Monopolies attained by superior products, business acumen, or historical accident.	Willful acquisition, abuse and/or maintenance of monopoly power via exclusionary or otherwise unlawful conduct.

- The United States generally takes a cautious approach to enforcing § 2.

Attempt and Conspiracy

Attempted Monopoly

- Exclusionary or anticompetitive conduct,
- With a specific intent to monopolize,
- In a properly defined relevant market
- With a "dangerous probability of achieving monopoly power."

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

Malden Transportation* v. *Uber
321 F.Supp.3d 174 (D. Mass. Jun 18, 2018)

- Boston Taxi companies alleged that Uber attempted to monopolize the greater Boston ride-hail market.
- The alleged exclusionary conduct was below-cost pricing with the specific intent of achieving monopoly power in the local ride-hail market and obstructing, restraining and excluding competition.
- The court granted Uber's motion to dismiss for failure to state a claim, finding insufficient evidence that Uber set prices below cost in the Boston area or had the specific intent to destroy competition.
- "Without an unlawful intent, increasing sales and increasing market share are normal business goals."

Very difficult standard!

Conspiracy to Monopolize

- A combination, agreement or conspiracy (does not need to be a formal agreement),
- An overt act in furtherance of the conspiracy,
- With a specific intent to monopolize.

Times-Picayune Pub. Co. v. *United States*, 345 U.S. 594, 626 (1953)

Monopoly Power

Monopoly power may be proven by direct or indirect evidence.

- **Direct evidence:** the ability to control prices and/or exclude competition.
- **Indirect evidence:** monopoly power can be inferred from:
  - High market shares AND
  - Significant barriers to entry.

- Courts demand a "dominant" market share, but disagree on the requisite percentage.
  - Controlling 90% of supply "is enough to constitute a monopoly; it is doubtful whether 60% or 64% percent would be enough; and certainly 33% is not." *United States* v. *Aluminum Co.*, 148 F.2d 416, 424 (2d Cir. 1945).
  - 100% market share does not imply monopoly power where barriers to entry are low. *Fabrication Enters.* v. *Hygenic Corp.*, 848 F. Supp. 1156, 1160 (S.D.N.Y. 1994), *rev'd on other grounds*, 64 F.3d 53 (2d Cir. 1995).

Monopoly Power: Defining the Relevant Market

The first step in finding a Section 2 violation is defining the relevant market, which has two components:

1. Product and
2. Geography.

Considerations:

- Reasonable interchangeability ("cross-elasticity of demand").
- Customers' perspective. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).

American Football League* v. *National Football League
323 F.2d 124 (4th Cir. 1963)

- AFL alleged that the NFL offered expansion franchises to certain cities (Dallas & Minneapolis) to frustrate AFL's plan to move into the cities.
- AFL wanted the market to be defined as the 17 cities in which NFL was operating franchises.
- After defining the relevant market as nationwide professional football, the Fourth Circuit held that the NFL did not possess monopoly power.

Monopoly Power: Identifying Barriers to Entry

Entry barriers are "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns."

Rebel Oil Co. v. *Atlantic Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995)

Examples include:

- Regulatory regimes or approvals (*e.g.*, patents, licensing, or other IP rights);
- Control of necessary inputs;
- Existing exclusivity arrangements or other long-term restrictions on entry; and
- Sometimes, high capital costs or brand name/seller entrenchment.

- Also consider the history of entry, including frequency, magnitude and success, or lack thereof.

Tops Markets* v. *Quality Markets
142 F.3d 90, 99 (2d Cir. 1998)

- Tops supermarket had a contract to purchase 4 parcels of land in Jamestown, NY. Allegedly upon discovering this, Quality supermarket purchased 2 of the parcels, making its purchase expressly contingent upon the termination of the seller's prior contract with Tops.
- The Second Circuit found that Quality did not have monopoly power despite 70% market share because of recent successful entry by competitors such as Wegmans.

Exclusionary Conduct

- "Anticompetitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *Caribbean Broad. Sys., Ltd.* v. *Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998).
- Disadvantaging rivals by means other than competition on the merits
  1. Refusal to Deal (Essential Facilities)
  2. Exclusive Dealing
  3. Predatory Pricing
  4. Anti-Competitive Product Design
  5. Others (e.g., dispar-agement)

CollegeNET* v. *Common Application
2017 WL 4772552 (9th Cir. 2017)
- The Ninth Circuit reversed the district court's dismissal.
- CollegeNET alleged Common Application monopolized the standardized college application process by:
  1. limiting college choice,
  2. decreasing the scope of services and price competition available to student applicants, and
  3. foreclosing rivals from entry to the market, thereby "leaving one dominant provider offering inferior products and services."
- Failure to allege below-cost pricing not fatal to claims

Exclusionary Conduct: Refusal to Deal

- A firm generally has a right to deal or not deal with whomever it chooses. *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919) (the "*Colgate* Doctrine"). *See also Verizon Commc'ns* v. *Trinko, LLP*, 540 U.S. 398 (2004).
- Consider whether the conduct impaired competition on some basis other than efficiency or competition on the merits.

Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.
472 U.S. 585 (1985)
- An All-Aspen lift ticket gave skiers access to three mountains owned by Ski Co. and one owned by Highlands. Ski Co. discontinued the ticket and took other action that made it difficult for Highlands to market its product.
- Ski Co. violated Section 2 by terminating a prior course of dealing with Highlands and acting contrary to its own economic interests without any legitimate business purpose.
- The Court considered the effect of Ski Co.'s conduct on consumers, Highlands, and Ski Co. itself.
  - Skiers were adversely affected by the elimination of the ticket;
  - Highland's share of the market steadily declined; and
  - The decision was not justified by any normal business purpose.

Exclusionary Conduct: Essential Facility

- A facility is essential if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants – it need not be indispensable.
- Requires proof of:
  - Control of the essential facility by a monopolist;
  - A competitor's inability practically or reasonably to duplicate the essential facility;
  - The denial of the use of the facility to a competitor; and
  - The feasibility of the monopolist providing access to the facility.
- Recently, this theory has been disfavored.

Hecht* v. *Pro-Football, Inc.
570 F.2d 982 (D.C. Cir. 1977)

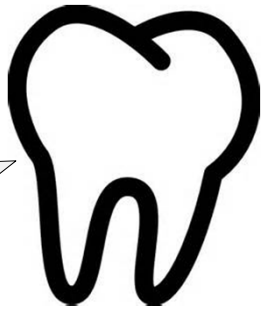
- The AFL wanted a D.C. team, and the only stadium in the D.C. metro area suitable for playing pro football was RFK stadium (leased exclusively to the Redskins).
- Court remanded, finding that a team may not use a restrictive covenant to foreclose on a facility where the facility may not practicably be duplicated by would-be competitors.

Exclusionary Conduct: Exclusive Dealing

- An exclusive dealing contract prevents a distributor from selling the products of a different supplier.

United States* v. *Dentsply
399 F.3d 181 (3d Cir. 2005)

- Dentsply wouldn't sell to dealers unless the dealer agreed to "not add further tooth lines [i.e., sell competitor's products] to their product offering."
- None of Dentsply's dealers gave up Dentsply's product line to take on a competitor.
- Third Circuit held that Dentsply's exclusive dealing agreements had substantial anticompetitive threats.



Exclusionary Conduct: Predatory Pricing

- The two elements of a predatory pricing claim are:
  1. The prices complained of are below an appropriate measure of costs; AND
  2. There is a dangerous probability that the company will recoup its investment in the below-cost prices.

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

- There is much debate about how to measure below-cost pricing.

United States* v. *AMR Corp.
335 F.3d 1109 (10th Cir. 2003)

- American Airlines lowered prices and increased capacity on certain Dallas routes, allegedly to drive out low cost carriers. After the carriers failed, American reduced flights and raised prices again.
- The court held that the government failed to establish the first element of *Brooke Group*, because American did not price below Average Variable Cost (the average of costs that vary with the level of output) for any route.
  - There is no general consensus as to what the appropriate measure of cost is, although cost can be divided into "fixed" and "marginal" costs, and Average Variable Cost is a proxy for marginal cost.

Spirit Airlines* v. *Northwest Airlines
431 F.3d 917 (6th Cir. 2005)

- Northwest dramatically reduced its fares and increased the number of flights on some Detroit routes, allegedly to drive out Spirit.
- The Sixth Circuit reversed summary judgment for Northwest, holding that a reasonable trier of fact could find that leisure or price-sensitive passengers are a separate and distinct market in the airline industry, Northwest possessed the requisite market power, Northwest engaged in predatory conduct, and Northwest's profits showed a probability of recouping its investment.

Exclusionary Conduct: Product Design

Introduction of a new product or modification of an existing product that makes the interconnection/interoperability with a competitor's products more difficult and expensive.

- A new or modified product introduction, even by a monopolist, is generally pro-competitive where it improves performance or reduces costs.
  - Increased scrutiny if motivated by anticompetitive intentions.

Allied Orthopedic Appliances* v. *Tyco Health Care Grp.
592 F.3d 991, 1001 (9th Cir. 2010)

- Hospitals and healthcare providers alleged manufacturer Tyco redesigned its pulse oximetry sensors to make them incompatible with generic products.
- The Ninth Circuit held that the redesign was an improvement because it added flexibility and reduced cost for consumers of pulse oximetry equipment.
  - The court noted this is not a balancing analysis; if the design change is an improvement, it is "necessarily tolerated by the antitrust laws."

Comparative Glance

The European equivalent of monopolization is "Abuse of Dominance."

- Article 102 of the Treaty on the Functioning of the European Union prohibits "any abuse by one or more undertakings of a dominant position . . ." E.g.:
  1. Imposing unfair prices or trading conditions
  2. Limiting production, markets or technical development
  3. Applying dissimilar conditions to equivalent transaction
  4. Contracts subjected to supplementary obligations

Generally more aggressive than the United States

Google Android

Case 40099 (European Commission, Competition) (Jul 18, 2018)

- The Commission fined Google approx. $5 billion, finding that Google imposed illegal restrictions on device manufacturers and mobile network operators to maintain its dominance in general internet search.
- The Commission stated that Google (1) required device makers to pre-install Google search and the Chrome browser, (2) paid large manufacturers to exclusively bundle Google apps, and (3) blocked new open source development on the Android mobile software platform. Along with the fine, Google must cease these activities and refrain from any with similar effects.
- Google is currently appealing the ruling.