# VII. MONOPOLIZATION

## A. Overview

The second, and perhaps the most enigmatic, of antitrust's three great pillars is the monopolization offense, which prohibits some unilateral conduct by monopolists and near-monopolists that may harm competition. Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits monopolization, attempted monopolization, and conspiracy to monopolize:

> 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.

This raises one of the thorniest questions in all of antitrust law: what exactly does it mean to "monopolize"? How is it different from simply having or exploiting monopoly power? And how is it different from aggressive competition, which antitrust is supposed to encourage, even—and perhaps especially—from monopolists?

The Supreme Court has said that monopolization has just two elements: (1) monopoly power; and (2) "anticompetitive conduct."[480] Monopoly power is fairly straightforward. But it is harder to figure out what the conduct test is. Sometimes courts describe it as a requirement of "predatory" or "exclusionary" behavior, or just something *other* than "competition on the merits."[481] But the parade of synonyms is little help in practice.

Happily, there is broad agreement about some fundamentals of Section 2 law. First, the prohibition applies to firms that hold or acquire monopoly power (and, for the attempt offense, those who have a dangerous probability of attaining it through the challenged conduct). Second, monopolization centrally involves either the acquisition or the maintenance—meaning the increase or entrenchment—of monopoly power. Thus, Section 2 generally does not prohibit conduct unless it increases the magnitude or durability of monopoly power, even if that conduct harms consumers or rivals and even if it exploits existing monopoly power.[482] For example, merely charging high prices does not constitute monopolization. Third, the prohibition does not cover *all*, or even most, conduct that leads to the acquisition or maintenance of monopoly power: there are plenty of lawful ways to attain, keep, or increase monopoly power. In particular, courts routinely emphasize that Section 2 does not prohibit conduct that is variously described as "industry," "honest competition," "innovation," and so on, which is often contrasted with behavior labeled "predatory," "exclusionary," and "anticompetitive."[483] But the resulting line between lawful competition and unlawful monopolization has always been complex, blurry, and controversial.[484]

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[480] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[481] *See*, *e.g.*, Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 506 (9th Cir. 2010) ("illegitimate predatory practices"); Superior Prod. P'ship v. Gordon Auto Body Parts Co., 784 F.3d 311, 318 (6th Cir. 2015) ("anti-competitive or exclusionary means"); Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 522 (5th Cir. 1999) ("means other than . . . competition on the merits").

[482] *See* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[483] *See*, *e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) (monopolization offense is concerned with "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"); Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 854 (7th Cir. 2011) ("After all, many kinds of conduct may prevent or discourage a potential competitor from entering a particular market. Federal antitrust laws are implicated only when that conduct is predatory or unjustifiable.").

[484] *See*, *e.g.*, Thomas A. Lambert, *Defining Unreasonably Exclusionary Conduct: The "Exclusion of a Competitive Rival" Approach*, 92 N.C. L. Rev. 1175, 1177 (2014) (noting that the "problem with Section 2" is that "nobody knows what it means"); Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 342 (2003) (suggesting that "[i]t is time . . . to acknowledge that the emperor has no clothes," and that monopolization doctrine is a "barrage of conclusory labels"); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147, 147–48 (2005) ("Notwithstanding a century of litigation, the scope and meaning of exclusionary conduct under the Sherman Act remain poorly defined. No generalized formulation of unilateral or multilateral exclusionary conduct enjoys anything approaching universal acceptance.").

Whether there are truly principles common to all monopolization cases, and what those principles might be, remains unclear. There is a flourishing scholarly literature offering theories of monopolization that purport to explain current law, outline desirable reforms, or both. These theories differ widely. For example, some commentators and courts indicate that monopolization law should prohibit only those practices that make "no economic sense" but for their tendency to drive out rivals and contribute to monopoly[485]; others claim that courts should assess whether an individual practice can be shown to be actually harmful, overall, to consumers[486]; others think Section 2 should condemn only conduct that would be capable of excluding an "equally efficient competitor" from the market (to avoid antitrust becoming a tool to protect less effective rivals from the rigors of competition)[487]; while still others propose that monopolization law should be reframed into a series of bright-line rules to avoid bogging courts and agencies down in difficult factual assessments.[488] Former AAG Hew Pate once called the search for a general monopolization framework a hunt for a "Holy Grail" of antitrust.[489]

Partly as a result of this indeterminacy, and partly for fear that monopolization law will end up discouraging monopolists from competing aggressively, modern courts are often reluctant to impose liability under Section 2, above all in cases involving novel practices, unusual markets, or new technologies.[490] Agencies and plaintiffs, in turn, may be deterred by the uncertain prospects of success from even filing a Section 2 case in the first place. This is a serious concern, and suggests that it would be valuable to clarify monopolization law. Nevertheless, claims of agency inaction are often overstated: the agencies, and the FTC in particular, have a long record of bringing monopolization cases, including in high-technology markets.[491]

Although no general theory of monopolization has won broad acceptance, legal standards are clearer for some specific kinds of practices (such as exclusivity, tying, and predatory pricing) that might fall under the monopolization umbrella. Such practices are governed by a set of more specific doctrinal frameworks (or "micro-rules"): thus, for example, we have a set of rules for tying claims, a set of rules for predatory pricing claims, and so on. So, while we are still waiting for a Grand Unified Theory of Monopolization to win universal acceptance, we have a pretty good working sense of the standards that govern familiar categories of monopolization theories.

Today, monopolization law faces several sharp questions. These include:

- **Digital markets and platform ecosystems.** Section 2 is center stage in debates about antitrust's response to the problems of digital monopoly. How, for example, should monopolization law apply to conduct by digital platform businesses that excludes competition on their own platforms? Many platforms face a choice between a "closed" business model, in which third parties are not permitted to offer products and services that interoperate with the platform, and an "open" business model, in which third parties are permitted to offer some such services. Does monopolization law give businesses a right to compete—at all or on particular terms—against monopolists on their own platforms? If so, will antitrust law encourage businesses to fully close their platforms? Is that a good thing? "Closed systems" have existed for a long time in other settings (*e.g.*, healthcare systems): are digital ecosystems special?

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485 *See*, *e.g.*, Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413 (2006); In re Adderall XR Antitrust Litig., 754 F.3d 128, 133 (2d Cir. 2014).

486 *See*, *e.g.*, Steven C. Salop & Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and* Microsoft, 7 Geo. Mason L. Rev. 617, 652 (1999).

487 Richard A. Posner, ANTITRUST LAW (2001) 43.

488 Open Markets Institute, *Restoring Antimonopoly Through Bright-Line Rules*, PROMARKET (Apr. 26, 2019), https://www.promarket.org/2019/04/26/restoring-antimonopoly-through-bright-line-rules/; Zephyr Teachout, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY (2020) 214 (FTC should "lay out very particular clear, bright-line rules—like speed limits—against certain kinds of 'vertical' behavior").

489 R. Hewitt Pate, *The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct* (Oct. 23, 2003).

490 *See*, *e.g.*, FTC v. Qualcomm Inc., 969 F.3d 974, 990–91 (9th Cir. 2020).

491 *See* Daniel Francis, *Making Sense of Monopolization*, 84 Antitrust L.J. 779, Appx. A (2022) (collecting more than 30 selected monopolization cases filed by federal enforcers post-*Microsoft*). *Compare*, *e.g.*, Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. Indus. Org. 714, 742–43 (2018) ("[M]any observers appear frustrated that the DOJ and the FTC have brought very few Sherman Act Section 2 monopolization cases over the past 25 years.").

- **The antitrust / IP interface.** How should monopolization law interact with intellectual property law? In particular, when should antitrust liability be imposed for conduct involving the use and enforcement of IP rights, or of claimed IP rights?[492] (We will explore some of these themes in detail in Chapter X.)
- **Is the bar too high?** For a long time, courts have been explicitly concerned with the dangers of too much monopolization enforcement.[493] Has this led the law astray: in particular, do courts today impose unrealistically demanding conditions in monopolization cases? Do they require unnecessarily clear or convincing evidence of actual effects on outcomes of the competitive process, such as price or quality?
- **What about unfamiliar conduct?** How should courts approach conduct falling outside the familiar categories of concern (exclusive dealing, tying, and so on)? What legal criteria should apply to the assessment of practices that appear to increase or shore up monopoly but that do not neatly fall into established doctrinal categories? Should courts be skeptical of practices that appear to them to be non-standard, or should they err in favor of tolerating novel practices unless and until their harmful tendencies are clear?
- **Monopsony and monopsonization.** As we have already seen, antitrust is equally concerned with monopoly power on the buy-side of a market ("monopsony power").[494] It follows that Section 2 provides a basis to prohibit and remedy "monopsonization"—conduct that improperly creates or augments monopsony power—as well as traditional seller-side monopolization. But this concern has not been particularly visible in Section 2 enforcement practice or case law, nor heavily studied by academic writers. Where, and how, might agencies and courts find troubling monopsonization out in the world? How, if at all, should monopsonization doctrine differ from traditional monopolization law?
- **Criminal prosecution.** As we've seen, the Sherman Act makes monopolization a *felony*, punishable by criminal fines and up to 10 years of imprisonment. But modern practice confined criminal prosecution to *per se* violations of Section 1 until 2022, when DOJ launched a series of criminal monopolization prosecutions.[495] Is this desirable? What is the proper role for criminal enforcement of Section 2?

This chapter will give only a brief overview of this deeply complex area of law. In Section B we will consider the foundation-stone of monopolization doctrine: monopoly power. In Section C we will examine some of the common threads that appear to unite all monopolization cases: exclusion of rivals; contribution to monopoly power; the monopolist's freedom of competitive action; and the analysis of procompetitive justifications. In Section D, we will consider some of the most important recognized categories of monopolization: exclusivity, tying, and so on. Finally, in Section E, we will briefly encounter the attempt and conspiracy variations on the core monopolization offense.

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[492] As we will see in Chapter X there are many perspectives on the right way to define this interface. *See*, *e.g.*, Robin Feldman, *Patent and Antitrust: Different Shades of Meaning*, 13 Va. J.L. & Tech. 1, 18–20 (2008); Makan Delrahim, *The "New Madison" Approach to Antitrust and Intellectual Property Law* (speech of Mar. 16, 2018), https://www.justice.gov/opa/speech/file/1044316/download; Daniel Francis, *Making Sense of Monopolization*, 84 Antitrust L.J. 779 (2022); Herbert Hovenkamp, Mark D. Janis, Mark A. Lemley, Christopher R. Leslie & Michael A. Carrier, 1 IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW (2020).

[493] *See*, *e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) (Hand., J.) ("The successful competitor, having been urged to compete, must not be turned upon when he wins."); Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (under Section 2 "[m]istaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect"). *See also* Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) 157 ("The real danger for the law is less that predation will be missed than that normal competitive behavior will be wrongly classified as predatory and suppressed.").

[494] *See supra* § III.E.

[495] *See* Press Release, U.S. Department of Justice, Executive Pleads Guilty to Criminal Attempted Monopolization (Oct. 31, 2022); Press Release, U.S. Department of Justice, Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border (Dec. 6, 2022). For earlier signals, *see* Richard A. Powers, *Effective Antitrust Enforcement: The Future Is Now* (remarks of June 3, 2022); *see also* Jonathan Kanter, *Remarks at 2022 Spring Enforcers Summit* (Apr. 4, 2022). *See also* Daniel A. Crane, *Criminal Enforcement of Section 2 of the Sherman Act*, 84 Antitrust L.J. 753 (2022); D. Daniel Sokol, *Reinvigorating Criminal Antitrust?*, 60 Wm. & Mary L. Rev. 1545 (2019); Spencer W. Waller, *The Incoherence of Punishment in Antitrust*, 78 Chi.-Kent L. Rev. 207 (2003). For older cases, *see* United States v. Dunham Concrete Prods., Crim. No. 1842 (E.D. La. 1969); United States v. United Fruit Co., 11 Trade Reg. Rep. (CCH) ¶ 45,063, at 52,528 (July 16, 1963); United States v. Gen. Motors Corp., 11 Trade Reg. Rep. (CCH) ¶ 45,061, at 52,424 (Apr. 12, 1961).

# B. Monopoly Power

It is elementary that the first element of the monopolization offense is the possession of monopoly power.[496] Monopoly power is something like market power,[497] but it is greater in magnitude. It thus amounts to something like very substantial market power, although it is certainly not limited to "strict monopoly" involving only a single seller. But, as Einer Elhauge explains in the following extract, this is a harder concept to pin down than we might think. You may remember some of these concerns from our discussion of the law of market power in Chapter III.

### Einer Elhauge, Defining Better Monopolization Standards

**56 Stan. L. Rev. 253 (2003)**[498]

The Court defines "monopoly power" as "the power to control prices or exclude competition." This definition raises a problem because the standard economic definition of any "market power" is a power to raise prices over the competitive level. Given this, doesn't all market power necessarily give a defendant "control" over its prices and thus make it a monopolist? Apparently not, because the Court has stressed: "Monopoly power under § 2 requires, of course, something greater than market power under § 1." But then, just what is the difference?

To an economist, the distinction is theoretically puzzling: A firm either enjoys a downward-sloping demand curve or it doesn't. But courts and regulators sensibly recoil from that conclusion because it would make antitrust far too sweeping given that, in our brand-differentiated world, just about every producer has a brand name that enables it to enjoy a downward-sloping demand curve and thus has some pricing discretion. This is a problem that has only gotten worse over time, as we have moved from an economy that tends to focus on mass-produced, homogeneous commodities to an economy that focuses on providing not only brand-differentiated products but services and experiences that inevitably enjoy some pricing discretion. Likewise, the price discrimination normally taken to evidence market power is so ubiquitous that it would indicate market power exists everywhere. The logical purity of the economist's test thus must be rejected, for it would disable the monopoly power element from serving its intended function of limiting antitrust challenges against unilateral conduct to a subset of cases where the potential harm to markets is gravest.

The usual reaction is to cut down on this excessive potential sweep by defining monopoly power to be a "significant" or "substantial" degree of market power. But this raises three problems. The first is rather predictable: This approach is vague about how much power it takes to cross this line of "substantiality." The second problem is more comical. To avoid excessive sweep even under § 1, market power itself is normally defined as not just any ability to raise prices above competitive levels but an ability to raise prices "substantially" over those levels. We are thus left with a standard that defines itself as requiring a substantial degree of a sort of power that is itself defined to exist only when substantial. This builds vagueness upon vagueness. It reminds me of the story of the flat-earth adherent who insisted the earth rested on the back of a giant turtle, and when asked what held up the turtle, answered that from then on, "it's turtles all the way down." Substantial turtles, one supposes.

The third problem is more serious: This standard fails even to define which variable is having its "substantiality" judged. One could imagine . . . deciding the monopoly power issue based directly on whether a particular firm's individual demand curve has an elasticity lower than some defined number X, or on whether it has the ability to raise prices more than Y percent over the competitive level, with less demanding Xs and Ys being used to define market power. But while considering such issues, courts generally seem moved more by market shares, with the classic formulation being that 90% is certainly enough, 33% is certainly not, and 60–64% is close to the line. Nor is the market share approach supported by only precedent and the statutory language referring to a "monopoly," for a pure firm-specific demand elasticity approach that ignored market share would create problems by sweeping in firms with brands that enjoy considerable pricing discretion but compete vigorously with other brands. It would also cause legal rules to vary from day to day with shifts in demand, costs, or rival abilities, and would subject

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496 *See*, *e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 570 (1966).

497 *See supra* §§ II.F (economics of market power) and III.E (law of market power)

498 {*Eds.: A full version of this work previously appeared in the Stanford Law Review at the citation above. When possible and appropriate, please cite to that version.*}

different firms that engage in the same anticompetitive conduct to acquire the same high market share to different rules depending on the degree of demand elasticity in their industry. On the other hand, a market share test is problematic because high market shares may not indicate much ability to raise prices over competitive levels, which is the economic injury of concern. We are thus left uncertain about just what to do when our inferences from market share conflict with those from firm-specific demand elasticity. [. . .]

[But] at least we all have a sense of what sort of evidence moves us closer to a conclusion of monopoly power: More market share or more discretion over prices makes it more likely a firm has monopoly power. Sometimes these two standards diverge, but it is not the case that the sort of evidence that affirmatively supports a monopoly power conclusion under one standard actually cuts against that conclusion under the other standard. And often the same sort of evidence supports a monopoly power conclusion under either standard. While we may not know how many lost hairs it takes to become bald, and have some conflict in beliefs about what precisely constitutes a hair, most of the time that variation in belief does not matter much because the same sorts of things are judged a hair under either belief.

{*Eds: later in the article, Elhauge proposes a working definition: a market share of 50% and the "ability to either influence marketwide prices or impose significant marketwide foreclosure that impairs rival efficiency."*}

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Monopoly power—like market power, as you will remember from Chapter III—can be shown through "direct evidence," like evidence of control over prices and output levels in the relevant market, and/or through "indirect evidence," usually in the form of a high share of a defined relevant market protected by barriers to entry.[499]

In practice, as you might expect, market share is often an important starting point for inquiries into monopoly power (just as with market power). Broadly speaking, and while courts express differing views, a market share of around 70% is often suggestive of monopoly,[500] although—as with market power—evidence of share is usually relevant but not dispositive.[501] A seminal statement of the relationship between market share and monopoly is found in *Alcoa*, a 1945 decision of the Second Circuit.

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[499] *See*, *e.g.*, Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., 20 F.4th 466, 484 (9th Cir. 2021); Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 434–38 (3d Cir. 2016); McWane, Inc. v. FTC, 783 F.3d 814, 830 (11th Cir. 2015); United States v. Microsoft Corp., 253 F.3d 34, 51–52 (D.C. Cir. 2001) (en banc).

[500] *See*, *e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992) ("Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is . . . sufficient to survive summary judgment under the more stringent monopoly standard of § 2.") (citations omitted); United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) ("87% of the accredited central station service business leaves no doubt that the congeries of these defendants have monopoly power."); Dreamstime.com, LLC v. Google LLC, 54 F.4th 1130, 1137 n.5 (9th Cir. 2022) ("Generally, 65% market share is sufficient to establish that a defendant has monopoly power."); Comprehensive Sec., Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tennessee, No. 21-5617, 2022 WL 670135, at *5 (6th Cir. Mar. 7, 2022) ("Where market share can be estimated to be significant—usually upwards of 75% to 80%—courts find monopoly power exists and that the threshold inquiry has been satisfied."); FTC v. AbbVie Inc, 976 F.3d 327, 371 (3d Cir. 2020) ("A court can infer market power from a market share significantly greater than 55 percent.") McWane, Inc. v. FTC, 783 F.3d 814, 830 (11th Cir. 2015) (90–95% "plainly high enough"); Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 174 (4th Cir. 2014) ("Although there is no fixed percentage market share that conclusively resolves whether monopoly power exists, the Supreme Court has never found a party with less than 75% market share to have monopoly power."); Colorado Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989) ("While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70% and 80%."); Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc., 651 F.2d 122, 129 (2d Cir. 1981) ("[A] market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power.").

[501] *See*, *e.g.*, Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., Inc., No. 22-2289, 2023 WL 5521221, at *9 (3d Cir. Aug. 28, 2023) (evidence of a 90% market share at one point in time, standing alone, was not enough to compel a finding of market power); Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 967 (10th Cir. 1990) ("[M]arket share alone is insufficient to establish market power.") (internal quotation marks and citation omitted); Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc., 651 F.2d 122, 128 (2d Cir. 1981) ("The trend of guidance from the Supreme Court and the practice of most courts endeavoring to follow that guidance has been to give only weight and not conclusiveness to market share evidence.").

## CASENOTE: United States v. Aluminum Co. of America

### 148 F.2d 416 (2d Cir. 1945)

*Alcoa* concerned a challenge by the Department of Justice to a variety of practices used by the Aluminum Company of America ("Alcoa"), an industrial powerhouse of the mid-20th century that still exists today. (We will talk briefly about the challenged practices later in this chapter.[502] For now, as our focus is on the question of monopoly power, it is enough to know that DOJ challenged a range of conduct, including acquisitions, buying-up of important inputs, and other behavior.) In an unusual feature of the case, so many Supreme Court Justices were recused that a quorum could not be formed. So the case was referred to the Second Circuit, where Judge Learned Hand wrote an opinion that has become a landmark in the history of monopolization.[503]

Before considering whether Alcoa's conduct had violated Section 2, Judge Hand was required first to figure out whether Alcoa held monopoly power in the market for aluminum. It was easy enough to measure aluminum output, but two complexities presented themselves: first, whether the market share calculations should include Alcoa's production of aluminum for the use of its own downstream businesses, rather than for sale on the open market; and, second, whether the ability of some customers to use "secondary" (*i.e.*, recycled) aluminum rather than "virgin" (*i.e.*, new) aluminum ingot should be considered as an independent source of competition in the market. It was not clear whether there was any physical difference between virgin and secondary aluminum: certainly the plaintiff had not proven any such difference, although some customers declined to use secondary.

In approaching the analysis, Judge Hand articulated a meaning of "monopoly power" that has passed into antitrust scripture: "[Ninety percent] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." This rough guidance about the inference of monopoly power from market share is still cited with approval by courts.[504] (Indeed, it is probably the only holding of the case that is routinely invoked or relied upon by courts and litigants today! Much of the court's analysis of conduct has been overtaken by time and subsequent case law.)

On the first issue, Judge Hand concluded that Alcoa's production of aluminum ingot for internal use *should* count toward its share of the market for aluminum. That production, he pointed out, "necessarily had a direct effect on the ingot market," by reducing the demand for aluminum from other sources.[505] As a result, Alcoa's market share should reflect all of its production, whether Alcoa chose to sell it on the open market or not.

On the second issue, Judge Hand declined to treat the availability of recycled "secondary" aluminum as an independent "competitor" when calculating market shares. The fact that some customers might use their aluminum again, or sell it to others who would, did not change the identity or relative strength of the suppliers of fresh aluminum to the market. "Alcoa always knew that the future supply of ingot would be made up in part of what it produced at the time, and, if it was as far-sighted as it proclaims itself, that consideration must have had its share in determining how much to produce. . . . The competition of secondary [aluminum] must therefore be disregarded, as soon as we consider the position of Alcoa over a period of years; it was as much within Alcoa's control as was the production of the 'virgin' [aluminum] from which it had been derived."

Alcoa was an unusual (and complicated!) case in many ways. One was that it involved an assessment of competition between a product and a kind of recycled or second-hand supply of that same product. Would you have included secondary aluminum in the same market as virgin? Can you think of other markets or industries where "second-hand" products might be an important constraint on new production? Why do you think Judge Hand indicated

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[502] *See infra* § VII.C.3.

[503] For some context regarding the Alcoa case ("antitrust's closest equivalent to an epic poem"), *see* Marc Winerman & William E. Kovacic, *Learned Hand, "*Alcoa,*" And The Reluctant Application Of The Sherman Act*, 79 Antitrust L.J. 295 (2013).

[504] *See*, *e.g.*, Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 935 (6th Cir. 2005); Syufy Enterprises v. Am. Multicinema, Inc., 793 F.2d 990, 995 (9th Cir. 1986); City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc., 838 F.2d 268, 279 (8th Cir. 1988); In re Pool Prod. Distribution Mkt. Antitrust Litig., 940 F. Supp. 2d 367, 382 (E.D. La. 2013); Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP, 612 F. Supp. 2d 330, 368 n.156 (S.D.N.Y. 2009).

[505] This may remind you of some of the logic in Wickard v. Filburn, 317 U.S. 111 (1942), which was decided just a few years earlier.

that the extent of substitutability differed from one use to the next, but did not measure monopoly power within individual use-specific product markets?[506]

In some cases, the evidence of monopoly power is clear-cut; in other cases, the picture is complex. Digital markets can pose particular challenges: not just in proving monopoly power after discovery but even in alleging it in a complaint. In some such markets it may be hard to identify something that could plausibly be used as a market share—market shares are not legally necessary for a plaintiff, but they sure do help! A central issue in the disposition of the FTC's first antitrust complaint against Facebook was whether the FTC had adequately alleged that Facebook held monopoly power in a market for personal social networking ("PSN") services. The case involved a Section 2 challenge to Facebook's acquisition of competitive threats, and its use of "platform policies" that allegedly punished app developers from competing or working with rivals.

## FTC v. Facebook, Inc.

### 560 F. Supp. 3d 1 (D.D.C. 2021)

Judge Boasberg.

[1] Begin with the linchpin of this Opinion: whether the FTC has plausibly alleged, as it must, that Facebook exercises monopoly power. . . . [M]onopoly power is the power to control prices or exclude competition, such that a firm is a monopolist if it can profitably raise prices substantially above the competitive level. Where a plaintiff can provide direct proof that a firm has in fact profitably done so, the existence of monopoly power is clear. Because such proof is rare, however, plaintiffs and courts usually search for indirect or circumstantial evidence of monopoly power by inferring it from a firm's possession of a dominant share of a relevant market. . . . Because market power is meaningful only if it is durable, a plaintiff proceeding by the indirect method of providing a relevant market and share thereof must also show that there are barriers to entry into that market.

[2] Although the FTC briefly suggests in its Opposition that it can offer direct proof of market power . . . it spends nearly its entire brief arguing why it has sufficiently pleaded indirect proof—viz., that Facebook has a dominant share of a relevant product and geographic market (the United States market for Personal Social Networking [("PSN")] Services) protected by entry barriers. Because the agency thus makes no real direct-proof argument, the Court will analyze the Complaint's market-power allegations using the indirect framework. Again, that framework first requires the plaintiff to establish the relevant market in which the defendant firm allegedly has monopoly power. . . . It then demands that a plaintiff establish that the defendant has a dominant share of that market protected by entry barriers. . . . As the Court explains below, it is the market-share step that trips up the FTC here. [. . .]

[3] Off the bat, there is ample authority that the FTC's bare assertions would be too conclusory to plausibly establish market power in any context. It is hard to imagine a market-share allegation that is much more conclusory than the FTC's here.

[4] Even accepting that merely alleging market share "in excess of 60%" might sometimes be acceptable, it cannot suffice in this context, where Plaintiff does not even allege what it is measuring. Indeed, in its Opposition the FTC expressly contends that it need not specify which metrics or method it used to calculate Facebook's market share. In a case involving a more typical goods market, perhaps the Court might be able to reasonably infer how Plaintiff arrived at its calculations—e.g., by proportion of total revenue or of units sold. As the above market-definition analysis underscores, however, the market at issue here is unusual in a number of ways, including that the products therein are not sold for a price, meaning that PSN services earn no direct revenue from users. The Court is thus unable to understand exactly what the agency's "60%-plus" figure is even referring to, let alone able to infer the underlying facts that might substantiate it.

[5] Rather than undergirding any inference of market power, Plaintiff's allegations make it even less clear what the agency might be measuring. The overall revenues earned by PSN services cannot be the right metric for

[506] *Compare*, *e.g.*, FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 303 (D.D.C. 2020) (defining product markets around specific end uses).

measuring market share here, as those revenues are all earned in a separate market—viz., the market for advertising. Percent of daily users or monthly users of PSN services—metrics the Complaint mentions offhandedly—are not much better, as they might significantly overstate or understate any one firm's market share depending on the various proportions of users who have accounts on multiple services, not to mention how often users visit each service and for how long.

[6] What about the share of total time spent by users on PSN services? Plaintiff says nothing about that metric in its Complaint. And although it seems tenable at first glance, that metric may also be of limited utility. That is because at least some of the features offered by a Facebook or Instagram or Path are not, seemingly, part of those firms' PSN-services offerings as defined by the FTC; time spent on those apps or websites, accordingly, is not necessarily time spent on a PSN service. The Commission, for instance, expressly alleges that social-networking services based on interest-based connections such as Strava are not, by its definition, PSN services. That definition of what is in the market, perhaps counterintuitively to Facebook users, would mean that time a user spends engaging with specific interest-based Facebook pages or groups may not qualify as time spent on a PSN service. The same problem arises when a user passively consumes online video on a PSN service. To the extent that, say, Instagram users spend their time on the site or app watching a comedy routine posted by the official page of a famous comedian, are they spending time on a PSN service? If not, as the Complaint suggests is the case, then time spent "on Facebook" or "on Instagram" bears an uncertain relationship to the actual metric that would be relevant: time spent using their PSN services in particular. Put another way, the uncertainty left open by the Complaint as to exactly which features of Facebook, Instagram, et al. do and do not constitute part of their PSN services, while not necessarily rendering the alleged PSN-services market implausible, compounds the trouble created by the FTC's vaguer-still allegations regarding Facebook's share of that market.

[7] Nor do the difficulties stop there. Readers may well have noticed that the discussion to this point has consistently referred to Instagram and Facebook as examples of PSN services. That is because, outside of Path, Myspace, and Friendster, all of which seem to be long defunct or quite small, Plaintiff's Complaint does not identify any other providers of PSN services. Yet the FTC is apparently unwilling to allege that Facebook has ever (pre- or post-Instagram acquisition) had something like 85% or even 75% market share; instead it hedges by offering only that the number is somewhere north of 60%. The question naturally arises: which firms make up the remaining 30–40%? Although Plaintiff is correct that it is not required to identify every alleged competitor in its pleadings, its choice to identify essentially none is striking. Especially when combined with its refusal to offer any clue as to how it calculated its noncommittal market-share number, the Court cannot see how the Commission has nudged its market power claims across the line from conceivable to plausible. Its complaint must therefore be dismissed.

[8] The Court's decision here does not rest on some pleading technicality or arcane feature of antitrust law. Rather, the existence of market power is at the heart of any monopolization claim. As the Supreme Court explained in [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)], itself an antitrust case, [a] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. Here, this Court must exercise that power. The FTC's Complaint says almost nothing concrete on the key question of how much power Facebook actually had, and still has, in a properly defined antitrust product market. It is almost as if the agency expects the Court to simply nod to the conventional wisdom that Facebook is a monopolist. After all, no one who hears the title of the 2010 film "The Social Network" wonders which company it is about. Yet, whatever it may mean to the public, "monopoly power" is a term of art under federal law with a precise economic meaning: the power to profitably raise prices or exclude competition in a properly defined market. To merely allege that a defendant firm has somewhere over 60% share of an unusual, nonintuitive product market—the confines of which are only somewhat fleshed out and the players within which remain almost entirely unspecified—is not enough. The FTC has therefore fallen short of its pleading burden.

[9] That said, because it believes that the agency may be able to cure these deficiencies by repleading, the Court will dismiss without prejudice only the Complaint, not the entire case, leaving Plaintiff free to amend [its] pleading and continue the litigation. Whether and how the agency chooses to do so is up to it.

* * *

The FTC took the hint and bulked up the complaint's monopoly-power allegations, as the next extract shows.

## FTC v. Facebook, Inc.

### 581 F. Supp. 3d 34 (D.D.C. 2022)

Judge Boasberg.

[1] [T]he Court now addresses what has thus far been the FTC's Achilles' heel: sufficiently alleging Facebook's market dominance. In the last go-round, the Commission alleged only that Facebook has maintained a dominant share of the U.S. personal social networking market (in excess of 60%) since 2011, and that no other social network of comparable scale exists in the United States. The Court concluded that such bare allegations—which do not even provide an estimated actual figure or range for Facebook's market share at any point over the past ten years—ultimately fall short of plausibly establishing that Facebook holds market power. Because it was conceivable that the agency may be able to cure these deficiencies by repleading, however, the Court dismissed the Complaint without prejudice, leaving Plaintiff free to amend its pleading and continue the litigation.

[2] The FTC has now done precisely that, adding substantial new allegations about the contours of Facebook's market share. Most notably, the Amended Complaint alleges far more detailed facts to support its claim that Facebook has today, and has maintained since 2011, a dominant share of the relevant market for U.S. personal social networking services. Specifically, the Amended Complaint includes allegations regarding Facebook's market share of daily average users (DAUs) and monthly average users (MAUs) of [personal social networking ("PSN")] services in the United States, as well as its share of users' average time spent on PSN services. For instance, the FTC alleges that, based on an analysis of data maintained by Comscore, a commercially-available data source, Facebook's share of DAUs of apps providing personal social networking services in the United States has exceeded 70% since 2016 and was at least as high in 2011. Indeed, the Amended Complaint alleges that, from September 2016 through December 2020, Facebook's share of DAUs among apps providing personal social networking services in the United States averaged 80% per month for smartphones, 86% per month in tablets, and 98% per month for desktop computers, and that Facebook's share of DAUs has not dropped below 70% in any month on any device-type. The combined shares of other PSN providers, meanwhile—which the FTC identifies as including Snapchat, Google+, Myspace, Path, MeWe, Orkut, and Friendster—did not exceed 30% on any device type during any month in this period.

[3] The agency's allegations concerning MAUs tell the same story. Again relying on Comscore data, the FTC alleges that Facebook's share of MAUs of apps providing personal social networking services in the United States has exceeded 65% since 2012 and was at least as high in 2011. Similarly, the combined shares of other providers did not exceed 32% on either device type, mobile or desktop, in any month during the period of September 2012 to December 2020. Plaintiff's allegations concerning Facebook's share of the time spent by users of apps providing personal social networking services in the United States are also in accord with the DAU and MAU data. In fact, the FTC alleges that Facebook's share of users' time spent on such services has exceeded 80% since 2012 and was at least as high in 2011.

[4] The Amended Complaint also adequately alleges that the three metrics offered to measure market share—DAUs, MAUs, and time spent—are appropriate indicators. The FTC explains, consistent with common sense, that a personal social networking service's attractiveness to users, and therefore its competitive significance, is related to its number of users and to how intensively its users engage with the service. Significantly, the Amended Complaint alleges that Facebook itself uses these metrics to assess its performance, as well as that of rival PSN services. Indeed, in the ordinary course of business, Facebook's executives and investors, rival personal social networking providers, and industry observers have assessed the performance of Facebook Blue, Instagram, and other personal social networking providers using measures of active user base and how much people use the services—with DAUs, MAUs, and the amount time spent by users on the service being common units of measure. For instance, Facebook's internal presentations assessing the performance of Facebook Blue and Instagram focus on time spent per month, MAUs, and DAUs, and the company relies on these same metrics to assess its rivals' competitive significance.

[5] The FTC similarly alleges that other firms offering PSN services cite these metrics. Snapchat, for example, regularly compares its performance with that of Instagram by observing the firms' MAUs, DAUs, and time spent metrics. Relatedly, the FTC also alleges that commercial data sources track the usage of online services within the United States using metrics such as MAUs, DAUs, and time spent.

[6] Considering these new allegations and granting Plaintiff the benefit of all inferences that can be derived from the facts alleged, means that the Amended Complaint contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. In stark contrast with its predecessor, this Complaint provides reinforcing, specific allegations that all point toward the same conclusion: Facebook has maintained a dominant market share during the relevant time period. Accepting the market definition (which Defendant does) and the truth of Plaintiff's market-share allegations (which the Court must at this stage), Facebook's market share comfortably exceeds the levels that courts ordinarily find sufficient to establish monopoly power.

**NOTES**

1) What is the difference between market power and monopoly power? Would we do better to eliminate the distinction altogether? How could we do so?
2) What does it mean to talk as Elhauge does about a firm having "more discretion over prices"? Don't all businesses have a profit-maximizing price, such that all other prices would be less profitable?
3) How does antitrust's conception of "monopoly power" differ from the everyday public usage of that term? Would it be an improvement to use the everyday meaning instead?
4) Do you think that, in practice, the managers of businesses generally know whether or not their business holds monopoly power in the antitrust sense? Does this matter for antitrust law or policy?
5) As we have seen, the court gave some famous guidance in *Alcoa* about the relationship between market share and monopoly power, often cited by courts today. But how do you think the *Alcoa* court calculated or determined that "[ninety percent] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not"? Where did this come from?
6) How would you measure market share in social networking? Does Facebook's share of monthly and daily active users, and of time spent on the platform, illuminate the kind of power that antitrust's concept of monopoly is designed to capture? Why, or why not? What other information or materials would you consider probative or helpful, and why?
7) Some markets for content are highly differentiated. How would you go about figuring out whether a content publisher—say, a book publisher or a music publisher—had monopoly power in the antitrust sense?
8) What does "monopoly power" mean in a market in which the product or service is provided to a user for free? Is the concept helpful or important in such markets? Why, or why not?
9) Suppose that every brand of some product (say, clothing, music, or candy) has a small percentage of customers who are fanatically loyal to the brand and will pay vastly in excess of the competitive price for it. Is each of those brands a monopolist in a price-discrimination market? (The economics and law of price-discrimination markets are covered in Chapters II and III respectively.). What facts would affect your answer?
10) Suppose that a firm is the only supplier of a particular product or service, but that its prices are limited by law at what the government (correctly) considers to be a roughly competitive level. Does that firm hold monopoly power in the antitrust sense, such that Section 2 would govern its conduct?

## C. The Conduct Element: Are There Any Common Principles?

So we know that Section 2 applies to monopolists. But what, exactly, does Section 2 tell a monopolist that it may not *do*? What counts as "exclusionary," "anticompetitive," or "predatory" conduct? Or, to put it another way, what counts as "competition on the merits"? As we will see in the next section, we have pretty good micro-rules for analyzing specific types of conduct like exclusivity, tying, and so on: but are there any common principles that apply across Section 2? Can we understand the micro-rules as reflecting or implementing some deeper underlying themes?

In this Section we will focus on four "big picture" themes or ideas that characterize many monopolization cases and which might be understood to underpin the micro-rules for individual practices: (1) a violation of Section 2 requires "exclusion" of one or more rivals (that is, impairment of their ability or incentive to compete); (2) a violation requires that the exclusion be sufficiently likely to make a contribution to the defendant's monopoly power; (3) some practices (like above-cost discounting, or an unconditional refusal to deal) are treated much more indulgently than other practices; and (4) courts are willing to consider procompetitive justifications for conduct that would otherwise constitute monopolization, even if the rules for analyzing justifications are less than perfectly clear.

We will take these four themes in turn, before turning in the next section to specific categories of exclusionary practice. Keep in mind that this is just one way of thinking about the common threads or themes that unify Section 2. There are plenty of other ways of understanding what monopolization law does, or should do.

## 1. Exclusion

The first, and perhaps the clearest, of the unifying themes in monopolization law is that, in order to violate Section 2, the monopolist's conduct must in some way suppress the ability or incentive of rivals to compete. In other words, it must tend to "exclude." This can be, and usually is, accomplished in a way that we might call "indirect": that is, by changing the incentives of trading partners (like input suppliers, distributors, or customers) in a way that increases competitors' costs. For example, signing key trading partners up to deal with the monopolist exclusively, or on preferred terms, can drive up rivals' costs and reduce competitive pressure on the monopolist. In rarer cases, exclusion can be accomplished in a way that we might call "direct": that is, operating immediately on the excluded firms, such as by offering threats or benefits to induce actual or potential rivals to avoid competition,[507] by purchasing them, or even by directly damaging their competitive assets.[508] (The terms "direct" and "indirect" do not appear in the cases: they are used here to illustrate a difference between two categories of exclusion.)

A simple example of indirect exclusion is found in the Third Circuit's *Dentsply* decision. In that case, the defendant monopolist obtained exclusive control over dental dealers—the best and most cost-effective method of distributing dental products to the customers (dental laboratories)—leaving rivals to make do with markedly inferior alternatives. The court imposed monopolization liability.

### United States v. Dentsply Intern., Inc.

**399 F.3d 181 (3d Cir. 2005)**

Judge Weis.

[1] . . . Dentsply has long dominated the [prefabricated artificial teeth] industry consisting of 12–13 manufacturers and enjoys a 75%—80% market share on a revenue basis, 67% on a unit basis, and is about 15 times larger than its next closest competitor.

[2] For more than fifteen years, Dentsply has operated under a policy that discouraged its dealers from adding competitors' teeth to their lines of products. In 1993, Dentsply adopted "Dealer Criterion 6." It provides that in order to effectively promote Dentsply–York products, authorized dealers "may not add further [(*i.e.*, competitors')] tooth lines to their product offering." Dentsply operates on a purchase order basis with its distributors and, therefore, the relationship is essentially terminable at will. Dealer Criterion 6 was enforced against dealers with the exception of those who had carried competing products before 1993 and were "grandfathered" for sales of those products. Dentsply rebuffed attempts by those particular distributors to expand their lines of competing products beyond the grandfathered ones. [. . .]

[3] Dealers have been dissatisfied with Dealer Criterion 6, but, at least in the recent past, none of them have given up the popular Dentsply teeth to take on a competitive line. [. . .]

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[507] *See*, *e.g.*, FTC v. Actavis, Inc., 570 U.S. 136 (2013) ("pay for delay").

[508] *See*, *e.g.*, Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002).

[4] The reality is that over a period of years, because of Dentsply's domination of dealers, direct sales have not been a practical alternative for most manufacturers. It has not been so much the competitors' less than enthusiastic efforts at competition that produced paltry results, as it is the blocking of access to the key dealers. This is the part of the real market that is denied to the rivals.

[5] The apparent lack of aggressiveness by competitors is not a matter of apathy, but a reflection of the effectiveness of Dentsply's exclusionary policy. Although its rivals could theoretically convince a dealer to buy their products and drop Dentsply's line, that has not occurred. [. . .]

[6] The realities of the artificial tooth market were candidly expressed by two former managerial employees of Dentsply when they explained their rules of engagement. One testified that Dealer Criterion 6 was designed to "block competitive distribution points." He continued, "Do not allow competition to achieve toeholds in dealers; tie up dealers; do not 'free up' key players."

[7] Another former manager said:

> You don't want your competition with your distributors, you don't want to give the distributors an opportunity to sell a competitive product. And you don't want to give your end user, the customer, meaning a laboratory and/or a dentist, a choice. He has to buy Dentsply teeth. That's the only thing that's available. The only place you can get it is through the distributor and the only one that the distributor is selling is Dentsply teeth. That's your objective.

These are clear expressions of a plan to maintain monopolistic power.

[8] The District Court detailed some ten separate incidents in which Dentsply required agreement by new as well as long-standing dealers not to handle competitors' teeth. For example, when the DLDS firm [(a dealer)] considered adding two other tooth lines because of customers' demand, Dentsply threatened to sever access not only to its teeth, but to other dental products as well. DLDS yielded to that pressure. The termination of Trinity Dental, which had previously sold Dentsply products other than teeth, was a similar instance. When Trinity wanted to add teeth to its line for the first time and chose a competitor, Dentsply refused to supply other dental products. [. . .]

[9] The evidence demonstrated conclusively that Dentsply had supremacy over the dealer network and it was at that crucial point in the distribution chain that monopoly power over the market for artificial teeth was established. The reality in this case is that the firm that ties up the key dealers rules the market. [. . .]

[10] The factual pattern here is quite similar to that in LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003). There, a manufacturer of transparent tape locked up high volume distribution channels by means of substantial discounts on a range of its other products. We concluded that the use of exclusive dealing and bundled rebates to the detriment of the rival manufacturer violated Section 2. Similarly, in [United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001)], the Court of Appeals for the D.C. Circuit concluded that, through the use of exclusive contracts with key dealers, a manufacturer foreclosed competitors from a substantial percentage of the available opportunities for product distribution.

[11] The evidence in this case demonstrates that for a considerable time, through the use of Dealer Criterion 6 Dentsply has been able to exclude competitors from the dealers' network, a narrow, but heavily traveled channel to the dental laboratories. [. . .]

[12] Assessing anti-competitive effect is important in evaluating a challenge to a violation of Section 2. Under that Section of the Sherman Act, it is not necessary that all competition be removed from the market. The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit. [. . .]

[13] By ensuring that the key dealers offer Dentsply teeth either as the only or dominant choice, Dealer Criterion 6 has a significant effect in preserving Dentsply's monopoly. It helps keep sales of competing teeth below the critical level necessary for any rival to pose a real threat to Dentsply's market share. As such, Dealer Criterion 6 is a solid pillar of harm to competition. [. . .]

[14] For a great number of dental laboratories, the dealer is the preferred source for artificial teeth. . . . [L]aboratories are driven by the realities of the marketplace to buy far more heavily from dealers than manufacturers. This may be largely attributed to the beneficial services, credit function, economies of scale and convenience that dealers provide to laboratories, benefits which are otherwise unavailable to them when they buy direct.

[15] The record is replete with evidence of benefits provided by dealers. For example, they provide laboratories the benefit of "one stop-shopping" and extensive credit services. Because dealers typically carry the products of multiple manufacturers, a laboratory can order, with a single phone call to a dealer, products from multiple sources. Without dealers, in most instances laboratories would have to place individual calls to each manufacturer, expend the time, and pay multiple shipping charges to fill the same orders. [. . .]

[16] Buying through dealers also enables laboratories to take advantage of obtaining discounts. Because they engage in price competition to gain laboratories' business, dealers often discount manufacturers' suggested laboratory price for artificial teeth. There is no finding on this record that manufacturers offer similar discounts. [. . .]

[17] Dealers also provide benefits to manufacturers, perhaps the most obvious of which is efficiency of scale. Using select high-volume dealers, as opposed to directly selling to hundreds if not thousands of laboratories, greatly reduces the manufacturer's distribution costs and credit risks. Dentsply, for example, currently sells to twenty three dealers. If it were instead to sell directly to individual laboratories, Dentsply would incur significantly higher transaction costs, extension of credit burdens, and credit risks. [. . .]

[18] The benefits that dealers provide manufacturers help make dealers the preferred distribution channels—in effect, the "gateways"—to the artificial teeth market. Nonetheless, the District Court found that selling direct is a "viable" method of distributing artificial teeth. But we are convinced that it is "viable" only in the sense that it is "possible," not that it is practical or feasible in the market as it exists and functions. [. . .]

[19] It is true that Dentsply's competitors can sell directly to the dental laboratories and an insignificant number do. The undeniable reality, however, is that dealers have a controlling degree of access to the laboratories. The long-entrenched Dentsply dealer network with its ties to the laboratories makes it impracticable for a manufacturer to rely on direct distribution to the laboratories in any significant amount.

[20] That some manufacturers resort to direct sales and are even able to stay in business by selling directly is insufficient proof that direct selling is an effective means of competition. The proper inquiry is not whether direct sales enable a competitor to "survive" but rather whether direct selling "poses a real threat" to defendant's monopoly. The minuscule 5% and 3% market shares eked out by direct-selling manufacturers Ivoclar and Vita, Dentsply's "primary competitors," reveal that direct selling poses little threat to Dentsply.

[21] Although the parties to the sales transactions consider the exclusionary arrangements to be agreements, they are technically only a series of independent sales. Dentsply sells teeth to the dealers on an individual transaction basis and essentially the arrangement is "at-will." Nevertheless, the economic elements involved—the large share of the market held by Dentsply and its conduct excluding competing manufacturers—realistically make the arrangements here as effective as those in written contracts.

[22] . . . Dealer Criterion 6 created a strong economic incentive for dealers to reject competing lines in favor of Dentsply's teeth.

### *Theories of Exclusion*

As we saw in evaluating vertical restraints in Chapter VI, there are many ways to "exclude" rivals by suppressing their ability or incentive to compete. These may include, for example:

**Foreclosure.** Perhaps the classic method of exclusion is foreclosure: that is, cutting rivals off from access to inputs, distribution, or customers in a manner that reduces those rivals' ability/incentive to compete. This comes in several flavors:

*Input foreclosure.* If a monopolist can limit rivals to higher-cost or lower-quality inputs, those rivals may find it harder, or impossible, to exert competitive pressure on the monopolist. As a result, the monopolist may obtain increased power.

*Complement foreclosure.* If a monopolist can limit the access of rivals' customers to complements for rivals' inputs, the value of rivals' products will be reduced—and so too the competitive pressure on the monopolist. Increased power may be the result.

*Distribution foreclosure.* The same tactic can work just as well with distribution infrastructure as with inputs. If a monopolist can make it more expensive or difficult for rivals to reach consumers, by forcing them to switch to inferior mechanisms of distribution, the result may be a reduction in competitive pressure on the monopolist.

*Customer foreclosure.* In a slight variation on distribution foreclosure, a monopolist may engage in conduct that deprives rivals of access to a sufficient customer base to maintain competitive viability (for example, scale economies). For example, through tying or bundling, a monopolist may cause customers to switch over to the monopolist's products—even if rivals offer a superior product—and as a consequence rivals may lose scale economies and be forced from the market.

**Predation.** Predation is a play in two acts. In the first stage, a monopolist may charge unsustainably low prices that rivals cannot match, driving them out of a market protected by entry barriers. In the second stage, the successful monopolist enjoys more power over price and output following the exits of its rivals, and raises prices to recoup the losses incurred during the predation scheme. Courts tend to be cautious to condemn predation not because exclusion is implausible, but in light of the costs and risks of punishing or deterring low prices.

**Buying off and buying up.** Monopolists can also suppress rivals by targeting their *incentives* to compete: for example, by acquiring them or by paying them (or otherwise compensating them) to stay out of the market or to delay their entry. (We will meet the so called pay-for-delay practice when we consider IP and pharmaceutical competition in Chapter X.)

**Other exclusion.** In theory, anything else that limits rivals' ability or incentives to compete might be capable of constituting exclusion for the purposes of Section 2, including abuses of process (like sham litigation and fraudulently obtaining intellectual property), and even some torts & deception. (Of course, exclusion alone is not enough to establish illegality.)

The most famous academic article on exclusion is probably the pathbreaking piece by Steve Salop and Tom Krattenmaker on "raising rivals' costs." Among other things, the article explores different ways in which a monopolist can drive input costs up. As Salop and Krattenmaker explain, a monopolist might leave rivals with inputs that are too expensive, insufficient in quality, or vulnerable to oligopoly or cartelization.

## Thomas G. Krattenmaker and Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price

### 96 Yale L.J. 209 (1986)

We present an antitrust theory that explains how a wide variety of exclusionary restraints can, under fairly strict conditions, create or enhance market power. We also offer guidelines to assist enforcement agencies and courts in developing reliable, objective, administrable tests to indicate when such anticompetitive results are probable and, therefore, which specific conditions should be present before the arrangement is condemned.

To summarize, a firm may gain the ability to raise price by contracting with input suppliers for the suppliers' agreements not to deal with the purchasing firm's competitors on equal terms. We call these agreements "exclusionary rights contracts." Under certain conditions, such contracts for exclusionary rights can have the effect of raising rivals' costs by restraining the supply of inputs available to rivals, thereby giving the purchaser power to raise prices in its output market. Courts should inquire whether the firm that purchases an exclusionary rights agreement thereby places its competitors at such a cost disadvantage that the purchaser can then exercise monopoly power by raising its price. [. . .]

We can identify four distinct methods by which an exclusionary rights contract can raise the costs of the purchaser's rivals. With all these methods, the agreement raises rivals' costs by "foreclosure": more precisely, by restricting the supply available to rivals of a key input without similarly restricting the amount available to satisfy the purchaser's demand. Two of these methods succeed by restricting rivals' supply directly. They are techniques of direct foreclosure. The others induce suppliers to restrict output in response to incentives created by the exclusionary rights agreement. They are methods of facilitating tacit or express collusion that lead to foreclosed or restricted supply. [. . .]

The simplest and most obvious method by which foreclosure of supply can raise rivals' costs is the purchaser's obtaining exclusionary rights from all (or a sufficient number of) the lowest-cost suppliers, where those suppliers determine the input's market price. Competitors of the purchaser experience a cost increase as they necessarily shift to higher cost suppliers or less efficient inputs.

Antitrust literati know this as the "Bottleneck" or "essential facilities" problem. This Bottleneck method is precisely the technique employed collectively by a group of vertically integrated firms in [United States v. Terminal R. R. Ass'n of St. Louis, 224 U.S. 383 (1912)]. In that case, a group of railroad operators obtained an important input: the only railroad bridges across the Mississippi River at St. Louis. The railroad operators also obtained a promise from the bridge owners (here, the railroad operators themselves) that the bridges could be made available to other, non-owner, railroads on discriminatory terms. Excluded railroads could avoid this risk only by building their own bridges or ferries. [. . .]

Foreclosure also can raise rivals' costs when the purchaser acquires an exclusionary right over a representative portion of the supply, withholding that portion from rivals and thereby driving up the market price for the remainder of the input still available to rivals. Antitrust lingo often dubs this method a "supply squeeze" or "quantitative foreclosure," because the emphasis is not on the unique quality of the input foreclosed, but rather is on the sheer amount. We call it the Real Foreclosure technique to denote that the purchaser gains actual, effective control of the inputs to restrict potential supply and to raise price.

In a leading monopoly case [(United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945))], Alcoa was accused of having employed this Real Foreclosure tactic on two separate occasions. First, when Alcoa's patents on the manufacture of aluminum expired after the turn of the century, Alcoa maintained its monopoly in part by obtaining promises from some electrical utilities not to supply power to any other aluminum manufacturer. The price of electricity to Alcoa's potential rivals would increase as they bid for the remaining scarce supply. The right acquired was a naked exclusionary right; Alcoa apparently did not purchase any electricity from these utilities. *Alcoa* also involved a more controversial type of Real Foreclosure. Judge Learned Hand concluded that, wholly apart from its covenants with electrical utilities, Alcoa had illegally maintained its monopoly by repeatedly expanding its capacity before demand for aluminum increased. One interpretation of this charge against Alcoa is that it used a variant of the Real Foreclosure technique that we denote as Overbuying. Alcoa's excess accumulation of scarce inputs, notably bauxite, left potential new aluminum manufacturers facing the prospect that their bids would significantly drive up the prices of the remaining available inputs. By overbuying bauxite, Alcoa raised its rivals' costs of producing aluminum. [. . .]

Under certain conditions, exclusionary vertical restraints also can facilitate pricing coordination that enriches suppliers while raising the cost of the purchaser's competitors. The suppliers who inflict these harms may or may not participate in the vertical restraint. [. . .]

There are two variants of this collusive method, one involving discrimination against rivals and the other involving refusal to deal. We denominate both as the Cartel Ringmaster technique because the purchaser, in effect, orchestrates cartel-like discriminatory input pricing against its rivals. The purchaser provides a more efficient organizing, profit-sharing, and policing mechanism than the suppliers could generate themselves.

In the first type of case, a firm purchasing a vertical restraint may, as part of the agreement, induce a number of its suppliers to deal with the purchaser's rivals only on terms disadvantageous to those rivals. Antitrust lore sometimes describes this as a "price squeeze," although this term is most commonly employed when the selling and buying firms practicing the restraint are merged. [. . .]

Cartel Ringmaster also may involve outright refusals to deal with rivals by a number of suppliers. In this case, the suppliers also can gain by sharing directly in the increased profits of the purchaser or by extracting some of its gains by raising the purchaser's input costs.

Cartel Ringmaster is somewhat different from the other techniques analyzed here because it has a greater horizontal aspect. Its profitability may not depend on the purchaser's gaining power over price in the market in which it sells and sharing the resulting profit with restrained suppliers. Instead, it is possible that the suppliers themselves may gain sufficient benefits from charging a higher monopoly price for their input, irrespective of any additional benefits obtained by the purchaser from competing against higher cost rivals. Indeed, in extreme cases, they may profit enough to be able to compensate the purchaser for its role as organizer of the collusive scheme. Moreover, by embedding the collusive agreement in a vertical contract that raises input prices, it is easier to prevent cheating and to redistribute the collusive gains. The purchaser can monitor the agreement and, absent antitrust strictures, enforce it. [. . .]

Finally, a vertical restraint can effectively alter the industry structure confronting the purchaser's competitors and thereby significantly increase the probability that the remaining unrestrained suppliers can successfully collude, expressly or tacitly, to raise price. We denominate this the Frankenstein Monster technique, because through this method the purchaser of an exclusionary rights contract creates and turns loose upon its rivals an industry structure likely to generate a price increase. . . . Unlike the Cartel Ringmaster technique, when a purchaser employs the Frankenstein Monster tactic, its rivals' cost increase is inflicted by suppliers that are not parties to the exclusionary rights agreement.

## NOTES

1) Most of the examples above deal with impairing the *ability* of competitors to compete with the monopolist: but what about conduct that impairs only the *incentive* to compete, while leaving intact rivals' ability to do so? What kinds of conduct would, or might, be included in this category? Should antitrust treat impact on ability and impact on incentive similarly or differently? What, in economic analysis, is the difference?
2) When a monopolist engages in conduct that make it costlier or harder for a rival to deal with a key input supplier, or a key distributor, the rival's incentive to create or sponsor alternatives is increased. This can result in *more* competition among suppliers or distributors. Is this a good reason to be cautious in imposing Section 2 liability? Under what circumstances is this argument stronger or weaker?
3) What is the difference between wrongful exclusion and merely losing out in the competitive struggle? To put it another way: what's the difference between competing successfully and wrongfully excluding your rivals?
4) Should courts and agencies focus on whether a company has actually been driven out of the market, rather than on whether its ability or incentive to compete have been impaired?
5) Is a rival "excluded" for the purposes of monopolization law if:
    a. a monopolist buys the best or cheapest inputs or distribution, such that rivals are left with inferior alternatives? (Assume no exclusivity commitments or other restraints: the monopolist just offers the best price for the inputs or distribution in a spot market.)
    b. a monopolist makes misleading claims about the inferiority of the rival's product, and, by doing so, seems to influence some actual and potential customers?
    c. a monopolist makes misleading claims about the superiority and desirability of its own product, and, by doing so, seems to influence some actual and potential customers?
    d. a monopolist refuses to give a rival a free benefit (*e.g.*, free or subsidized access to its infrastructure and resources)?
    e. a monopolist refuses to sell to a rival on the terms that it would sell to a non-rival?
    f. a monopolist fraudulently avoids paying taxes, or minimum wages to its employees, thus deriving a significant cost advantage over rivals?
    g. a monopolist recruits away key employees from a rival by offering them better salaries, knowing that the rival may struggle to navigate an important period in the industry without their help?
6) Should courts worry about subjective intentions in assessing whether exclusion has taken place? In particular, should the law evaluate:

a. the intentions of the monopolist (*e.g.*, by asking whether the alleged exclusion was intentional, incidental to another purpose, or entirely unforeseen), or
b. the intentions of the "excluded" firm (*e.g.*, by asking whether the rival actually intended to exert serious competitive pressure on the monopolist)?

## 2. Contribution to Monopoly

The exclusion that is challenged in a monopolization case must make a contribution of some kind to the acquisition or maintenance of the defendant's monopoly power. Excluding an entirely irrelevant rival, or a company that will surely not become a competitor of the monopolist, almost certainly cannot violate Section 2. Nor can conduct that will exclude rivals only in a market in which the defendant is not present.[509]

In some cases, the existence of a causal relationship between the conduct and a contribution to monopoly will be very clear. For example, if a monopolist blows up the factory of its single major competitor, in a market where entry takes many years and a vast amount of capital, leaving the monopolist without any active rivals at all, the necessary contribution will probably not be hard to establish. But if things are more complicated—and they usually are—then the threshold becomes much more important. For example, what if a monopolist acquires an upstart competitor that is rapidly gaining momentum and share, but before it becomes clear that the competitor is likely to take a bite out of the monopolist's market position? Or what if the monopolist somehow eliminates multiple small entrants or startups, each of which had a modest chance of becoming a serious competitive threat?

The starting point is that *some* contribution is necessary: there must be a reason to think that the challenged practice or transaction will or could lead to more, or more durable, monopoly power. Conduct that merely *exploits* existing monopoly power, without increasing or reinforcing it, does not violate Section 2. The seminal modern statement of this point came in *Trinko*:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. 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. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.[510]

So the conduct must contribute to monopoly power: but *how much* contribution is enough—both in terms of magnitude and in terms of confidence that the conduct will matter at all? And what evidence illuminates it?

The leading modern case is the 2001 decision of the *en banc* D.C. Circuit in *Microsoft*. This decision—which followed a high-profile and lengthy (76-day!) trial in D.C. district court—is sufficiently central to modern antitrust, and to modern Section 2 law in particular, that it is worth familiarizing yourself with the case in some detail.

### The *Microsoft* Case: Background

The famous *Microsoft* case dealt primarily with Microsoft's efforts to protect its monopoly in the computer operating system ("OS") market from incipient threats.[511] In the federal government's telling, what happened was something like the following. Microsoft had perceived that its monopoly in PC operating systems (which it held through its "Windows" OS) was protected by the fact that third-party software developers wrote applications and other software that depended on Windows, and would not run on rival operating systems. As long as this remained true, would-be entrants and rivals would face a chicken-and-egg problem: there would be little demand for their

[509] *See*, *e.g.*, Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1062 (2d Cir. 1996) ("[I]t is axiomatic that a firm cannot monopolize a market in which it does not compete."), *vacated on other grounds*, 525 U.S. 128 (1998).

[510] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004). *See also* NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

[511] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001). Microsoft had previously been the subject of federal antitrust attention. *See* United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995); United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998).

operating systems without a thriving ecosystem of compatible software; but there was little reason for software developers to invest in creating such software until there was consumer demand for those other operating systems.

But by the mid-1990s, this barrier to effective competition appeared to be under some threat from the emergence of so-called "middleware" products like Netscape's Navigator internet browser and Sun's Java libraries and related technologies. These middleware products were not themselves operating systems—they ran "on top" of Windows or another operating system—but they provided resources and interfaces to support third-party applications and software. In other words, both independently and together, they represented the threat that a cross-OS operating environment built on middleware could emerge, capable of running on a number of operating systems, for which software developers could start writing applications. If this happened, Microsoft's operating-system rivals would no longer face the chicken-and-egg problem: Netscape and Sun would have effectively solved the problem by stimulating the development of compatible software.

This prospect was (at the time) a fairly distant future possibility—but it's worth noting that it has to a significant extent come true. Internet browsers, for example, are middleware on which a suite of web-based applications (including Google's portfolio of productivity applications) run that compete with Microsoft's Windows Office productivity software. Microsoft itself offers cloud versions of its Office productivity software that can run in a browser on non-Windows operating systems. But at the time of the litigation against Microsoft, it was far from certain that middleware would take on a platform role, and the lowering of the barrier to entry that protected the dominance of Microsoft's OS might not have materialized at all. Navigator and Java might not have gained sufficient traction, or might not have been able to support a vibrant ecosystem of software that could, in turn, lower barriers to entry in operating systems. Or rivals might simply have been unable or unwilling to invest in taking on Windows in the OS market. Nevertheless, Microsoft's executives saw the threat on the horizon, and decided to do something about it.

Microsoft engaged in multiple complementary strategies designed to forestall the middleware threat. The company directed four strategies at Netscape Navigator:

> (1) entering into exclusive licenses with PC computer manufacturers ("original equipment manufacturers" or "OEMs") that required preinstalling Microsoft's own web browser, Internet Explorer, on new PCs, and ensuring that it was prominently presented to users (thus deterring OEMs from installing a second browser, like Navigator, that would perform the same function and (Microsoft claimed) confuse users[512]), while limiting the changes that an OEM could make to a PC that could have the effect of promoting rival browsers;
>
> (2) technologically "tying" the Internet Explorer browser to Windows, by making it an irremovable part of the operating system (thus forcing OEMs to train their support staff to answer questions about it, and in turn deterring them from incurring that same investment for rival browsers);
>
> (3) entering into various arrangements with all leading internet service providers for sole preferential promotion (such promotion being a key distribution channel for consumer software), and obtaining commitments that the service providers would limit their distribution of rival browsers; and
>
> (4) entering into various arrangements with other third parties, including Apple as well as independent software vendors, that guaranteed Internet Explorer default-browser status on much third-party software and on Mac OS devices, while ensuring that other browsers would not be installed on the desktops of Mac computers.

Microsoft also targeted Sun's Java technologies with four main practices:

[512] At this time, preinstallation by an OEM—so that the software is already installed on the computer when the user starts it up for the first time—was a critical method of distribution for software. Direct download as a means of purchasing software was not widespread until much later, after high-speed internet access became more widely available.

(1) designing its own "Java virtual machine"—essentially a system that translated between Java and the operating system—that was incompatible with Sun's virtual machine (note that the D.C. Circuit would later conclude that this was *not* an anticompetitive practice[513]);
(2) entering into various arrangements with independent software vendors requiring that Microsoft's Java virtual machine be the default virtual machine in the software they developed (affecting a "substantial portion of the field" for virtual machine distribution);
(3) providing Java developers with certain tools, as well as its own Java virtual machine, and deceiving the developers into believing that applications made using those tools would be cross-platform, when in fact they would run only on Windows; and
(4) offering benefits to Intel, a key chip-maker, conditioned on Intel terminating its assistance to Sun in developing Sun's Java technologies.

The ensuing litigation raised a wide range of challenging questions under Section 2—including the principles guiding its application to dynamic technology markets—and terminated in a lengthy *en banc* decision of the D.C. Circuit that has become a landmark of modern antitrust jurisprudence and a subject of extensive commentary.[514]

One of the decision's most important facets was its treatment of causation: specifically, the causal link between Microsoft's conduct, aimed at Java and Navigator, and the maintenance of its monopoly in the operating-system market. This was a particularly tricky issue in *Microsoft* because neither Netscape Navigator nor Sun's Java products were actually competing with Microsoft's operating system. Microsoft wasn't trying to take out an existing rival: rather, Microsoft was trying to suppress the threat that middleware could evolve in a way that would stimulate software development that would, in turn, lower the barriers to entry into the operating system market. As such, it would have been extremely challenging to show that, but for Microsoft's conduct, the threat feared by the company—the emergence of a cross-platform ecosystem of apps and the subsequent entry of operating system competitors—would actually have been more likely than not to materialize. This illustrates a general problem in monopolization cases: how confident should a court be that it can predict what would have happened had the defendant not acted (sometimes called the "counterfactual world" or the "but-for world"[515] (*i.e.*, the world that would exist *but for* the defendant's conduct))?

To see how the *Microsoft* court approached this issue, first read the district court's findings of fact regarding the nature and strength of the threat posed by Navigator and Java, and then the court of appeals' discussion of causation.

## Findings of Fact, United States v. Microsoft Corp.

### 84 F. Supp. 2d 9 (D.D.C. 1999)

Judge Jackson.[516]

[1] Middleware technologies . . . have the potential to weaken the applications barrier to entry. Microsoft was apprehensive that the APIs exposed by middleware technologies would attract so much developer interest, and would become so numerous and varied, that there would arise a substantial and growing number of full-featured applications that relied largely, or even wholly, on middleware APIs. The applications relying largely on middleware APIs would potentially be relatively easy to port from one operating system to another. The applications relying exclusively on middleware APIs would run, as written, on any operating system hosting the

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513 United States v. Microsoft Corp., 253 F.3d 34, 74–75 (D.C. Cir. 2001).

514 *See*, *e.g.*, Andrew I. Gavil & Harry First, THE MICROSOFT ANTITRUST CASES: COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY (2014); William H. Page & John E. Lopatka, THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE (2009); Stan J. Liebowitz & Stephen E. Margolis, WINNERS, LOSERS & MICROSOFT: COMPETITION AND ANTITRUST IN HIGH TECHNOLOGY (1999).

515 This term will appear again when we discuss merger law in Chapter VIII.

516 Judge Thomas Penfield Jackson's role in presiding over the *Microsoft* trial became a focus of intense attention and controversy when it emerged that he had been giving interviews to journalists during the proceedings that gave rise to a strong appearance of partiality: the *en banc* D.C. Circuit disqualified him from hearing the case on remand, describing his ethical violations as "deliberate, repeated, egregious, and flagrant," but did not conclude that his findings were tainted by bias. *See* United States v. Microsoft Corp., 253 F.3d 34, 107–18 (D.C. Cir. 2001).

requisite middleware. So the more popular middleware became and the more APIs it exposed, the more the positive feedback loop that sustains the applications barrier to entry would dissipate. Microsoft was concerned with middleware as a category of software; each type of middleware contributed to the threat posed by the entire category. At the same time, Microsoft focused its antipathy on two incarnations of middleware that, working together, had the potential to weaken the applications barrier severely without the assistance of any other middleware. These were Netscape's Web browser and Sun's implementation of the Java technologies. [. . .]

[2] Netscape Navigator possesses three key middleware attributes that endow it with the potential to diminish the applications barrier to entry. First, in contrast to non-Microsoft, Intel-compatible PC operating systems, which few users would want to use on the same PC systems that carry their copies of Windows, a browser can gain widespread use based on its value as a complement to Windows. Second, because Navigator exposes a set (albeit a limited one) of APIs, it can serve as a platform for other software used by consumers. A browser product is particularly well positioned to serve as a platform for network-centric applications that run in association with Web pages. Finally, Navigator has been ported to more than fifteen different operating systems. Thus, if a developer writes an application that relies solely on the APIs exposed by Navigator, that application will, without any porting, run on many different operating systems.

[3] Adding to Navigator's potential to weaken the applications barrier to entry is the fact that the Internet has become both a major inducement for consumers to buy PCs for the first time and a major occupier of the time and attention of current PC users. For any firm looking to turn its browser product into an applications platform such to rival Windows, the intense consumer interest in all things Internet-related is a great boon.

[4] Microsoft knew in the fall of 1994 that Netscape was developing versions of a Web browser to run on different operating systems. It did not yet know, however, that Netscape would employ Navigator to generate revenue directly, much less that the product would evolve in such a way as to threaten Microsoft. In fact, in late December 1994, Netscape's chairman and chief executive officer ("CEO"), Jim Clark, told a Microsoft executive that the focus of Netscape's business would be applications running on servers and that Netscape did not intend to succeed at Microsoft's expense.

[5] As soon as Netscape released Navigator on December 15, 1994, the product began to enjoy dramatic acceptance by the public; shortly after its release, consumers were already using Navigator far more than any other browser product. This alarmed Microsoft, which feared that Navigator's enthusiastic reception could embolden Netscape to develop Navigator into an alternative platform for applications development. In late May 1995, Bill Gates, the chairman and CEO of Microsoft, sent a memorandum entitled "The Internet Tidal Wave" to Microsoft's executives describing Netscape as a "new competitor 'born' on the Internet." He warned his colleagues within Microsoft that Netscape was "pursuing a multi-platform strategy where they move the key API into the client to commoditize the underlying operating system." By the late spring of 1995, the executives responsible for setting Microsoft's corporate strategy were deeply concerned that Netscape was moving its business in a direction that could diminish the applications barrier to entry. [. . .]

[6] The term "Java" refers to four interlocking elements. First, there is a Java programming language with which developers can write applications. Second, there is a set of programs written in Java that expose APIs on which developers writing in Java can rely. These programs are called the "Java class libraries." The third element is the Java compiler, which translates the code written by the developer into Java "bytecode." Finally, there are programs called "Java virtual machines," or "JVMs," which translate Java bytecode into instructions comprehensible to the underlying operating system. If the Java class libraries and a JVM are present on a PC system, the system is said to carry a "Java runtime environment."

[7] The inventors of Java at Sun Microsystems intended the technology to enable applications written in the Java language to run on a variety of platforms with minimal porting. A program written in Java and relying only on APIs exposed by the Java class libraries will run on any PC system containing a JVM that has itself been ported to the resident operating system. Therefore, Java developers need to port their applications only to the extent that those applications rely directly on the APIs exposed by a particular operating system. The more an application written in Java relies on APIs exposed by the Java class libraries, the less work its developer will need to do to port the application to different operating systems. The easier it is for developers to port their applications to different

operating systems, the more applications will be written for operating systems other than Windows. To date, the Java class libraries do not expose enough APIs to support the development of full-featured applications that will run well on multiple operating systems without the need for porting; however, they do allow relatively simple, network-centric applications to be written cross-platform. It is Sun's ultimate ambition to expand the class libraries to such an extent that many full-featured, end-user-oriented applications will be written cross-platform. The closer Sun gets to this goal of "write once, run anywhere," the more the applications barrier to entry will erode.

[8] Sun announced in May 1995 that it had developed the Java programming language. Mid-level executives at Microsoft began to express concern about Sun's Java vision in the fall of that year, and by late spring of 1996, senior Microsoft executives were deeply worried about the potential of Sun's Java technologies to diminish the applications barrier to entry.

[9] Sun's strategy could only succeed if a Java runtime environment that complied with Sun's standards found its way onto PC systems running Windows. Sun could not count on Microsoft to ship with Windows an implementation of the Java runtime environment that threatened the applications barrier to entry. Fortunately for Sun, Netscape agreed in May 1995 to include a copy of Sun's Java runtime environment with every copy of Navigator, and Navigator quickly became the principal vehicle by which Sun placed copies of its Java runtime environment on the PC systems of Windows users.

[10] The combined efforts of Netscape and Sun threatened to hasten the demise of the applications barrier to entry, opening the way for non-Microsoft operating systems to emerge as acceptable substitutes for Windows. By stimulating the development of network-centric Java applications accessible to users through browser products, the collaboration of Netscape and Sun also heralded the day when vendors of information appliances and network computers could present users with viable alternatives to PCs themselves. Nevertheless, these middleware technologies have a long way to go before they might imperil the applications barrier to entry. Windows 98 exposes nearly ten thousand APIs, whereas the combined APIs of Navigator and the Java class libraries, together representing the greatest hope for proponents of middleware, total less than a thousand. Decision-makers at Microsoft are apprehensive of potential as well as present threats, though, and in 1995 the implications of the symbiosis between Navigator and Sun's Java implementation were not lost on executives at Microsoft, who viewed Netscape's cooperation with Sun as a further reason to dread the increasing use of Navigator. [. . .]

[11] Although they have been the most prominent, Netscape's Navigator and Sun's Java implementation are not the only manifestations of middleware that Microsoft has perceived as having the potential to weaken the applications barrier to entry. Starting in 1994, Microsoft exhibited considerable concern over the software product Notes, distributed first by Lotus and then by IBM. Microsoft worried about Notes for several reasons: It presented a graphical interface that was common across multiple operating systems; it also exposed a set of APIs to developers; and, like Navigator, it served as a distribution vehicle for Sun's Java runtime environment. Then in 1995, Microsoft reacted with alarm to Intel's Native Signal Processing software, which interacted with the microprocessor independently of the operating system and exposed APIs directly to developers of multimedia content. Finally, in 1997 Microsoft noted the dangers of Apple's and RealNetworks' multimedia playback technologies, which ran on several platforms (including the Mac OS and Windows) and similarly exposed APIs to content developers. Microsoft feared all of these technologies because they facilitated the development of user-oriented software that would be indifferent to the identity of the underlying operating system.

* * *

Now see how the D.C. Circuit handled these findings on appeal.

## United States v. Microsoft Corp.

### 253 F.3d 34 (D.C. Cir. 2001) (en banc)

Per curiam.

[1] Microsoft urges this court to reverse on the monopoly maintenance claim, because plaintiffs never established a causal link between Microsoft's anticompetitive conduct, in particular its foreclosure of Netscape's and Java's

distribution channels, and the maintenance of Microsoft's operating system monopoly. . . . According to Microsoft, the District Court cannot simultaneously find that middleware is not a reasonable substitute and that Microsoft's exclusionary conduct contributed to the maintenance of monopoly power in the operating system market. Microsoft claims that the first finding depended on the court's view that middleware does not pose a serious threat to Windows . . . while the second finding required the court to find that Navigator and Java would have developed into serious enough cross-platform threats to erode the applications barrier to entry. We disagree.

[2] Microsoft points to no case, and we can find none, standing for the proposition that, as to § 2 liability in an equitable enforcement action, plaintiffs must present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct. As its lone authority, Microsoft cites the following passage from Professor Areeda's antitrust treatise: "The plaintiff has the burden of pleading, introducing evidence, and presumably proving by a preponderance of the evidence that reprehensible behavior has contributed significantly to the maintenance of the monopoly."

[3] But, with respect to actions seeking injunctive relief, the authors of that treatise also recognize the need for courts to infer causation from the fact that a defendant has engaged in anticompetitive conduct that reasonably appears capable of making a significant contribution to maintaining monopoly power. To require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action.

[4] We may infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes. Admittedly, in the former case there is added uncertainty, inasmuch as nascent threats are merely potential substitutes. But the underlying proof problem is the same—neither plaintiffs nor the court can confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct. To some degree, the defendant is made to suffer the uncertain consequences of its own undesirable conduct.

[5] Given this rather edentulous test for causation, the question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue. As to the first, suffice it to say that it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will—particularly in industries marked by rapid technological advance and frequent paradigm shifts. As to the second, the District Court made ample findings that both Navigator and Java showed potential as middleware platform threats. Counsel for Microsoft admitted as much at oral argument.

[6] Microsoft's concerns over causation have more purchase in connection with the appropriate remedy issue, i.e., whether the court should impose a structural remedy or merely enjoin the offensive conduct at issue. As we point out later in this opinion, divestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain. Absent some measure of confidence that there has been an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural relief. But these queries go to questions of remedy, not liability. In short, causation affords Microsoft no defense to liability for its unlawful actions undertaken to maintain its monopoly in the operating system market.

* * *

There is considerable controversy over the meaning and scope of this holding. Some have read it as authority for a flexible (*i.e.*, relaxed) test of causation in monopolization cases.[517] They emphasize that the "reasonably capable

[517] *See*, *e.g.*, D. Bruce Hoffman, *Antitrust in the Digital Economy: A Snapshot of FTC Issues* (May 2019) ("[The *Microsoft* causation standard] has two important implications. One is that given that Section 2 arises only in the exceptional case of actual monopoly power . . . this slightly reduced causation burden should not be viewed with alarm. Second, as the D.C. Circuit explained, a different view would reward monopolists for taking more aggressive anticompetitive steps earlier, and, perversely, would result in the most effective and egregious monopolists—those with longstanding monopolies, who successfully extinguish all competitive threats in their incipiency—being least vulnerable to challenge."); Daniel Francis, *Making Sense of Monopolization*, 84 Antitrust L.J. 779, 807–11 (2022).

of making a substantial contribution" test is well grounded in cases long preceding *Microsoft*.[518] Others argue that it is confined to a narrow subset of monopolization cases, such as practices lacking procompetitive justifications, or circumstances where an "anticompetitive effect" of some kind has already been shown.[519]

Setting aside the question of causation, multiple Section 2 cases indicate that there is a difference between creating or extending monopoly power (which can violate Section 2), and merely removing or reducing constraints on the exercise of that power (which cannot). This can be an elusive distinction.

## NYNEX Corp. v. Discon, Inc.

### 525 U.S. 128 (1998)

Justice Breyer.

[1] Discon, Inc., the respondent, sold removal services used by New York Telephone Company, a firm supplying local telephone service in much of New York State and parts of Connecticut. New York Telephone is a subsidiary of NYNEX Corporation. NYNEX also owns Materiel Enterprises Company, a purchasing entity that bought removal services for New York Telephone. Discon, in a lengthy detailed complaint, alleged that the NYNEX defendants . . . engaged in unfair, improper, and anticompetitive activities in order to hurt Discon and to benefit Discon's . . . competitor, AT & T Technologies . . . . The Federal District Court dismissed Discon's complaint for failure to state a claim. The Court of Appeals for the Second Circuit affirmed that dismissal with an exception, and that exception is before us for consideration.

[2] The Second Circuit focused on one of Discon's specific claims, a claim that Materiel Enterprises had switched its purchases from Discon to Discon's competitor, AT & T Technologies, as part of an attempt to defraud local telephone service customers by hoodwinking regulators. According to Discon, Materiel Enterprises would pay AT & T Technologies more than Discon would have charged for similar removal services. It did so because it could pass the higher prices on to New York Telephone, which in turn could pass those prices on to telephone consumers in the form of higher regulatory-agency-approved telephone service charges. At the end of the year, Materiel Enterprises would receive a special rebate from AT & T Technologies, which Materiel Enterprises would share with its parent, NYNEX. Discon added that it refused to participate in this fraudulent scheme, with the result that Materiel Enterprises would not buy from Discon, and Discon went out of business.

[3] These allegations, the Second Circuit said, state a cause of action under § 1 of the Sherman Act [for a group boycott.] . . . For somewhat similar reasons the Second Circuit believed the complaint stated a valid claim of conspiracy to monopolize under § 2 of the Sherman Act. [. . .]

[4] We concede Discon's claim that the petitioners' behavior hurt consumers by raising telephone service rates. But that consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power that is *lawfully* in the hands of a monopolist, namely, New York Telephone, combined with a deception worked upon the regulatory agency that prevented the agency from controlling New York Telephone's exercise of its monopoly power. [. . .]

[5] The Court of Appeals . . . upheld the complaint's charge of a conspiracy to monopolize in violation of § 2 of the Sherman Act . . . on the understanding that the conspiracy in question consisted of the very same purchasing practices that we have previously discussed. Unless those agreements harmed the competitive process, they did not amount to a conspiracy to monopolize. We do not see, on the basis of the facts alleged, how Discon could

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[518] *See*, *e.g.*, Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983); S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co., 740 F.2d 980, 999 n.19 (D.C. Cir. 1984); C.E. Servs., Inc. v. Control Data Corp., 759 F.2d 1241, 1247 n.7 (5th Cir. 1985); Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co., Case No. 82-2105, 1986 WL 30775, at *7 (10th Cir. Mar. 31, 1986), *modified on reh'g*, 817 F.2d 639 (10th Cir. 1987).

[519] Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 5 Criterion J. on Innovation 29, 35, 39–40 (2020) (arguing, among other things, that "even where Microsoft's plaintiff-friendly standard of causation is relevant at all, it is relevant only to liability but not to remedy"); Douglas Ginsburg & Koren Wong-Ervin, *Challenging Consummated Mergers Under Section 2*, Comp. Pol'y Int'l (May 2020) 4 ("[T]he Microsoft court's more lenient 'reasonably capable' standard applies by its terms only to exclusionary conduct lacking any procompetitive justification . . . only when anticompetitive effects are shown . . . does the "reasonably capable of" causation standard apply to allegations that exclusionary conduct killed a nascent threat.").

succeed on this claim without prevailing on its § 1 claim. Given our conclusion that Discon has not alleged a § 1 per se violation, we think it prudent to vacate this portion of the Court of Appeals' decision and allow the court to reconsider its finding of a § 2 claim.

* * *

*NYNEX* has come to stand for the idea that gaining the ability to charge a higher price—for example, by evading a price cap or by manipulating a regulatory scheme—does not amount to an increase in monopoly power unless it reflects increased freedom from competition. For example, in *Rambus*—a case we will meet in detail in Chapter X—Rambus, a participant in a standard-setting organization, had deceptively concealed its IP rights, which were then incorporated into an industry standard, giving Rambus monopoly power. The FTC alleged that but for Rambus's deception, the organization would either have incorporated a different technology or imposed a price cap (a prohibition on charging more than a reasonable and non-discriminatory ("RAND") royalty) on Rambus. Relying on *NYNEX*, the D.C. Circuit held that the deception would not have violated Section 2 if its only effect was to avoid a pricing limitation:

> Under [one of the FTC's two alternative legal theories, the standard-setting organization] lost only an opportunity to secure a RAND commitment from Rambus. But loss of such a commitment is not a harm to competition from alternative technologies in the relevant markets. Indeed, had [the organization] limited Rambus to reasonable royalties and required it to provide licenses on a nondiscriminatory basis, we would expect less competition from alternative technologies, not more; high prices and constrained output tend to attract competitors, not to repel them.
>
> Scholars in the field have urged that if nondisclosure to [a standard-setting organization] enables a participant to obtain higher royalties than would otherwise have been attainable, the overcharge can properly constitute competitive harm attributable to the nondisclosure, as the overcharge will distort competition in the downstream market. The contention that price-raising deception has downstream effects is surely correct, but that consequence was equally surely true in *NYNEX* (though perhaps on a smaller scale) and equally obvious to the Court. The Commission makes the related contention that because the ability to profitably restrict output and set supracompetitive prices is the *sine qua non* of monopoly power, any conduct that permits a monopolist to avoid constraints on the exercise of that power must be anticompetitive. But again, as in *NYNEX*, an otherwise lawful monopolist's end-run around price constraints, even when deceptive or fraudulent, does not alone present a harm to competition in the monopolized market.
>
> Thus, if [the standard-setting organization], in the world that would have existed but for Rambus's deception, would have standardized the very same technologies, Rambus's alleged deception cannot be said to have had an effect on competition in violation of the antitrust laws; [the organization's] loss of an opportunity to seek favorable licensing terms is not as such an antitrust harm. Yet the Commission did not reject this as being a possible—perhaps even the more probable—effect of Rambus's conduct. We hold, therefore, that the Commission failed to demonstrate that Rambus's conduct was exclusionary, and thus to establish its claim that Rambus unlawfully monopolized the relevant markets.[520]

## NOTES

1) Suppose that you have been asked to advise a company with a 40% share of a relevant market for steel production. The company has asked you to determine whether a proposed exclusive deal would contribute to monopoly power. Concretely, what documents and information would you want to examine, and what analysis would you want to conduct, to figure out the answer? What if the company supplied free email services rather than steel? What about nursing services across the Pacific Northwest and West Coast?
2) Imagine that every year, exactly ten new startups appear in a market for some digital product or service. Today, that market is dominated by a monopolist with a market share of 90%. But each startup has a 5% chance of completely displacing the monopolist. How many of those startups should the monopolist be able to buy, or otherwise exclude, each year without creating a prohibited contribution to monopoly for the

[520] Rambus Inc. v. FTC, 522 F.3d 456, 466–67 (D.C. Cir. 2008). *See also infra* § X.D.1.

purposes of Section 2—and why is that the right number? (Do not worry about other legal tests: just focus on contribution to monopoly power. And assume that the 5% chance of competitive success is known with perfect accuracy by the court and by all market participants.)

   a. What if each startup had a 1% chance of displacing the monopolist? Or a 10% chance?
   b. Suppose that the monopolist had in fact managed to purchase more than the prohibited number of startups before the litigation was filed. How would you determine which ones should be sold off as a remedy?[521]

3) How far should agencies and courts rely on the subjective assessment of market participants, when gauging how much difference some practice or transaction has made or is likely to make to monopoly power? What if the monopolist, the target, and other market participants disagree: whose assessment is likely to be most helpful, and why? What if ordinary-course documents express one view, but executives tell a different story in deposition under oath?
4) When, how, and why should we insist that plaintiffs show a price increase in order to establish a contribution to monopoly power? Can you imagine circumstances under which a business gains greater monopoly power but does not increase its prices?
5) How could we see the effects of an increase in monopoly power in a zero-price market? Could we quantify such effects?
6) Do you agree with the holding in *NYNEX*?
7) What kinds of labor markets, or groups of employees, do you think might be vulnerable to labor monopsonization?

## 3. Freedom of Action and Refusal to Deal: When Is Excluding Rivals OK?

Not all conduct that makes life harder for rivals and contributes to monopoly is unlawful: in fact, much such conduct is not only legal but actually desirable overall. Most obviously, improving a product makes it harder for rivals to survive. So does finding a way to lower costs or improve operational efficiency. Winning contracts and bids generally comes at the expense of rivals. In fact, most things that we would think of as "desirable competition" involve harm to competitors, including the impairment of opportunities and loss of profits.

Thus, even monopolists enjoy considerable freedom to compete on the merits and to make competitive decisions, including if rivals suffer as a result. But: how much freedom? When does sharp-elbowed competition become unlawful monopolization? This is an immensely difficult question and there is a great deal of disagreement about what the answer should be.

There is an old strand of thinking in monopolization law that certain kinds of conduct can be thought of as "fair competition" and are not a basis for antitrust liability *regardless of their effects*: that is, even if exclusion, monopoly power, and consumer harm follow.[522] The Court seems to have been getting at something like this when it tried to summarize the conduct element of the monopolization offense in *Grinnell*—but the Court buried the idea in a passage that becomes more confusing the more closely you read it:

> The offense of monopoly under s 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the 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*. We shall see that this second ingredient presents no major problem here, as what was done in building the empire was done plainly and explicitly for a single purpose.[523]

Read element (2) carefully. Can you see why it may be unhelpful to contrast "the willful acquisition or maintenance of monopoly power" with "growth or development as a consequence of a superior product, business acumen, or

[521] We will talk about merger remedies in Chapter VIII.

[522] *See*, *e.g.*, Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 Antitrust L.J. 435, 442 (2006).

[523] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) (emphasis added).

historic accident"? For example: are there cases that might fall into *both* categories? And what business does not knowingly pursue market or monopoly power, even if it does so solely through innovation?

In any event: the idea that certain kinds of behavior should not be haunted by the threat of monopolization liability—or at least that courts should be particularly reluctant to impose liability for certain types of behavior—has a long pedigree in monopolization's history. For example, on the day that the Sherman Act passed the Senate (April 8, 1890), the senators were explicitly reassured that someone who does "[no]thing but compete" need not fear antitrust liability, even if a monopoly resulted from his or her "skill and energy":

> Mr. KENNA. Suppose a citizen of Kentucky is dealing in shorthorn cattle and by virtue of his superior skill in that particular product it turns out that be is the only one in the United States to whom an order comes from Mexico for cattle of that stock for a considerable period, so that he is conceded to have a monopoly of that trade with Mexico; is it intended by the committee that the bill shall make that man a culprit?
>
> Mr. EDMUNDS. It is not intended by it and the bill does not do it. Anybody who knows the meaning of the word "monopoly," as the courts apply it, would not apply it to such a person at all; and I am sure my friend must understand that.
>
> Mr. KENNA. [. . .] [H]ere is a provision in the bill which, if plain English means anything in the courts or elsewhere, provides a penalty for such conduct on the part of any citizen of this country engaged in the commonest and most legitimate callings of the country, who happens by his skill and energy to command an innocent and legitimate monopoly of a business.
>
> Mr. EDMUNDS. It does not do anything of the kind, because in the case stated the gentleman has not any monopoly at all. He has not bought off his adversaries. He has not got the possession of all the horned cattle in the United State. He has not done anything but compete with his adversaries in trade, if he had any, to furnish the commodity for the lowest price. So I assure my friend he need not be disturbed upon that subject.[524]

There are many different ways in which monopolization law could reflect the concern to allow "competition" or "industry" even if it leads to the acquisition or maintenance of monopoly power. One way to understand the shape of monopolization law is to posit a "privilege" or "safe harbor": a zone of competitive conduct within which courts will be particularly reluctant to impose liability under Section 2, as some have suggested.[525] Something like this may help to explain antitrust's response to certain kinds of core competitive decisions, including those relating to pricing decisions.[526] A second approach would be to provide, as some other writers suggest, that a monopolist's conduct must be in some sense "bad"—perhaps we could say "anticompetitive" if we had some specific meaning in mind for that term—before it can violate Section 2.[527] For example, some global theories of Section 2 propose that courts should examine whether the specific conduct challenged is overall harmful to consumers, or whether it lacks any "legitimate" business purpose or rational economic basis.[528] A third approach could involve something more intricately structured than a unitary "goodness" or "badness" test: for example, we might attempt to define zones of both *per se* illegality and *per se* legality.[529] Another approach might be to focus analytical attention on the subjective intention of the monopolist, although a rule of this kind could raise some serious challenges.[530] In this area, among others, it is very hard to identify clear lines of consistency across our tangled Section 2 cases.

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[524] 21 Cong. Rec. 3151–52 (Apr. 8, 1890).

[525] *See*, *e.g.*, Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules,* 73 Antitrust L.J. 435 (2006); Daniel Francis, *Making Sense of Monopolization*, 84 Antitrust L.J. 779 (2022).

[526] *See*, *e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[527] *See*, *e.g.*, Timothy J. Muris, *The FTC and the Law of Monopolization*, 67(3) Antitrust L.J. 693, 695 (2003).

[528] *See*, *e.g.*, Gregory J. Werden, Ident*ifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413 (2006) (no economic sense); Steven C. Salop & Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 Geo. Mason L. Rev. 617, 652 (1999) (overall harm).

[529] *See*, *e.g.*, Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 315 (2003) (proposing that conduct should be "per se legal if its exclusionary effect on rivals depends on enhancing the defendant's efficiency," but "per se illegal if its exclusionary effect on rivals will enhance monopoly power regardless of any improvement in defendant efficiency").

[530] *See*, *e.g.*, Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, 54 Am. U. L. Rev. 151 (2004).

There are a number of areas in which courts appear to foreclose, or at least strongly disfavor, the possibility of liability under Section 2 for conduct by a monopolist even when it excludes rivals and contributes to monopoly.[531] These include:

- **Unconditional refusals to deal.** If a plaintiff's theory of harm is simply that it was excluded by the fact that a monopolist won't sell to it—or won't sell to it at desired prices or terms—then it will be hard or impossible to establish antitrust liability. As we will see below, the dominant modern view is that a monopolist can almost never be liable under Section 2 for refusing to sell a product or service to a new customer: refusal-to-deal liability is often thought to be limited to a termination of a previous profitable course of dealing (or perhaps other forms of short-run profit sacrifice) for purely anticompetitive reasons. The Court has said that "[t]he freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage."[532] Later in this section we will meet the "essential facilities" doctrine, which may very modestly qualify this position: at least in theory.[533]
- **Unconditional above-cost discounting.** If a plaintiff's theory of harm is simply that it was excluded by a monopolist's unconditional above-cost discounting—even if precisely calibrated to exclude entry—liability seems foreclosed under existing law.[534]
- **Mere introduction of a new product or mere withdrawal of an old one.** If a plaintiff's theory of harm is simply that a new product was introduced with which it cannot compete, or that a product was withdrawn from the market, liability seems foreclosed or at least very unlikely.[535] (In Chapter X we will meet the practice of "product hopping" in which these principles come under some pressure.[536])
- **Product "design changes" or "improvements"?** Some courts and commentators have suggested that changes in design should be immune or nearly immune from antitrust attack, at least where there is a plausible claim that the change is an improvement.[537]
- **Advertising.** Courts have held that Section 2 should be particularly slow to punish advertising, even when it may affect competition and protect monopoly. In *Ayerst*, for example, the Second Circuit articulated a special presumption that misleading advertising has no more than a *de minimis* effect on competition.[538] Other courts have erected similarly stiff barriers to claims of this kind.[539]

The difficulty in defining the scope of a monopolist's "competitive freedom" is presented with unusual sharpness by antitrust's tangled law on "refusals to deal": that is, cases where a competitor wants to deal with a monopolist in some way (*e.g.*, to interoperate with it, or to purchase products or supplies from it) and the monopolist says no. On the one hand, courts repeatedly warn that there is no general duty to deal with rivals, and emphasize the freedom of all enterprises—even monopolists—to choose to whom they will sell.[540] And there are certainly very good reasons to encourage businesses to develop their own facilities rather than encouraging them to rely on the

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[531] *See also*, *e.g.*, Viamedia, Inc. v. Comcast Corporation, 951 F.3d 429, 452 (7th Cir. 2020) (no liability for "innovation resulting in superior products, the introduction of efficiencies reflecting superior business acumen, or even the luck of a firm that unwittingly stumbles into a monopoly position").

[532] NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137 (1998).

[533] *See infra* notes 544–548 and accompanying text.

[534] *See infra* § VII.D.3.

[535] *See*, *e.g.*, New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 653–54 (2d Cir. 2015) ("[N]either product withdrawal nor product improvement alone is anticompetitive."); *see also* In re Asacol Antitrust Litig., 233 F. Supp. 3d 247, 268 (D. Mass. 2017); In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 682 (E.D. Pa. 2014); Steamfitters Loc. Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 925 n.7 (3d Cir. 1999).

[536] *See infra* § X.B.3.

[537] *See*, *e.g.*, Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 999–1000 (9th Cir. 2010) (describing as uncontroversial the proposition that "product improvement by itself does not violate Section 2, even if it is performed by a monopolist and harms competitors as a result"); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147, 158 (2005) ("Innovation is anticompetitive only in the very rare situation when the innovator knew in advance that the product would not be an improvement but that it would serve to make a rival's technology (typically a complement to the innovated product) incompatible with the dominant technology.").

[538] National Ass'n of Pharmaceutical Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904, 916 (2d Cir. 1988).

[539] *See*, *e.g.*, Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114, 1127 (10th Cir. 2014); Am. Pro. Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Pro. Publications, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997); Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 371 (6th Cir. 2003).

[540] The classic citation is United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

efforts of their competitors. If a rival firm has the option of simply relying on the monopolist's investment, it may be much less likely to invest in its own competitive alternative. On the other hand, refusals to deal can function as an enforcement mechanism for various complementary anticompetitive strategies, and the Supreme Court has indicated that a failure or refusal to deal can, sometimes, lead to antitrust liability. How can these principles be reconciled?

### *Colgate* and the Right to Choose Your Trading Partners

**United States v. Colgate & Co., 250 U.S. 300 (1919)**

*Colgate* is a short, early decision that has come to stand for a basic proposition of refusal-to-deal law. In that case, the Court reviewed a "rather vague and general" allegation that Colgate—a manufacturer of "soap and toilet articles"—had terminated dealers that had failed to respect Colgate's proposed retail prices. The Court pointed out that no resale price maintenance agreement (see Chapter VI) had been alleged: this was unilateral action. In a famous passage, the Court indicated that—at least absent a forbidden purpose—a business had a right to pick its own trading partners. Thus, as there was no RPM *agreement*, Colgate would not be liable for merely cutting off businesses that did not respect its retail price schedules.

The relevant passage provides: "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell. The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases. A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade." What do you make of the language "[i]n the absence of any purpose to create or maintain a monopoly"?

Today, the leading Supreme Court cases on unconditional refusals to deal are *Aspen Skiing* (in which the Court imposed antitrust liability for a ski company's withdrawal from a joint ticket arrangement with its smaller competitor) and *Trinko* (in which the Court declined to impose antitrust liability for Verizon's failure to supply interconnection services to a smaller rival). These are controversial cases and they excite strong feelings! *Trinko* has acquired symbolic status as an emblem of the modern Court's hesitation to impose liability in monopolization cases.[541] *Aspen Skiing*—described in *Trinko* as "at or near the outer bounds of Section 2"—has been criticized with equal vigor from the other direction.[542]

As you read the extracts, ask yourself: are they in tension? Or do they coherently define a border between lawful and unlawful refusals to deal? Does *Trinko* leave room for refusal-to-deal liability beyond *Aspen Skiing*'s facts?

## Aspen Skiing Co. v. Aspen Highlands Skiing Corp.

**472 U.S. 585 (1985)**

Justice Stevens.

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[541] *See*, *e.g.*, Spencer Weber Waller, Microsoft *and* Trinko: *A Tale of Two Courts*, 2006 Utah L. Rev. 741, 742 (2006) ("Justice Scalia's opinion [in *Trinko*] is wrong on the law, wrong on the facts, wrong as a matter of procedure, wrong as a matter of economics, wrong as a matter of institutional competencies, and a poor contrast with the way Section 2 legal standards have been articulated by courts in antitrust cases since the passage of the Sherman Act"); *see also id.* at 741–42 ("Sometimes there is an opinion that it so profoundly wrong that Mary McCarthy's famous quote about Lillian Hellman comes to mind: '[E]very word she writes is a lie, including *and* and *the*.' *Trinko* is such an opinion.").

[542] *See*, *e.g.*, Michael Jacobs, *Introduction: Hail or Farewell? The* Aspen *Case 20 Years Later*, 73 Antitrust L.J. 59, 63– (2005) (articulating criticisms of *Aspen*'s "oddities and inexplicable failures"—including a "fundamental mistake" regarding market definition, a "rather remarkable and utterly incorrect" conclusion regarding price effects, a "circular" justification analysis, and "economically perverse" implications—and concluding that the case is an "anomaly" that "did little to clarify the meaning of Section 2 and much to obscure it").

[1] Aspen is a destination ski resort with a reputation for super powder, a wide range of runs, and an active night life, including some of the best restaurants in North America. Between 1945 and 1960, private investors independently developed three major facilities for downhill skiing: Aspen Mountain (Ajax), Aspen Highlands (Highlands), and Buttermilk. A fourth mountain, Snowmass, opened in 1967. [. . .]

[2] Between 1958 and 1964, three independent companies operated Ajax, Highlands, and Buttermilk. In the early years, each company offered its own day or half-day tickets for use of its mountain. In 1962, however, the three competitors also introduced an interchangeable ticket. The 6-day, all-Aspen ticket provided convenience to the vast majority of skiers who visited the resort for weekly periods, but preferred to remain flexible about what mountain they might ski each day during the visit. It also emphasized the unusual variety in ski mountains available in Aspen.

[3] As initially designed, the all-Aspen ticket program consisted of booklets containing six coupons, each redeemable for a daily lift ticket at Ajax, Highlands, or Buttermilk. . . . The revenues from the sale of the 3-area coupon books were distributed in accordance with the number of coupons collected at each mountain.

[4] In 1964, Buttermilk was purchased by Ski Co., but the interchangeable ticket program continued. In most seasons after it acquired Buttermilk, Ski Co. offered 2-area, 6- or 7-day tickets featuring Ajax and Buttermilk in competition with the 3-area, 6-coupon booklet. Although it sold briskly, the all-Aspen ticket did not sell as well as Ski Co.'s multiarea ticket until Ski Co. opened Snowmass in 1967. Thereafter, the all-Aspen coupon booklet began to outsell Ski Co.'s ticket featuring only its mountains. [. . .]

[5] In the 1970's the management of Ski Co. increasingly expressed their dislike for the all-Aspen ticket. They complained that a coupon method of monitoring usage was administratively cumbersome. They doubted the accuracy of the survey and decried the appearance, deportment, and attitude of the college students who were conducting it. In addition, Ski Co.'s president had expressed the view that the 4-area ticket was siphoning off revenues that could be recaptured by Ski Co. if the ticket was discontinued. In fact, Ski Co. had reinstated its 3-area, 6-day ticket during the 1977–1978 season, but that ticket had been outsold by the 4-area, 6-day ticket nearly two to one.

[6] In March 1978, the Ski Co. management recommended to the board of directors that the 4-area ticket be discontinued for the 1978–1979 season. The board decided to offer Highlands a 4-area ticket provided that Highlands would agree to receive a 12.5% fixed percentage of the revenue-considerably below Highlands' historical average based on usage. Later in the 1978–1979 season, a member of Ski Co.'s board of directors candidly informed a Highlands official that he had advocated making Highlands an offer that it could not accept.

[7] Finding the proposal unacceptable, Highlands suggested a distribution of the revenues based on usage to be monitored by coupons, electronic counting, or random sample surveys. If Ski Co. was concerned about who was to conduct the survey, Highlands proposed to hire disinterested ticket counters at its own expense—"somebody like Price Waterhouse"—to count or survey usage of the 4-area ticket at Highlands. Ski Co. refused to consider any counterproposals, and Highlands finally rejected the offer of the fixed percentage.

[8] As far as Ski Co. was concerned, the all-Aspen ticket was dead. In its place Ski Co. offered the 3-area, 6-day ticket featuring only its mountains. In an effort to promote this ticket, Ski Co. embarked on a national advertising campaign that strongly implied to people who were unfamiliar with Aspen that Ajax, Buttermilk, and Snowmass were the only ski mountains in the area. For example, Ski Co. had a sign changed in the Aspen Airways waiting room at Stapleton Airport in Denver. The old sign had a picture of the four mountains in Aspen touting "Four Big Mountains" whereas the new sign retained the picture but referred only to three. [. . .]

[9] In this Court, Ski Co. contends that even a firm with monopoly power has no duty to engage in joint marketing with a competitor, that a violation of § 2 cannot be established without evidence of substantial exclusionary conduct, and that none of its activities can be characterized as exclusionary. It also contends that the Court of Appeals incorrectly relied on the "essential facilities" doctrine and that an "anticompetitive intent" does not transform nonexclusionary conduct into monopolization. In response, Highlands submits that, given the evidence in the record, it is not necessary to rely on the "essential facilities" doctrine in order to affirm the judgment.

[10] The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors. Ski Co., therefore, is surely correct in submitting that even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor. Ski Co. is quite wrong, however, in suggesting that the judgment in this case rests on any such proposition of law. For the trial court unambiguously instructed the jury that a firm possessing monopoly power has no duty to cooperate with its business rivals.

[11] The absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.

[12] In *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), we squarely held that this right was not unqualified. Between 1933 and 1948 the publisher of the Lorain Journal, a newspaper, was the only local business disseminating news and advertising in that Ohio town. In 1948, a small radio station was established in a nearby community. In an effort to destroy its small competitor, and thereby regain its "pre-1948 substantial monopoly over the mass dissemination of all news and advertising," the Journal refused to sell advertising to persons that patronized the radio station.

[13] In holding that this conduct violated § 2 of the Sherman Act, the Court dispatched the same argument raised by the monopolist here:

> The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases. We do not dispute that general right. But the word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

[14] The Court approved the entry of an injunction ordering the Journal to print the advertisements of the customers of its small competitor.

[15] In *Lorain Journal*, the violation of § 2 was an attempt to monopolize, rather than monopolization, but the question of intent is relevant to both offenses. In the former case it is necessary to prove a specific intent to accomplish the forbidden objective—as Judge Hand explained, an intent which goes beyond the mere intent to do the act. In the latter case evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as "exclusionary" or "anticompetitive"—to use the words in the trial court's instructions—or "predatory," to use a word that scholars seem to favor. Whichever label is used, there is agreement on the proposition that no monopolist monopolizes unconscious of what he is doing. As Judge Bork stated more recently: "Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended."

[16] The qualification on the right of a monopolist to deal with whom he pleases is not so narrow that it encompasses no more than the circumstances of *Lorain Journal*. In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years. The all-Aspen, 6-day ticket with revenues allocated on the basis of usage was first developed when three independent companies operated three different ski mountains in the Aspen area. It continued to provide a desirable option for skiers when the market was enlarged to include four mountains, and when the character of the market was changed by Ski Co.'s acquisition of monopoly power. Moreover, since the record discloses that interchangeable tickets are used in other multimountain areas

which apparently are competitive, it seems appropriate to infer that such tickets satisfy consumer demand in free competitive markets.

[17] Ski Co.'s decision to terminate the all-Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market. Such a decision is not necessarily anticompetitive, and Ski Co. contends that neither its decision, nor the conduct in which it engaged to implement that decision, can fairly be characterized as exclusionary in this case. It recognizes, however, that as the case is presented to us, we must interpret the entire record in the light most favorable to Highlands and give to it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.

[18] Moreover, we must assume that the jury followed the court's instructions. The jury must, therefore, have drawn a distinction between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck, on the other. Since the jury was unambiguously instructed that Ski Co.'s refusal to deal with Highlands does not violate Section 2 if valid business reasons exist for that refusal, we must assume that the jury concluded that there were no valid business reasons for the refusal. The question then is whether that conclusion finds support in the record. [. . .]

[19] The question whether Ski Co.'s conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers, on Ski Co.'s smaller rival, and on Ski Co. itself. [. . .]

[20] The average Aspen visitor is a well-educated, relatively affluent, experienced skier who has skied a number of times in the past. Over 80% of the skiers visiting the resort each year have been there before-40% of these repeat visitors have skied Aspen at least five times. Over the years, they developed a strong demand for the 6-day, all-Aspen ticket in its various refinements. Most experienced skiers quite logically prefer to purchase their tickets at once for the whole period that they will spend at the resort; they can then spend more time on the slopes and enjoying après-ski amenities and less time standing in ticket lines. The 4-area attribute of the ticket allowed the skier to purchase his 6-day ticket in advance while reserving the right to decide in his own time and for his own reasons which mountain he would ski on each day. It provided convenience and flexibility, and expanded the vistas and the number of challenging runs available to him during the week's vacation.

[21] While the 3-area, 6-day ticket offered by Ski Co. possessed some of these attributes, the evidence supports a conclusion that consumers were adversely affected by the elimination of the 4-area ticket. In the first place, the actual record of competition between a 3-area ticket and the all-Aspen ticket in the years after 1967 indicated that skiers demonstrably preferred four mountains to three. Highlands' expert marketing witness testified that many of the skiers who come to Aspen want to ski the four mountains, and the abolition of the 4-area pass made it more difficult to satisfy that ambition. A consumer survey undertaken in the 1979-1980 season indicated that 53.7% of the respondents wanted to ski Highlands, but would not; 39.9% said that they would not be skiing at the mountain of their choice because their ticket would not permit it.

[22] Expert testimony and anecdotal evidence supported these statistical measures of consumer preference. A major wholesale tour operator asserted that he would not even consider marketing a 3-area ticket if a 4-area ticket were available. During the 1977–1978 and 1978–1979 seasons, people with Ski Co.'s 3-area ticket came to Highlands on a very regular basis and attempted to board the lifts or join the ski school. Highlands officials were left to explain to angry skiers that they could only ski at Highlands or join its ski school by paying for a 1-day lift ticket. Even for the affluent, this was an irritating situation because it left the skier the option of either wasting 1 day of the 6-day, 3-area pass or obtaining a refund which could take all morning and entailed the forfeit of the 6-day discount. An active officer in the Atlanta Ski Club testified that the elimination of the 4-area pass "infuriated" him. [. . .]

[23] The adverse impact of Ski Co.'s pattern of conduct on Highlands is not disputed in this Court. Expert testimony described the extent of its pecuniary injury. The evidence concerning its attempt to develop a substitute

product either by buying Ski Co.'s daily tickets in bulk, or by marketing its own Adventure Pack, demonstrates that it tried to protect itself from the loss of its share of the patrons of the all-Aspen ticket. The development of a new distribution system for providing the experience that skiers had learned to expect in Aspen proved to be prohibitively expensive. As a result, Highlands' share of the relevant market steadily declined after the 4-area ticket was terminated. The size of the damages award also confirms the substantial character of the effect of Ski Co.'s conduct upon Highlands.

[24] Perhaps most significant, however, is the evidence relating to Ski Co. itself, for Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose. Ski Co. was apparently willing to forgo daily ticket sales both to skiers who sought to exchange the coupons contained in Highlands' Adventure Pack, and to those who would have purchased Ski Co. daily lift tickets from Highlands if Highlands had been permitted to purchase them in bulk. The jury may well have concluded that Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor.

[25] That conclusion is strongly supported by Ski Co.'s failure to offer any efficiency justification whatever for its pattern of conduct. In defending the decision to terminate the jointly offered ticket, Ski Co. claimed that usage could not be properly monitored. The evidence, however, established that Ski Co. itself monitored the use of the 3-area passes based on a count taken by lift operators, and distributed the revenues among its mountains on that basis. Ski Co. contended that coupons were administratively cumbersome, and that the survey takers had been disruptive and their work inaccurate. Coupons, however, were no more burdensome than the credit cards accepted at Ski Co. ticket windows. Moreover, in other markets Ski Co. itself participated in interchangeable lift tickets using coupons. As for the survey, its own manager testified that the problems were much overemphasized by Ski Co. officials, and were mostly resolved as they arose. Ski Co.'s explanation for the rejection of Highlands' offer to hire-at its own expense-a reputable national accounting firm to audit usage of the 4-area tickets at Highlands' mountain, was that there was no way to "control" the audit.

[26] In the end, Ski Co. was pressed to justify its pattern of conduct on a desire to disassociate itself from what it considered the inferior skiing services offered at Highlands. The all-Aspen ticket based on usage, however, allowed consumers to make their own choice on these matters of quality. Ski Co.'s purported concern for the relative quality of Highlands' product was supported in the record by little more than vague insinuations, and was sharply contested by numerous witnesses. Moreover, Ski Co. admitted that it was willing to associate with what it considered to be inferior products in other markets.

[27] Although Ski Co.'s pattern of conduct may not have been as bold, relentless, and predatory as the publisher's actions in *Lorain Journal*, the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival. The sale of its 3-area, 6-day ticket, particularly when it was discounted below the daily ticket price, deterred the ticket holders from skiing at Highlands. The refusal to accept the Adventure Pack coupons in exchange for daily tickets was apparently motivated entirely by a decision to avoid providing any benefit to Highlands even though accepting the coupons would have entailed no cost to Ski Co. itself, would have provided it with immediate benefits, and would have satisfied its potential customers. Thus the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.

[28] Because we are satisfied that the evidence in the record, construed most favorably in support of Highlands' position, is adequate to support the verdict under the instructions given by the trial court, the judgment of the Court of Appeals is

*Affirmed.*

* * *

The meaning, basis, and scope of *Aspen Skiing* were at issue twenty years later when *Trinko* came before the Court. Verizon was the incumbent local exchange carrier ("LEC") in New York State. Under the Telecommunications Act 1996, incumbent LECs had to share their network on a nondiscriminatory basis with entrants that could then

resell access. But Verizon allegedly dragged its heels in serving AT&T, including by discriminating against AT&T's customers: and it was eventually sued by one such customer, a NYC law firm, under Section 2. In an opinion by Justice Scalia—and over no dissent, just a concurrence in the judgment by three Justices who concluded that the plaintiff lacked standing—the Court held that there was no Section 2 violation.

As we noted above, *Trinko* has come to symbolize a modern, somewhat conservative approach to the imposition of liability for monopolization. That approach emphasizes the relative freedom of a monopolist, and the value of allowing sharp-elbowed behavior in the marketplace, as well as the difficulties of imposing and supervising forced-sharing obligations under the antitrust laws. It is, at least in tone and emphasis, and perhaps in substance too, a long way from *Aspen Skiing*.[543]

## Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP

### 540 U.S. 398 (2004)

Justice Scalia.

[1] The Telecommunications Act of 1996 imposes certain duties upon incumbent local telephone companies in order to facilitate market entry by competitors, and establishes a complex regime for monitoring and enforcement. In this case we consider whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act.

[2] Petitioner Verizon Communications Inc. is the incumbent local exchange carrier (LEC) serving New York State. . . . Central to the scheme of the Act is the incumbent LEC's obligation under 47 U.S.C. § 251(c) to share its network with competitors, including provision of access to individual elements of the network on an "unbundled" basis. New entrants, so-called competitive LECs, resell these unbundled network elements (UNEs), recombined with each other or with elements belonging to the LECs. [. . .]

[3] Part of Verizon's UNE obligation under § 251(c)(3) is the provision of access to operations support systems (OSS), a set of systems used by incumbent LECs to provide services to customers and ensure quality. . . .

[4] In late 1999, competitive LECs complained to regulators that many orders were going unfilled, in violation of Verizon's obligation to provide access to OSS functions. The [New York Public Service Commission ("PSC")] and [Federal Communications Commission ("FCC")] opened parallel investigations, which led to a series of orders by the PSC and a consent decree with the FCC. . . .

[5] Respondent Law Offices of Curtis V. Trinko, LLP, a New York City law firm, was a local telephone service customer of AT & T. . . . [Its] complaint . . . alleged that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs, thus impeding the competitive LECs' ability to enter and compete in the market for local telephone service. According to the complaint, Verizon has filled orders of competitive LEC customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for competitive LEC customers, and has systematically failed to inform competitive LECs of the status of their customers' orders. . . . It asserted that the result of Verizon's improper behavior with respect to providing access to its local loop was to deter potential customers of rivals from switching. The complaint sought damages and injunctive relief for violation of § 2 of the Sherman Act . . . .

[6] To decide this case, we must first determine what effect (if any) the 1996 Act has upon the application of traditional antitrust principles. The Act imposes a large number of duties upon incumbent LECs—above and beyond those basic responsibilities it imposes upon all carriers . . . . Under the sharing duties of § 251(c), incumbent LECs are required to offer [various] kinds of access. Already noted, and perhaps most intrusive, is the duty to offer access to UNEs on just, reasonable, and nondiscriminatory terms, a phrase that the FCC has interpreted to mean

[543] *See*, *e.g.*, Eleanor M. Fox, *Is There Life In* Aspen *After* Trinko? 73 Antitrust L.J. 153 (2005) ("While in theory *Aspen* is not overruled, *Trinko* has, at least, opened wide the door to argument in every Section 2 case that the starting point is skepticism about Section 2 based on fear that courts will condemn ambiguous conduct that is in fact efficient.").

a price reflecting long-run incremental cost. A rival can interconnect its own facilities with those of the incumbent LEC, or it can simply purchase services at wholesale from the incumbent and resell them to consumers.

[7] That Congress created these duties, however, does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim. Indeed, a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity. In some respects the enforcement scheme set up by the 1996 Act is 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.

[8] Congress, however, precluded that interpretation. Section 601(b)(1) of the 1996 Act is an antitrust-specific saving clause providing that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." This bars a finding of implied immunity. . . .

[9] But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's mandate that nothing in the Act "modify, impair, or supersede the applicability" of the antitrust laws. . . .

[10] The complaint alleges that Verizon denied interconnection services to rivals in order to limit entry. If that allegation states an antitrust claim at all, it does so under § 2 of the Sherman Act, 15 U.S.C. § 2, which declares that a firm shall not "monopolize" or "attempt to monopolize." It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, 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. The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. 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. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.

[11] Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

[12] However, the high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified. Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm. The question before us today is whether the allegations of respondent's complaint fit within existing exceptions or provide a basis, under traditional antitrust principles, for recognizing a new one.

[13] The leading case for § 2 liability based on refusal to cooperate with a rival, and the case upon which respondent understandably places greatest reliance, is *Aspen Skiing*. The Aspen ski area consisted of four mountain areas. The defendant, who owned three of those areas, and the plaintiff, who owned the fourth, had cooperated for years in the issuance of a joint, multiple-day, all-area ski ticket. After repeatedly demanding an increased share of the proceeds, the defendant canceled the joint ticket. The plaintiff, concerned that skiers would bypass its mountain without some joint offering, tried a variety of increasingly desperate measures to re-create the joint ticket, even to the point of in effect offering to buy the defendant's tickets at retail price. The defendant refused even that. We upheld a jury verdict for the plaintiff, reasoning that the jury may well have concluded that the

defendant elected to forgo these short-run benefits because it was more interested in reducing competition over the long run by harming its smaller competitor.

[14] *Aspen Skiing* is at or near the outer boundary of § 2 liability. The Court there found significance in the defendant's decision to cease participation in a cooperative venture. The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. Similarly, the defendant's unwillingness to renew the ticket even if compensated at retail price revealed a distinctly anticompetitive bent.

[15] The refusal to deal alleged in the present case does not fit within the limited exception recognized in *Aspen Skiing*. The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal—upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior. In *Aspen Skiing*, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation . . . tells us nothing about dreams of monopoly.

[16] The specific nature of what the [Telecommunications Act of 1996] compels makes this case different from *Aspen Skiing* in a more fundamental way. In *Aspen Skiing*, what the defendant refused to provide to its competitor was a product that it already sold at retail—to oversimplify slightly, lift tickets representing a bundle of services to skiers. Similarly, in *Otter Tail Power Co. v. United States*, [410 U.S. 366 (1973)], another case relied upon by respondent, the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public. The sharing obligation imposed by the 1996 Act created something brand new—the wholesale market for leasing network elements. The unbundled elements offered pursuant to [the 1996 Act] exist only deep within the bowels of Verizon; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort. New systems must be designed and implemented simply to make that access possible—indeed, it is the failure of one of those systems that prompted the present complaint.

[17] We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents. This conclusion would be unchanged even if we considered to be established law the "essential facilities" doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent's allegations might state a claim. . . . We have never recognized such a doctrine, and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. Thus, it is said that essential facility claims should be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms. Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's "essential facilities" argument is distinct from its general § 2 argument, we reject it. [. . .]

[18] Finally, we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. As we have noted, careful account must be taken of the pervasive federal and state regulation characteristic of the industry. . . . .

[19] One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, 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. Where, by contrast, there is nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context

may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2. [. . .]

[20] Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 can be difficult because the means of illicit exclusion, like the means of legitimate competition, are myriad. Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect. The cost of false positives counsels against an undue expansion of § 2 liability. One false-positive risk is that an incumbent LEC's failure to provide a service with sufficient alacrity might have nothing to do with exclusion. Allegations of violations of [duties under the Telecommunications Act] are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. Amici States have filed a brief asserting that competitive LECs are threatened with death by a thousand cuts, the identification of which would surely be a daunting task for a generalist antitrust court. Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by [competitors].

[21] Even if the problem of false positives did not exist, conduct consisting of anticompetitive violations of [the 1996 Act] may be, as we have concluded with respect to above-cost predatory pricing schemes, beyond the practical ability of a judicial tribunal to control. Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think that Professor Areeda got it exactly right: No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremediable by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency. In this case, respondent has requested an equitable decree to preliminarily and permanently enjoin Verizon from providing access to the local loop market to rivals on terms and conditions that are not as favorable as those that Verizon enjoys. An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.

### *The Essential Facilities Doctrine*

Although—as Justice Scalia noted in paragraph 8 of the *Trinko* extract above—the Supreme Court has never endorsed the theory,[544] many lower courts have acknowledged or indicated the existence of an "essential facilities" doctrine.[545]

In principle, this doctrine requires a monopolist in possession of a strictly necessary facility to offer to share it with rivals. But this broad-sounding rule is very limited in practice. Among other things, it applies only to strictly necessary facilities or assets, when no alternative is available and where the plaintiff cannot duplicate them, and this requirement is construed sternly.[546] Moreover, in order to be really effective, an essential-facilities doctrine requires courts to specify or at least police the terms of access—price, terms, and so on—in ways that courts tend

[544] *But see* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

[545] *See*, *e.g.*, Kerwin v. Casino, 802 F. App'x 723, 727 (3d Cir. 2020); Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1310 (10th Cir. 2017); Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1185 (9th Cir. 2016); MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1128–29 (9th Cir. 2004); Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568–69 (2d Cir. 1990); Fishman v. Wirtz, 807 F.2d 520, 539 (7th Cir. 1986); MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1132 (7th Cir. 1983); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977). *See also*, *e.g.*, Robert Pitofsky, Donna Patterson, & Jonathan Hooks, *The Essential Facilities Doctrine Under United States Antitrust Law*, 70 Antitrust L.J. 443 (2002); Nikolas Guggenberger, *The Essential Facilities Doctrine in the Digital Economy: Dispelling Persistent Myth*s, 23 Yale J.L. & Tech. 301 (2021); *Antitrust Chronicle: Essential Digital Facilities*, Comp. Pol'y Intl. (Spring 2023) (symposium).

[546] *See*, *e.g.*, MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1129–30 (9th Cir. 2004) ("The doctrine makes a facility that is essential to competition in a given market available to competitors so that they may compete in that market. A facility is 'essential' only if it is otherwise unavailable and cannot be reasonably or practically replicated. The doctrine does not guarantee competitors access to the essential facility in the most profitable manner.") (internal quotation marks and citation omitted); Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1051 (N.D. Cal. 2021) ("This doctrine does not require distribution in the manner preferred by the competitor, here native apps. The availability of these other avenues of distribution, even if they are not the preferred or ideal methods, is dispositive of Epic Games' claim. The doctrine does not demand an ideal or preferred standard.").

to be reluctant to do.[547] Perhaps unsurprisingly, then, courts are *exceptionally* reluctant to actually apply the doctrine to compel sharing: in fact, they virtually never do so.[548] However, despite the Supreme Court's evident skepticism, the doctrine retains at least theoretical viability among the lower courts, and the threat of liability may affect the behavior of some monopolists in the real world, including their willingness to negotiate with rivals over access.

In the wake of *Trinko*, courts have generally taken a narrow view of *Aspen Skiing* and liability for refusal to deal.[549]

### *Refusal to Deal after* Trinko

Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC, 111 F.4th 337 (4th Cir. 2024); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429 (7th Cir. 2020); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013)

After *Trinko*, courts have struggled to define the narrow zone in which a monopolist will be liable for a refusal to deal. Three contrasting decisions illustrate how appellate courts are navigating the terrain.

*Novell* dealt with allegations by Novell—the creator of the WordPerfect word processor application—that Microsoft had violated Section 2 by cutting off WordPerfect's access to certain functions on Microsoft's Windows operating system. Specifically, Novell alleged that Microsoft feared that WordPerfect could offer rival operating systems a promising unintegrated complement, and thus encourage such rivals to enter and compete against Windows in the operating system market. To eliminate this threat, the theory went, Microsoft cut off the access that third-party applications like WordPerfect had enjoyed to certain software interfaces ("namespace extensions") on Windows.

The Tenth Circuit, in an opinion by then-Judge Gorsuch, affirmed the dismissal of the claim. "In earlier days, some courts suggested that a monopolist must lend smaller rivals a helping hand." But "[t]he Supreme Court and this one . . . have long and emphatically rejected this approach, realizing that the proper focus of section 2 isn't on protecting competitors but on protecting the process of competition, with the interests of consumers, not competitors, in mind. Forcing monopolists to hold an umbrella over inefficient competitors might make rivals happy but it usually leaves consumers paying more for less." The court indicated that the touchstone for monopolization liability was "whether, based on the evidence and experience derived from past cases, the conduct at issue before us has little or no value beyond the capacity to protect the monopolist's market power—bearing in mind the risk of false positives (and negatives) any determination on the question of liability might invite, and the limits on the administrative capacities of courts to police market terms and transactions."

To prevail on a refusal-to-deal claim in the Tenth Circuit, the court held, a plaintiff must show: (1) "a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival"; and (2) discontinuation of that course of dealing that "suggest[s] a willingness to forsake short-term profits to achieve an anti-competitive end." Satisfying this test requires "proof not just that the monopolist decided to forsake short-term profits. Just as in predatory pricing cases, we also require a showing that the monopolist's refusal to deal was part of a larger anticompetitive enterprise, such as (again) seeking to drive a rival from the market or discipline it for daring to compete on price. Put simply, the monopolist's conduct must be irrational but for its anticompetitive effect." The Tenth Circuit held that when analyzing whether Microsoft had forsaken profits, what mattered was the total profits

[547] *See*, *e.g.*, Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 881 F. Supp. 1309, 1320–21 (W.D. Wis. 1994) ( "A denial of access on reasonable terms may be sufficient to satisfy the essential facilities doctrine; a complete denial of access may not be necessary."); Robert Pitofsky, Donna Patterson, & Jonathan Hooks, *The Essential Facilities Doctrine Under United States Antitrust Law*, 70 Antitrust L.J. 443, 448 n.21 (2002).

[548] *But see*, *e.g.*, MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1133 (7th Cir. 1983) ("[T]he evidence supports the jury's determination that AT & T denied the essential facilities, the interconnections for FX and CCSA service, when they could have been feasibly provided.").

[549] *See*, *e.g.*, Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074–76 (10th Cir. 2013) (refusal to deal claim requires "preexisting voluntary and presumably profitable course of dealing between the monopolist and rival" and "willingness to forsake short-term profits"); FTC v. Qualcomm Inc., 969 F.3d 974, 993–94 (9th Cir. 2020) (claim requires termination of a voluntary and profitable course of dealing, sacrifice of short-run profits, and product or service that the defendant sells to similarly situated buyers); Covad Communications Co. v. Bell Atlantic Corp., 398 F.3d 666 (D.C. Cir. 2005) (plaintiff must prove refusal caused defendant "short-term economic loss"). *See also*, *e.g.*, In re Elevator Antitrust Litig., 502 F.3d 47, 53 (2d Cir. 2007) (noting "[t]he limited nature of this exception to the right of refusal to deal" after *Trinko*). *But see*, *e.g.*, Michael A. Carrier, *Sharing, Samples, and Generics: An Antitrust Framework*, 103 Cornell L. Rev. 1, 51–53 (2017) (collecting authority for liability without a prior course of dealing).

from selling both Windows and Microsoft Office, not just foregone profits on Windows from making Windows a less useful product. And Novell had not shown such a sacrifice.

Seven years later, the plaintiff in *Viamedia* had somewhat better luck in the Seventh Circuit. In that case, Comcast held monopoly power in two markets: a market for "interconnect" services ("cooperative selling arrangements for advertising through an 'Interconnect' that enables providers of retail cable television services to sell advertising targeted efficiently at regional audiences") and a market for "advertising representation" services ("services for retail cable television providers [that] assist those providers with the sale and delivery of national, regional, and local advertising"). The theory of harm was that Comcast used its interconnect monopoly to give cable TV businesses a choice: buy advertising representation services from Comcast or be cut off from interconnect services. Viamedia, an advertising representation competitor, sued for monopolization.

The Seventh Circuit reversed the district court's dismissal of the case. In doing so, it denied that *Aspen Skiing* provided a straitjacket for claims premised on a refusal to deal: "The *Aspen Skiing* factors help case-by-case assessments of whether a challenged refusal to deal is indeed anticompetitive, even though no factor is always decisive by itself." And "because the factors as a whole provide a window into likely harm to competition, a court should start with the *Aspen Skiing* factors in determining whether a refusal to deal is unlawful." The court held that Viamedia had stated a claim that was at least as strong as that in *Aspen Skiing* itself, given the relationship between the two markets: "unlike in *Aspen Skiing*, where the ultimate customers were skiers who did not compete against the defendant ski resort, Comcast's refusal to deal with Viamedia has left its MVPD customers in these markets no practical choice but to turn over their ad sales business, along with their sensitive business information and a large percentage of their ad revenue, to their dominant MVPD competitor."

Critically, the court declined to accept Comcast's protestations that its refusal to deal might have promoted its own efficiency. The court expressed pointed skepticism of the idea that liability under Section 2 required a showing that the refusal was economically irrational; rather, an assessment of "procompetitive benefits and anticompetitive harms is necessary to answer the ultimate question of whether competition was harmed." In a footnote, the court indicated that a balancing test of some kind might be applied to condemn certain refusals when the harm very significantly outweighed the efficiency gain. But "[e]ven if an allegation that a defendant's conduct was irrational but for its anticompetitive effect were necessary, Viamedia has plausibly alleged just that."

And in 2024, the Fourth Circuit kept a complicated refusal-to-deal claim alive in *Duke Energy*. Duke Energy both generated power and provided power transmission services in the Carolinas, and it was sued for monopolization by its growing power-generation rival, NTE. NTE alleged that Duke, as a power-generation monopolist, feared competition from NTE. To meet that threat, NTE complained, Duke had deployed an intricate strategy: (1) it made a key customer (Fayetteville, NC) a renewal offer with a deep retroactive discount (on demand that was already contractually committed to Duke), resulting in an overall price that even an equally, or more, efficient competitor such as NTE could not match; and (2) it blew up a relationship pursuant to which Duke was supplying transmission services to NTE, falsely giving the impression to customers and regulators—through false statements and sham litigation—that NTE had breached the underlying agreement and that it lacked access to interconnection capacity, thus discouraging Fayetteville from inviting NTE to compete for its business. And by preventing NTE from competing for Fayetteville's business, Duke deprived NTE of the scale necessary to invest in a critical new plant—and therefore unlawfully maintained its monopoly.

The district court had granted summary judgment to Duke, but the Fourth Circuit reversed. The court emphasized that the case did not charge a pure refusal-to-deal, but rather a multi-part scheme—including acts of deception and sham litigation—of which the refusal formed just a part. The court also noted that a jury could conclude that Duke had sacrificed short-term profits to achieve an anticompetitive goal, like the defendant in *Aspen Skiing*. The court sent the matter on to trial, although Duke filed a cert petition that is currently pending.

As these cases suggest, courts often emphasize the importance of a profit sacrifice or some kind of irrationality when considering a refusal-to-deal claim, but other avenues may retain some viability. Today, *Novell* represents

the more common view among courts.[550] At the time of writing, no plaintiff in a refusal-to-deal case seems to have won a final judgment since *Trinko*. [551]

As you ponder the interaction of the modern landmarks of *Aspen Skiing* and *Trinko*, it is worth keeping in mind that antitrust was not always so solicitous of the monopolist's freedom to do "nothing but compete."

## CASENOTE: United States v. Aluminum Co. of America

### 148 F.2d 416 (2d Cir. 1945)

As you will remember, *Alcoa* dealt with a monopolization suit against Aluminum Co. of America ("Alcoa"): the Supreme Court lacked a quorum and the case was heard by the Second Circuit. The plaintiff alleged, among other things, that Alcoa had violated Section 2 through a range of conduct, including predatory overbuying of bauxite (an ore from which aluminum is created) and water power, various acquisitions, and various practices relating to downstream markets for "fabricated goods," including a so-called "price squeeze" of competing "sheet rollers."

The court's specific findings with respect to these practices are not of great importance today, having been overtaken by subsequent developments in the law. For example, the court ultimately condemned Alcoa's price squeeze—*i.e.*, Alcoa charged a high price for ingot, which is an input to sheet rolling, and a low price for sheet rolling itself, so that competing rollers could not profitably compete—although today that practice is *per se* lawful. *See* Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438 (2009).

Of some more interest, at least as a matter of antitrust history, are Judge Hand's broad-brush comments about the line between aggressive competition and monopolization. For example, Judge Hand used the terms "exclusion" and "monopolization" in terms that differ sharply from most modern usage:

- "Nothing compelled [Alcoa] to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to maneuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent."
- "Alcoa meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to 'monopolize' that market, however innocently it otherwise proceeded."

*Alcoa* is also intriguing, through modern eyes, for its treatment of subjective intent. Early in the opinion, Judge Hand indicated that monopolization liability does not depend on any question of intent other than "intent to bring about the forbidden act." It is not necessary, for example, that the specific means of monopolization be themselves independently unlawful.

However, when reviewing the individual allegations against Alcoa, Judge Hand appeared to pay close attention to matters of intention. In some places, he appeared to suggest that a monopolist acted lawfully when it was motivated by something like legitimate competitive purposes. For example, in discussing the allegations of overbuying, the court indicated that the decisive question was "whether, when Alcoa bought up the bauxite deposits, it really supposed that they would be useful in the future," and whether the purchasing of water power was "for the purpose of preventing competition." Likewise, in reviewing Alcoa's acquisitions, Judge Hand appeared to focus on the company's own reasons for the acquisitions, rather than their positive and negative effects on competition. Only when the court turned to consider Alcoa's conduct directed to markets for fabricated goods

[550] *See*, *e.g.*, OJ Com., LLC v. KidKraft, Inc., 34 F.4th 1232, 1245 (11th Cir. 2022); St. Luke's Hosp. v. ProMedica Health Sys., Inc., 8 F.4th 479, 486 (6th Cir. 2021); New York v. Facebook, Inc., 549 F. Supp. 3d 6, 25–28 (D.D.C. 2021).

[551] *See* Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 Yale L.J. 1483, 1497 n.71 (2022).

did the focus more directly shift to whether the challenged practices "served to make Alcoa's legal position as to the ingot industry less vulnerable than it would otherwise have been." The price squeeze was condemned on that basis under Section 2.

There are many ways to read the *Alcoa* opinion today. Among other things, it represents a mingling of older and newer views about the morality of competitive practices and the legal concept of monopolization itself. It can be seen as a boundary stone between a monopolization offense built on a theory of bad purposes and one based on competitive effects.

## NOTES

1) *Aspen Skiing*, *Trinko*, *Novell*, *Viamedia*, *Duke Energy*, and so on deal with unconditional refusals, where the harm arises from the defendant's failure to supply something to the plaintiff. After we meet exclusivity and tying, we will think about the relationship between these refusal-to-deal cases and "conditional dealing."[552]
2) Some courts suggest that a refusal to deal violates Section 2 if a plaintiff can show: (1) that the defendant has terminated a preexisting voluntary (and therefore presumably profitable) course of dealing; (2) the defendant supplies the product or service to other non-competitor purchasers; and (3) that the termination suggests a willingness to sacrifice short-term profits for anticompetitive purposes.[553] Is this a suitable reconciliation of *Aspen Skiing* and *Trinko*? What is the point of the second criterion? For some critical discussion of the profit-sacrifice test, *see* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 Antitrust L.J. 311 (2006).
3) What is a "superior product"? What practices, if any, that would otherwise violate Section 2, should be protected because they represent product superiority? What about "business acumen"?
4) Courts do not often use the language of "privilege" or "safe harbor." Are there other ways of capturing the concept that monopolization treats some practices more leniently than others? For example:
    a. Could, or should, the law apply a sliding scale that subjects conduct to increasingly demanding scrutiny based on its likelihood to harm competition? What facts or factors should determine where conduct appears on that scale?[554]
    b. Could we define a category of "bad conduct" into which unlawful monopolization would fall? What could that look like?
5) Was the "joint ticket" arrangement in *Aspen Skiing* procompetitive or anticompetitive? How did it differ from a price-fixing arrangement?
6) In *Trinko*, the Court emphasized the complexities of enforcing a remedy that requires one business to sell to another. How hard do you think this is in practice? Are the difficulties different from those that attend other antitrust remedies? Could you imagine other enforcement mechanisms or approaches that might help allay these difficulties? Does a court need to define "fair terms" in order to impose liability for refusal to deal?
7) When and how do you think remedial complexities should influence the shape of substantive liability rules?
8) In cases like *Aspen Skiing*, should courts treat cases in which a monopolist terminates a deal with a rival differently from cases in which a monopolist simply declines to enter into such a deal? How would it change monopolist's incentives if an ongoing duty to deal could result from a decision to deal?
9) One of us has written: "[The *Grinnell*] definition makes no sense: virtually every business seeks to win share from competitors—it willfully seeks monopoly—including through superior products and business acumen. No one thinks that 'willfulness' in chasing monopoly is bad or rare. Every monopolization defendant claims that its conduct facilitates 'superior' operation. And if the use of 'acumen' is exculpatory, then what remains? The first half of the Court's binary is not necessarily bad, the second part is not necessarily good, and they are in no real tension."[555] Do you agree?
10) How important is it that a monopolist be able to accurately predict in advance whether a particular practice will be held to be unlawful monopolization?

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[552] *See infra* note 582 and accompanying text.

[553] *See*, *e.g.*, FTC v. Qualcomm Inc., 969 F.3d 974, 993–94 (9th Cir. 2020); FTC v. Facebook, Inc., 560 F.Supp.3d 1, 23–24 (D.D.C. 2021).

[554] *See*, *e.g.*, Mark S. Popofsky, *Section 2, Safe Harbors, and the Rule of Reason*, 15 Geo. Mason L. Rev. 1265 (2008).

[555] Daniel Francis, *Making Sense of Monopolization*, 84 Antitrust L.J. 779 (2022).

11) In *Alcoa*, what if anything was objectionable about Alcoa's decision to "embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel"?
12) There was no dissent in *Trinko*: does this surprise you? As noted above, three Justices—Justices Stevens, Souter, and Thomas—concurred in the judgment, on the ground that AT&T, not its own customer, would have been the proper plaintiff. What might a dissent in *Trinko* have looked like?

## 4. Justification and the Microsoft Burden-Shifting Framework

Courts and commentators broadly agree that Section 2 requires courts to entertain arguments and evidence that purportedly exclusionary conduct is, in fact, justified by one or more procompetitive goals. Unfortunately, there is considerable confusion and contradiction regarding the relevant legal standard.

A frequently cited justification test for monopolization in modern law is found in *Microsoft*. It provides that a justification assessment should be applied in substantially the same form as Section 1's rule of reason; *i.e.*, in the form of a burden-shifting regime. First, a plaintiff must prove a *prima facie* case of harm; second, a defendant must establish the existence of a nonprextual justification; third, the burden of proof reverts to the plaintiff to establish that on "balance," the harmful tendencies of the relevant practice or transaction exceed the beneficial ones.[556] The relevant language provides as follows:

> From a century of case law on monopolization under § 2 . . . several principles . . . emerge. First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice. The Sherman Act directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.
>
> Second, the plaintiff, on whom the burden of proof of course rests . . . must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. In a case brought by a private plaintiff, the plaintiff must show that its injury is of the type that the statute was intended to forestall[.] [N]o less in a case brought by the Government, it must demonstrate that the monopolist's conduct harmed competition, not just a competitor.
>
> Third, if a plaintiff successfully establishes a prima facie case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a "procompetitive justification" for its conduct. . . . If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim. . . . .
>
> Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. In cases arising under § 1 of the Sherman Act, the courts routinely apply a similar balancing approach under the rubric of the rule of reason. The source of the rule of reason is Standard Oil Co. v. United States, 221 U.S. 1 . . . (1911), in which the Supreme Court used that term to describe the proper inquiry under both sections of the Act.
>
> Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a

[556] *See*, *e.g.*, FTC v. Qualcomm Inc., 969 F.3d 974, 991–92 (9th Cir. 2020) (indicating that, "[r]egardless of whether the alleged antitrust violation involves concerted anticompetitive conduct under § 1 or independent anticompetitive conduct under § 2, the three-part burden-shifting test under the rule of reason is essentially the same," and stating that "[i]f, in reviewing an alleged Sherman Act violation, a court finds that the conduct in question is not anticompetitive under § 1, the court need not separately analyze the conduct under § 2"); *see also*, *e.g.*, BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr., 176 F. Supp. 3d 606, 623 (W.D. La. 2016) ("Though the Fifth Circuit has not explicitly accepted or rejected the Microsoft framework, it previously has suggested that some type of burden-shifting framework is appropriate for analyzing section 2 claims."). *But see*, *e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001) ("[A] monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.").

> monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.[557]

There is a lot of detail and structure here. But there are important questions that remain open. First, can the defendant discharge its burden at step two by merely "proffer[ing]" or "asserting" a nonpretextual procompetitive purpose, as the language in *Microsoft* arguably suggests? Other parts of the *Microsoft* opinion suggest that the defendant's burden is more onerous than a mere assertion.[558] Or must the defendant make an evidentiary showing of some kind (*e.g.*, about the effect or purpose of the challenged practice or transaction): and if so, what is required, and how much?

Second, in what sense must a benefit be "nonpretextual"? Some courts, citing *Microsoft*, have suggested that the defendant's obligation is to "assert" or "proffer" a nonpretextual claimed procompetitive benefit.[559] Is this an objective test: that is, must a defendant prove significant actual procompetitive benefits (*i.e.*, "objectively nonpretextual")? Or is it a subjective one, requiring that defendants prove that, regardless of how things in fact turned out, the conduct was motivated (at least in part?) by a subjective purpose to pursue a procompetitive goal rather than anticompetitive ones? What *is* a "procompetitive" goal for this purpose? Surely the defendant need not have had the subjective purpose of improving consumer welfare: so what is the test?

Third, can it really be right that it falls to the plaintiff to measure the procompetitive effects of a claimed justification, given that many procompetitive benefits relate to the efficiency of the defendant's own operation, such that the defendant is uniquely well placed to develop that information?

The formulation in *Microsoft* does not reflect the last word, nor really a settled, worked-out consensus, on the analysis of procompetitive justifications under Section 2. Other cases and scholarly contributions support approaches that are both more and less demanding for plaintiffs. For example, some cases suggest that the mere existence of a legitimate business purpose could be exculpatory, regardless of the balance of benefits and harms.[560] The Third Circuit has used a formulation requiring that a benefit must be not just procompetitive but "*sufficiently* procompetitive," suggesting that a defendant has some obligation to show that the claimed beneficial effects are sufficient in magnitude.[561] Moreover, a number of courts have indicated that a "less restrictive alternative" test applies under Section 2: a plaintiff may rebut a claimed procompetitive benefit by showing that a less restrictive alternative—that is, a genuinely practicable means of obtaining the relevant benefit with significantly less harm—was available to the defendant, such that the practice in question was "unnecessarily restrictive."[562] It is also not

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[557] United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001).

[558] *See* United States v. Microsoft Corp., 253 F.3d 34, 66 (D.C. Cir. 2001) (rejecting a claimed procompetitive justification for failure to "specif[y]" or "substantiate[ ]" some "general claims" of procompetitive benefit).

[559] *See*, *e.g.*, FTC v. Qualcomm Inc., 969 F.3d 974, 991 (9th Cir. 2020); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 463 (7th Cir. 2020); New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 652 (2d Cir. 2015).

[560] *See*, *e.g.*, Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 856 (7th Cir. 2011) ("[W]e conclude that the [defendant] Hospital's conduct can be considered predatory only if its promises were made not to compete in the market, but only to unfairly stymie unwanted competition. That might be the case if, for example, it could be shown that the Hospital's promises were made with no intent of ever being kept, or if the Hospital's promises were broken only after the Hospital realized that [the plaintiff's] competitive threat had passed."); Imaging Ctr., Inc. v. W. Maryland Health Sys., Inc., 158 F. App'x 413, 421 (4th Cir. 2005) (suggesting that a "valid business reason " or "concern for efficiency" may be exculpatory under Section 2); Tech. Res. Servs., Inc. v. Dornier Med. Sys., Inc., 134 F.3d 1458, 1466 (11th Cir. 1998) ("A defendant can escape § 2 liability if the defendant's actions can be explained by legitimate business justifications."); Illinois ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1481–82 (7th Cir. 1991) ("When courts consider the 'intent' of a firm charged with monopolization, they look not to whether the firm intended to achieve or maintain a monopoly, but to whether the underlying purpose of the firm's conduct was to enable the firm to compete more effectively. Did the firm engage in the challenged conduct for a legitimate business reason? Or was the firm's conduct designed solely to insulate the firm from competitive pressure? Intent is relevant, then, because intent determines "whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.' . . . Conduct that tends to exclude competitors may . . . survive antitrust scrutiny if the exclusion is the product of a normal business purpose, for the presence of a legitimate business justification reduces the likelihood that the conduct will produce undesirable effects on the competitive process.") (citations omitted).

[561] *See*, *e.g.*, United States v. Dentsply Intern., Inc., 399 F.3d 181 (3d Cir. 2005) ("The Government, having demonstrated harm to competition, the burden shifts to Dentsply to show that Dealer Criterion 6 promotes a sufficiently pro-competitive objective.").

[562] *See*, *e.g.*, Retractable Techs., Inc. v. Becton Dickinson & Co., 842 F.3d 883, 891–92 (5th Cir. 2016); Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008); LePage's Inc. v. 3M, 324 F.3d 141, 167 (3d Cir. 2003) (en banc) (jury instruction); Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 188–89 (2d Cir. 1992). *See also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) ("The question whether Ski Co.'s conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.").

quite clear whether justifications should be measured against the same standards for different kinds of monopolization: for example, courts in refusal-to-deal cases commonly require only that a defendant demonstrate a legitimate business purpose, or that the conduct was economically rational aside from any exclusionary effects, which seems to reflect a relatively low bar for defendants in such cases.[563]

In *McWane*, the FTC considered procompetitive justifications for an exclusive-dealing scheme operated by a supplier of pipe fittings, which had excluded Star, McWane's competitor. In particular—as we will see in more detail later in this chapter—McWane, a nearly-strict monopolist of certain kinds of pipe fittings, had required its dealers to deal with it exclusively, on pain of losing access to valuable rebates and supply of product. This exclusivity scheme was very effective, and seriously hindered Star's efforts to erode McWane's monopoly. McWane attempted, unsuccessfully, to justify its use of exclusivity by asserting some procompetitive justifications for its conduct. The FTC's rejection of those justifications was subsequently endorsed by the Eleventh Circuit on appeal.[564] What test is the Commission applying?

## In the Matter of McWane, Inc.

### 2014-1 Trade Cas. (CCH) ¶ 78670, 2014 WL 556261 (F.T.C. Jan. 30, 2014)

Chairwoman Ramirez.

[1] Complaint Counsel has demonstrated harm to competition here, shifting the burden to McWane to show that the challenged conduct promotes a sufficiently pro-competitive objective. Cognizable justifications are typically those that reduce cost, increase output or improve product quality, service, or innovation.

[2] McWane offers two justifications for its conduct. It argues first that it engaged in exclusive dealing to preserve sales in order to generate sufficient volume to operate its last domestic foundry. While preserving sales volume to continue to operate a foundry may have been a significant business objective, it is not a cognizable procompetitive justification for antitrust purposes. As the ALJ recognized, McWane's sales goal provides benefits for McWane, but Respondent has proffered no explanation as to how its Full Support Program benefits consumers.

[3] Significantly, the measures that McWane took to preserve its sales volume were not the type of steps, such as a price reduction, that typically promote consumer welfare by increasing overall market output. Indeed, McWane considered the impact of lowering its domestic fittings pricing "to defend [its] near 100% share position," but ultimately determined that lowering pricing would hurt margins. Instead, the sales gained for production by McWane's exclusive-dealing arrangement were sales taken from Star by virtue of the increased costs imposed by the Full Support Program. That is, McWane's sales did not result from lower prices, improved service or quality, or other consumer benefits; instead, McWane's sales stemmed from anticompetitive reductions in Star's output. Sales so gained are not cognizable as procompetitive justifications.

[4] Furthermore, contemporaneous evidence belies McWane's contention that its exclusive dealing policies were motivated by a desire to gain volume in order to preserve operations at McWane's domestic foundry. Although that justification shows up in testimony from McWane witnesses, McWane's contemporaneous planning

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[563] *See*, *e.g.*, Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1295 (11th Cir. 2004) ("Even a company with monopoly power has no general duty to cooperate with its business rivals and may refuse to deal with them if valid business reasons exist for such refusal."); *see also* FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020) (refusal to deal unlawful only if "the only conceivable rationale or purpose" is anticompetitive). *But see* Viamedia, Inc. v. Comcast Corporation, 951 F.3d 429, 461 n.13 (7th Cir. 2020) ("[I]t has been observed that although the "no economic sense" test offers good insights into when aggressive actions by a single firm go too far, it can lead to erroneous results unless one also seeks to balance gains to the monopolist against losses to consumers, rivals, or others. Otherwise we could arrive at absurd outcomes: Theoretically, an act might benefit the defendant very slightly while doing considerable harm to the rest of the economy, and it would be lawful. It is possible the test could be adapted to meet these criticisms, given that a court should not consider any gain from eliminating competition, but—in any event—the no economic sense test was not intended to displace all other approaches. Rather, it is likely to be most useful as one part of a sufficient condition: If challenged conduct has a tendency to eliminate competition and would make no economic sense but for that tendency, the conduct is exclusionary. Areeda and Hovenkamp also suggest a broader approach, in which harm wholly disproportionate to the valid business justification can also support a refusal-to-deal-claim.") (internal quotation marks, brackets, and citations omitted).

[564] McWane, Inc. v. FTC, 783 F.3d 814, 840–42 (11th Cir. 2015).

documents from 2009 demonstrate that the objectives were almost exclusively to maintain domestic prices and profitability, deny Star critical mass, and prevent Star from becoming an effective competitor.

[5] McWane also argues that the Full Support Program prevents customers from cherry-picking the highest selling items from Star and persuades them to support McWane's full line of domestic fittings. Here too McWane fails to identify the benefit to consumers.

[6] In support of McWane's claim, its expert, Dr. Normann, explains that a full-line manufacturer incurs the costs of producing all fitting types and is able to bear these costs because it captures the benefit of scale economies arising from production of the most common fittings. According to Dr. Normann, a manufacturer that produces only the common fittings could avoid the cost of producing a full line and consequently could sell the common fittings at lower prices. If distributors were able to source from multiple manufacturers, he reasons, they would buy the common fittings from the limited supplier (at lower prices) and turn to the full-line supplier for less common products only, which could lead to the collapse of the full-line seller.

[7] This argument is unpersuasive. If a limited supplier undersells a full-line supplier for more common products, there is no reason in principle why the full-line supplier could not compete for that business by lowering its price for those products and increasing its price for the less common products. McWane offers no reason why supply would not be forthcoming to meet demand at a higher price, and we cannot conclude that consumers are necessarily worse off because less common fittings are sold for higher prices, when simultaneously, more common fittings are sold at lower prices. Even if selective entry by the full-line supplier's rivals led to the collapse of the full-line seller, that itself would not constitute a harm to the market (as opposed to harm to a single firm). Courts have long rejected claims that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition, concluding instead that the Sherman Act reflects a legislative judgment that ultimately competition will produce the best results. McWane's claim is not consonant with this core judgment of the Sherman Act, and it is inconsistent with the basic objectives of Section 2.

* * *

In *Eastman Kodak*, a case you may remember from our discussion of aftermarkets in Chapter III, the defendant was accused of monopolizing the aftermarket for service of its equipment, by operating a tying scheme. In particular, Kodak would only sell parts to customers if they agreed not to buy service from independent third parties. Kodak raised several justifications for its conduct. The matter was raised to the Court on the defendant's motion for summary judgment: the Court concluded that the applicability of the defenses would be a matter for a factfinder. In the process, the Court shed some light on what counts as a "procompetitive" justification.

## Eastman Kodak Co. v. Image Technical Services, Inc.

### 504 U.S. 451 (1992)

Justice Blackmun.

[1] [Plaintiffs] have presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market. Liability turns, then, on whether valid business reasons can explain Kodak's actions. Kodak contends that it has three valid business justifications for its actions: (1) to promote interbrand equipment competition by allowing Kodak to stress the quality of its service; (2) to improve asset management by reducing Kodak's inventory costs; and (3) to prevent [independent service organizations ("ISOs")] from free-riding on Kodak's capital investment in equipment, parts and service. Factual questions exist, however, about the validity and sufficiency of each claimed justification, making summary judgment inappropriate.

[2] Kodak first asserts that by preventing customers from using ISO's, it can best maintain high quality service for its sophisticated equipment and avoid being blamed for an equipment malfunction, even if the problem is the result of improper diagnosis, maintenance or repair by an ISO. Respondents have offered evidence that ISO's provide quality service and are preferred by some Kodak equipment owners. This is sufficient to raise a genuine issue of fact.

[3] Moreover, there are other reasons to question Kodak's proffered motive of commitment to quality service; its quality justification appears inconsistent with its thesis that consumers are knowledgeable enough to lifecycle price [(*i.e.*, choose equipment in light of knowledge of aftermarket prices for parts and services)], and its self-service policy. Kodak claims the exclusive-service contract is warranted because customers would otherwise blame Kodak equipment for breakdowns resulting from inferior ISO service. Thus, Kodak simultaneously claims that its customers are sophisticated enough to make complex and subtle lifecycle-pricing decisions, and yet too obtuse to distinguish which breakdowns are due to bad equipment and which are due to bad service. Kodak has failed to offer any reason why informational sophistication should be present in one circumstance and absent in the other. In addition, because self-service customers are just as likely as others to blame Kodak equipment for breakdowns resulting from (their own) inferior service, Kodak's willingness to allow self-service casts doubt on its quality claim. In sum, we agree with the Court of Appeals that respondents have presented evidence from which a reasonable trier of fact could conclude that Kodak's first reason is pretextual.

[4] There is also a triable issue of fact on Kodak's second justification—controlling inventory costs. As respondents argue, Kodak's actions appear inconsistent with any need to control inventory costs. Presumably, the inventory of parts needed to repair Kodak machines turns only on breakdown rates, and those rates should be the same whether Kodak or ISO's perform the repair. More importantly, the justification fails to explain respondents' evidence that Kodak forced [original equipment manufacturers ("OEMs")], equipment owners, and parts brokers not to sell parts to ISO's, actions that would have no effect on Kodak's inventory costs.

[5] Nor does Kodak's final justification entitle it to summary judgment on respondents' § 2 claim. Kodak claims that its policies prevent ISO's from exploiting the investment Kodak has made in product development, manufacturing and equipment sales in order to take away Kodak's service revenues. Kodak does not dispute that respondents invest substantially in the service market, with training of repair workers and investment in parts inventory. Instead, according to Kodak, the ISO's are free-riding because they have failed to enter the equipment and parts markets. This understanding of free-riding has no support in our case law. To the contrary, as the Court of Appeals noted, one of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously.

[6] None of Kodak's asserted business justifications, then, are sufficient to prove that Kodak is entitled to a judgment as a matter of law on respondents' § 2 claim.

[7] In the end, of course, Kodak's arguments may prove to be correct. It may be that its parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarkets so that all three are priced competitively overall, or that any anti-competitive effects of Kodak's behavior are outweighed by its competitive effects. But we cannot reach these conclusions as a matter of law on a record this sparse. Accordingly, the judgment of the Court of Appeals denying summary judgment is affirmed.

# D. Specific Exclusionary Practices

The vagueness in monopolization's conceptual core is somewhat offset by greater specificity and clarity in the law of specific *forms* of the offense. For example, we have already discussed antitrust's treatment of unconditional refusals to deal earlier in this chapter.[565] More than a century of jurisprudence has given us a taxonomy of other practices—including exclusive dealing, tying, predatory pricing, and so on—and a set of more specific doctrinal tests that apply to these forms of behavior. As you consider these practices and their respective analytical frames, consider whether and to what extent these "micro-rules" can be seen as consistent with one another, with a "grand theory" of monopolization, or with the common themes considered in the previous section.

## 1. Exclusivity

In a traditional exclusivity case, a monopolist obtains or induces an exclusive relationship of some kind with a key trading partner, disadvantaging rivals who must then make do with a second-best option. By driving up

[565] *See supra* § VII.C.3.

competitors' costs, the monopolist softens their ability to exert competitive constraint.[566] The crucial question in a Section 2 exclusivity case, just as under Section 1, is usually whether the exclusive agreement "substantially forecloses" access to inputs, distribution, customers, or complements. And when a monopolist excludes rivals through substantial foreclosure that is reasonably capable of making a significant contribution to monopoly power, without sufficient procompetitive justification, liability typically follows.

Unlike Section 1, no agreement is required to violate Section 2. A monopolist can violate Section 2 by inducing exclusivity through the application of a unilateral conditional-dealing policy (*e.g.*, "I will only sell to trading partners that do not deal with my rivals.").[567] And—because the assessment of exclusivity turns on economic substance, not on legal formalities—practices that result in or induce exclusivity can violate Section 2 even in the absence of a formal or literal requirement that input suppliers or distributors must completely refrain from dealing with rivals.

Exclusivity can violate Section 2 even if there are some literal alternatives to the foreclosed supply, so long as those other options fall short of being commercially reasonable substitutes for what is foreclosed. Antitrust does not give every business a right to its favorite or most preferred kind of supply! Thus, in *Dentsply*, as we saw above, the excluded rivals had the option of selling directly to their dental-lab customers rather than using the dealers who had been incentivized to deal exclusively with Dentsply: Dentsply was nevertheless held liable for monopolization, in light of the fact that direct selling was much less effective.[568]

Likewise, exclusivity can also violate Section 2 even if rivals are not wholly denied access to the relevant trading partners, so long as the supply that *is* foreclosed to them is sufficiently critical, by comparison with the available alternatives, to make enough of a difference to competition. Consigning rivals to supply that is significantly inferior quality, more expensive, less effective, or otherwise disadvantageous can be an effective mechanism of exclusion. For example, in the *Microsoft* case, some of the challenged practices involved inducing trading partners to assign Microsoft's internet browser a valuable default status, rather than literally preventing any dealings with third parties: can you see why and how this could have an effect equivalent to exclusivity?[569] (Do default statuses always have this effect?)

Finally—and no less importantly—a practice can constitute "exclusivity" for the purposes of the antitrust laws even if there is no contract or agreement that actually commits the relevant third party to dealing exclusively. It is enough, under Section 2, that exclusive dealing is incentivized by the monopolist's behavior.[570] For example, unilaterally offering a pricing schedule that provides more attractive "loyalty" pricing for customers that do not deal with rivals can violate Section 2. (Indeed, you may remember that the *Surescripts* litigation was brought under Section 2 and involved such pricing.[571])

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[566] Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986).

[567] *See*, *e.g.*, Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380 (7th Cir. 1984) ("One mind is not enough for a meeting of minds. The fact that Dresser was hostile to dealers who would not live and die by its product . . . and acted on its hostility by canceling a dealer who did the thing to which it was hostile, does not establish an agreement, but if anything the opposite: a failure to agree on a point critical to one of the parties."); *see also* Daniel Francis, *Monopolizing by Conditioning*, 124 Colum. L. Rev. 1917 (2024).

[568] United States v. Dentsply Intl., Inc., 399 F.3d 181, 191–93 (3d Cir. 2005).

[569] *See* United States v. Microsoft Corp., 253 F.3d 34, 65 (D.C. Cir. 2001) ("[T]he District Court found that Microsoft designed Windows 98 so that using Navigator on Windows 98 would have unpleasant consequences for users by, in some circumstances, overriding the user's choice of a browser other than IE as his or her default browser. Plaintiffs argue that this override harms the competitive process by deterring consumers from using a browser other than IE even though they might prefer to do so, thereby reducing rival browsers' usage share and, hence, the ability of rival browsers to draw developer attention away from the APIs exposed by Windows. Microsoft does not deny, of course, that overriding the user's preference prevents some people from using other browsers. Because the override reduces rivals' usage share and protects Microsoft's monopoly, it too is anticompetitive.") (internal quotation marks and citations omitted). *See also* United States v. Google, Case No 1:20-cv-3010 (D.D.C. filed Oct. 20, 2020) ¶ 3 ("For a general search engine, by far the most effective means of distribution is to be the preset default general search engine for mobile and computer search access points. Even where users can change the default, they rarely do. This leaves the preset default general search engine with de facto exclusivity. As Google itself has recognized, this is particularly true on mobile devices, where defaults are especially sticky.").

[570] *See*, *e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951); United States v. Microsoft Corp., 253 F.3d 34, 77 (D.C. Cir. 2001); McWane, Inc. v. FTC, 783 F.3d 814, 833–35 (11th Cir. 2015); FTC v. Surescripts, LLC, 424 F.Supp.3d 92, 101–02 (2020).

[571] *See supra* § VI.D.

But despite all this, exclusivity is not always, or even usually, unlawful. Exclusive deals are widespread in the economy, and courts have recognized a wide range of economic benefits that exclusive commercial relationships can create or protect. As we have already seen, one prominent justification in exclusivity cases is protection against "free riding": the economic phenomenon that occurs when the benefits of an investment are involuntarily shared with third parties. Thus, in cases where a defendant would be deterred from making a particular beneficial investment by a risk that the fruits of the investment would be appropriated in some way by a competitor, a court may consider whether exclusivity might be playing an important role in solving that problem and making the investment possible. However, the scope of the "free riding defense" is a matter of real controversy and criticism.[572]

As you will remember from Chapter VI, the modern law of exclusive dealing begins with *Tampa Electric*, a case decided under Section 3 of the Clayton Act, but which has been understood to guide the Sherman Act on exclusive dealing as well.[573] *Tampa* stands in particular for the proposition that a plaintiff in an exclusive dealing case must prove "substantial foreclosure" in a relevant market. As *Tampa* demonstrates—and like certain other practices such as tying—exclusive dealing can be challenged under multiple provisions, including Section 1 of the Sherman Act; Section 2 of the Sherman Act; and Section 3 of the Clayton Act. As we saw in Chapter VI, Section 3 is a specialized provision that provides, in principle, a slightly elevated level of scrutiny for exclusivity and tying arrangements involving the sale of goods, but in practice is very close to Section 1 in content and effect.[574]

A classic case of Section 2 exclusivity—maybe *the* classic Section 2 exclusivity case[575]—is *Lorain Journal*. In that case the Supreme Court considered a dominant newspaper that faced competition, as a seller of advertising space, from the developing radio industry. In order to keep radio rivals at bay, Lorain Journal refused to accept advertising from any company that was also buying advertising space on the radio. The Court had no hesitation in imposing liability.

## Lorain Journal Co. v. United States

### 342 U.S. 143 (1951)

Justice Burton.

[1] From 1933 to 1948 [Lorain Journal Co.] enjoyed a substantial monopoly in Lorain of the mass dissemination of news and advertising, both of a local and national character. However, in 1948 the Elyria-Lorain Broadcasting Company, a corporation independent of the publisher, was licensed by the Federal Communications Commission to establish and operate in Elyria, Ohio, eight miles south of Lorain, a radio station whose call letters, WEOL, stand for Elyria, Oberlin and Lorain. [. . .]

[2] [The Journal] knew that a substantial number of Journal advertisers wished to use the facilities of the radio station as well. For some of them . . . advertising in the Journal was essential for the promotion of their sales in Lorain County. [The court below] found that at all times since WEOL commenced broadcasting, [Lorain Journal] had executed a plan conceived to eliminate the threat of competition from the station. Under this plan the publisher refused to accept local advertisements in the Journal from any Lorain County advertiser who advertised or who appellants believed to be about to advertise over WEOL. The court found expressly that the purpose and intent of this procedure was to destroy the broadcasting company.

[3] The court [below] characterized all this as "bold, relentless, and predatory commercial behavior." To carry out appellants' plan, the publisher monitored WEOL programs to determine the identity of the station's local Lorain advertisers. Those using the station's facilities had their contracts with the publisher terminated and were able to renew them only after ceasing to advertise through WEOL. The program was effective. Numerous Lorain

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572 *See supra* Chapter VI (discussing the relationship between free riding concerns and vertical restraints).

573 *See*, *e.g.*, Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr., 684 F.2d 1346, 1352 n. 11 (7th Cir. 1982) ("*Tampa Electric* is applicable to Sherman Act section 1 cases even though it was decided under section 3 of the Clayton Act[.]").

574 *See supra* notes 435 to 441 and accompanying text.

575 *Lorain Journal*'s status as a landmark authority across the political spectrum is buttressed by an endorsement from a prominent monopolization skeptic: Robert Bork's comment that the result "seem[s] clearly correct." Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) 344–46. *See also* Leon B. Greenfield, *Afterwords:* Lorain Journal *and the Antitrust Legacy of Robert Bork*, 79 Antitrust L.J. 1047 (2014).

County merchants testified that, as a result of the publisher's policy, they either ceased or abandoned their plans to advertise over WEOL. [. . .]

[4] The conduct complained of was an attempt to monopolize interstate commerce. It consisted of the publisher's practice of refusing to accept local Lorain advertising from parties using WEOL for local advertising. Because of the Journal's complete daily newspaper monopoly of local advertising in Lorain and its practically indispensable coverage of 99% of the Lorain families, this practice forced numerous advertisers to refrain from using WEOL for local advertising. That result not only reduced the number of customers available to WEOL in the field of local Lorain advertising and strengthened the Journal's monopoly in that field, but more significantly tended to destroy and eliminate WEOL altogether. Attainment of that sought-for elimination would automatically restore to the publisher of the Journal its substantial monopoly in Lorain of the mass dissemination of all news and advertising, interstate and national, as well as local. It would deprive not merely Lorain but Elyria and all surrounding communities of their only nearby radio station. [. . .]

[5] The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisement from whomever it pleases. We do not dispute that general right. But the word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise in a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act.

* * *

A similar arrangement was at work in *Dentsply*, in which the Third Circuit noted that exclusivity was the result of a conditional-dealing practice, not an agreement:

> Although the parties to the sales transactions consider the exclusionary arrangements to be agreements, they are technically only a series of independent sales. Dentsply sells teeth to the dealers on an individual transaction basis and essentially the arrangement is "at-will." Nevertheless, the economic elements involved—the large share of the market held by Dentsply and its conduct excluding competing manufacturers—realistically make the arrangements here as effective as those in written contracts.[576]

When an agreement does exist, does it matter whether exclusivity is challenged under Section 1 or Section 2? The answer is: it might! One of the (relatively few) explicit discussions of the differences between Section 1 and Section 2 exclusivity claims is found in *Microsoft*. The plaintiffs had challenged Microsoft's use of exclusivity agreements with certain internet access providers ("IAPs") under both Sections 1 and 2, on the theory that these agreements foreclosed Netscape's opportunities for browser distribution. The district court had concluded that the plaintiffs could not prevail on their Section 1 claim unless the agreements fully excluded Netscape from roughly 40% of the browser market, and that the agreements had not in fact done so. Nevertheless, the district court held that the same exclusive agreements could nevertheless violate Section 2. On appeal, Microsoft protested to the D.C. Circuit that the same standard of legality should apply under Section 1 and Section 2. Rejecting that view, the court of appeals indicated that an exclusivity agreement could violate Section 2 at a lower level of foreclosure than Section 1 would require:

> The basic prudential concerns relevant to §§ 1 and 2 are admittedly the same: exclusive contracts are commonplace—particularly in the field of distribution—in our competitive, market economy, and imposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm. At the same time, however, we agree with plaintiffs that *a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.*[577]

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[576] United States v. Dentsply Intl., Inc., 399 F.3d 181 (3d Cir. 2005).

[577] United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001) (en banc) (emphasis added).

When a monopolist is involved, Section 2's thresholds are in some respects more plaintiff-friendly than those of Section 1: including the lack of an agreement requirement, the *Microsoft* court's lower foreclosure threshold for Section 2, and perhaps also the flexible "reasonably capable" causal test for contribution to monopoly. It is therefore unsurprising that some plaintiffs choose to bring their exclusive-dealing cases only under Section 2. *McWane* is a good example of such a case. (*Dentsply*, discussed above, is another.) In *McWane*, the Eleventh Circuit gave a fine tour of monopolization analysis, including the workings of an exclusion analysis, the operation of the substantial foreclosure test, and the flexible threshold for the assessment of causal contribution to monopoly power.

## McWane, Inc. v. FTC

### 783 F.3d 814 (11th Cir. 2015)

Judge Marcus.

[1] This antitrust case involves allegedly anticompetitive conduct in the ductile iron pipe fittings ("DIPF") market by McWane, Inc., a family-run company headquartered in Birmingham, Alabama. In 2009, following the passage of federal legislation that provided a large infusion of money for waterworks projects that required domestic pipe fittings, Star Pipe Products entered the domestic fittings market. In response, McWane, the dominant producer of domestic pipe fittings, announced to its distributors that (with limited exceptions) unless they bought all of their domestic fittings from McWane, they would lose their rebates and be cut off from purchases for 12 weeks. The Federal Trade Commission ("FTC") investigated and brought an enforcement action under Section 5 of the Federal Trade Commission Act. The Administrative Law Judge ("ALJ"), after a two-month trial, and then a divided Commission, found that McWane's actions constituted an illegal exclusive dealing policy used to maintain McWane's monopoly power in the domestic fittings market. The Commission issued an order directing McWane to stop requiring exclusivity from distributors. McWane appealed, challenging nearly every aspect of the Commission's ruling. [. . .]

[2] In response to Star's forthcoming entry into the domestic DIPF market, McWane implemented its "Full Support Program" in order to protect [its] domestic brands and market position. This program was announced in a September 22, 2009 letter to distributors. McWane informed customers that if they did not fully support McWane branded products for their domestic fitting and accessory requirements, they may forgo participation in any unpaid rebates they had accrued for domestic fittings and accessories or shipment of their domestic fitting and accessory orders of McWane products for up to 12 weeks. In other words, distributors who bought domestic fittings from other companies (such as Star) might lose their rebates or be cut off from purchasing McWane's domestic fittings for up to three months. [. . .]

[3] Internal documents reveal that McWane's express purpose was to raise Star's costs and impede it from becoming a viable competitor. McWane executive Richard Tatman wrote, "We need to make sure that they [Star] don't reach any critical market mass that will allow them to continue to invest and receive a profitable return." In another document, he observed that "any competitor" seeking to enter the domestic fittings market could face "significant blocking issues" if they are not a "full line" domestic supplier. In yet another, McWane employees described the nascent Full Support Program as a strategy to "force distribution to pick their horse," which would "force Star to absorb the costs associated with having a more full line before they can secure major distribution." Mr. Tatman was concerned about the "erosion of domestic pricing if Star emerges as a legitimate competitor," and another McWane executive wrote that his "chief concern is that the domestic market might get creamed from a pricing standpoint" should Star become a "domestic supplier."

[4] Initially, the Full Support Program was enforced as threatened. Thus, for example, when the Tulsa, Oklahoma branch of distributor Hajoca Corporation purchased Star domestic fittings, McWane cut off sales of its domestic fittings to all Hajoca branches and withheld its rebates. Other distributors testified to abiding by the Full Support Program in order to avoid the devastating result of being cut off from all McWane domestic fittings. For example, following the announcement of the Full Support Program, the country's two largest waterworks distributors, HD Supply (with approximately a 28–35% share of the distribution market) and Ferguson (with approximately 25%), prohibited their branches from purchasing domestic fittings from Star unless the purchases fell into one of the Full

Support Program exceptions, and even canceled pending orders for domestic fittings that they had placed with Star. . . .

[5] Despite McWane's Full Support Program, Star entered the domestic fittings market and made sales to various distributors. From 2006 until Star's entry in 2009, McWane was the only manufacturer of domestic fittings, with 100% of the market for domestic-only projects. By 2010, Star had gained approximately 5% of the domestic fittings market, while McWane captured the remaining 95%. Star grew to just under 10% market share in 2011, leaving the remaining 90% for McWane, and Star was "on pace, at the time of trial, to have its best year ever for [d]omestic [f]ittings sales in 2012." The Commission noted that "many distributors made purchases under the exceptions allowed by the Full Support Program," but that Star's sales in total "were small compared to the overall size of the market." Star estimated that if the Full Support Program had not been in place, its sales would have been greater by a multiple of 2.5 in 2010 and by a multiple of three in 2011. [. . .]

[6] Substantial foreclosure continues to be a requirement for exclusive dealing to run afoul of the antitrust statutes. Foreclosure occurs when the opportunities for other traders to enter into or remain in the market are significantly limited by the exclusive dealing arrangements. Traditionally a foreclosure percentage of at least 40% has been a threshold for liability in exclusive dealing cases. However, some courts have found that a lesser degree of foreclosure is required when the defendant is a monopolist.

[7] In this case, both the Commission and the ALJ found that the Full Support Program foreclosed Star from a substantial share of the market. Although the Commission did not quantify a percentage, it did note that the two largest distributors, who together controlled approximately 50–60% of distribution, prohibited their branches from purchasing from Star (except through the Full Support Program exceptions) following the announcement of the Full Support Program. Indeed, [one customer,] HD Supply[,] went so far as to cancel pending orders for domestic fittings that it had placed with Star. . . . Although the Commission did not place an exact number on the percentage foreclosed, it found that the Full Support Program tied up the key dealers and that the foreclosure was substantial and problematic.

[8] These factual findings are all consistent with the ALJ's determinations, and all pass our deferential review. Nevertheless, McWane challenges the Commission's conclusion by arguing that Star's entry and growth in the market demonstrate that, as a matter of law, the Full Support Program did not cause substantial foreclosure. As before, when McWane raised a substantially similar claim to rebut the Commission's finding of monopoly power, this argument is ultimately unpersuasive. The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit. Our sister circuits have found monopolists liable for anticompetitive conduct where, as here, the targeted rival gained market share—but less than it likely would have absent the conduct. As noted above, exclusive dealing measures that slow a rival's expansion can still produce consumer injury. Given the ample evidence in the record that the Full Support Program significantly contributed to key dealers freezing out Star, the Commission's foreclosure determination is supported by substantial evidence and sufficient as a matter of law. [. . .]

[9] Having concluded that the Commission's finding of substantial foreclosure is supported by substantial evidence, we turn to the remainder of the Commission's evidence that McWane's Full Support Program injured competition. The record contains both direct and indirect evidence that the Full Support Program harmed competition. The Commission relied on both, and taken together they are more than sufficient to meet the government's burden. The Commission found that McWane's program deprived its rivals of distribution sufficient to achieve efficient scale, thereby raising costs and slowing or preventing effective entry. It found that the Full Support Program made it infeasible for distributors to drop the monopolist McWane and switch to Star. This, the Commission found, deprived Star of the revenue needed to purchase its own domestic foundry, forcing it to rely on inefficient outsourcing arrangements and preventing it from providing meaningful price competition with McWane.

[10] Perhaps the Commission's most powerful evidence of anticompetitive harm was direct pricing evidence. It noted that McWane's prices and profit margins for domestic fittings were notably higher than prices for imported fittings, which faced greater competition. Thus, these prices appeared to be supracompetitive. Yet in states where Star entered as a competitor, notably there was no effect on McWane's prices. Indeed, soon after Star entered the

market, McWane raised prices and increased its gross profits—despite its flat production costs and its own internal projections that Star's unencumbered entry into the market would cause prices to fall. Since McWane was an incumbent monopolist already charging supracompetitive prices (as demonstrated by the difference in price and profit margin between domestic and imported fittings), evidence that McWane's prices did not fall is consistent with a reasonable inference that the Full Support Program significantly contributed to maintaining McWane's monopoly power.

[11] McWane claims, however, that the government did not adequately prove that the Full Support Program was responsible for this price behavior. But as we've noted, McWane demands too high a bar for causation. While it is true that there could have been other causes for the price behavior, the government need not demonstrate that the Full Support Program was the sole cause—only that the program reasonably appeared to be a significant contribution to maintaining McWane's monopoly power. Moreover, under our deferential standard of review, the mere fact that two inconsistent conclusions could be drawn from the record does not prevent the Commission's finding from being supported by substantial evidence. [. . .]

[12] We also consider it significant that alternative channels of distribution were unavailable to Star. In cases where exclusive dealing arrangements tie up distributors in a market, courts will often consider whether alternative channels of distribution exist. If firms can use other means of distribution, or sell directly to consumers, then it is less likely that their foreclosure from distributors will harm competition. . . .

[13] Finally, the clear anticompetitive intent behind the Full Support Program also supports the inference that it harmed competition. Anticompetitive intent alone, no matter how virulent, is insufficient to give rise to an antitrust violation. But, as this Court has said, evidence of intent is highly probative not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. For a monopolization charge, intent is relevant to the question whether the challenged conduct is fairly characterized as exclusionary or anticompetitive. There is agreement on the proposition that no monopolist monopolizes unconscious of what he is doing.

[14] In this case, the evidence of anticompetitive intent is particularly powerful. Testimony from McWane executives leaves little doubt that the Full Support Program was a deliberate plan to prevent Star from reaching any critical market mass that will allow them to continue to invest and receive a profitable return by forcing Star to absorb the costs associated with having a more full line before they can secure major distribution. Indeed, the plan was implemented as a reaction to concerns about the erosion of domestic pricing if Star emerges as a legitimate competitor. Although such intent alone is not illegal, it could reasonably help the Commission draw the inference that the witnessed price behavior was the (intended) result of the Full Support Program.

[15] Not all of the evidence adduced in this case uniformly points against McWane. For example, as we've previously noted, Star was not completely excluded from the domestic fittings market; it was able to enter and grow despite the presence of the Full Support Program. However, it is still perfectly plausible to conclude on this record that Star's growth was meaningfully (and deliberately) slowed and its development into a rival that could constrain McWane's monopoly power was stunted. Also, the Full Support Program was not a binding contract of a lengthy duration. As noted above, these characteristics do not render the program presumptively lawful, but they also do not point in the FTC's favor as an indirect indicator of anticompetitive harm. Nevertheless, the direct and indirect evidence of anticompetitive harm is more than sufficient to pass our deferential review. Again, the Commission's conclusion that the Full Support Program harmed competition is supported by substantial evidence and sound as a matter of law. [. . .]

[16] Having established that the defendant's conduct harmed competition, the burden shifts to the defendant to offer procompetitive justifications for its conduct.

## NOTES

1) What is substantial foreclosure?
    a. Does it relate to one of the basic concerns of monopolization we described above: monopoly power, exclusion, contribution to monopoly, and so on, or is it something else?

   b. Should courts apply a quantitative test or a qualitative test to determine whether it is present, and what should that test be?
   c. Should the analysis differ depending on whether Section 1 or Section 2 is at issue?
2) What kind of practice could constitute a "de facto" exclusive? Is there a sense in which every sale of a product is to some extent "exclusive"? In what circumstances should courts apply the exclusivity framework to agreements that do not literally prohibit suppliers or distributors from dealing with a monopolist's competitors?
3) Digital products and services often have "default" options so that users don't have to manually select an option each time: for example, computer or device operating systems commonly have default internet browsers, search engines, email programs, and so on. When and how do you think the designation of a default could work like an exclusivity agreement? What would "substantial foreclosure" mean in this context and how could it be measured? What remedy would be appropriate?
4) As we saw in Chapter VI, a common justification for exclusive dealing is protection against free riding on the defendant's investments. Does that justification sound with equal, lesser, or greater force when the defendant is a monopolist?

## 2. Tying

As we saw in Chapter VI, tying is the practice of making access to one product or service (such as a printer) conditional on customers' purchase of another product or service (such as a printer cartridge). The first product or service—the one that consumers want to buy (here, the printer)—is called the "tying" product or service. The second one—the one that the defendant insists they buy (here, the cartridge)—is called the "tied" product or service. Where this is done through an agreement, it may be challenged under Section 1 (or under Section 3 of the Clayton Act[578]); when it is done by a monopolist—regardless of whether an agreement is involved—it may be challenged under Section 2. In practice tying cases are often brought under multiple provisions.

The competitive concern in a Section 2 tying case is that, when a defendant has monopoly power in a market for the tying product, the induced purchase of the tied product or service will exclude competition in the market for that (tied) product or service and create or extend monopoly in that second market: for example, by driving competitors below minimum viable scale. The successful tying monopolist might thus be able to turn one monopoly into two.

The difference in legal standards between Section 1 and Section 2 is not entirely clear, but the main points of differentiation—apart from the agreement requirement—appear to be: (1) the existence of a (qualified and limited) *per se* rule under Section 1; (2) Section 2's requirement of monopoly power (or a dangerous probability thereof), which is more demanding than Section 1's market power requirement; (3) Section 2's more flexible threshold for the causal relationship between the conduct and a contribution to an outcome of the competitive process (*i.e.*, the acquisition or maintenance of monopoly power); and perhaps also (4) a lower threshold under Section 2—by analogy with exclusive-dealing law—for foreclosure of access to customers.[579]

Moreover, just as with exclusivity, Section 2 is often a more natural fit for a tying claim than Section 1. Recall that Section 1 needs an *agreement*: a mutual commitment to a common scheme. But tying claims—like exclusive dealing claims—often arise from a mere conditional dealing policy: that is, the seller simply will not sell to a trading partner unless the trading partner buys the tied product or service. No agreement is required to make tying work in that fashion.

Perhaps the most prominent discussion of tying under Section 2 is that in *Microsoft*. The tying at issue in that case involved not a formal condition of purchasing a separate product, but rather so-called "technological tying": the integration through technological means of what might otherwise be separate products. The tying claim involved integrating the Internet Explorer browser into Windows, making it an irremovable part of the operating system.

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[578] *See* Int'l Bus. Machines Corp. v. United States, 298 U.S. 131, 135 (1936).

[579] *See* United States v. Microsoft Corp. 253 F.3d 34, 70 (D.C. Cir. 2001) ("[A] monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.").

We will review an excerpt from the district court's findings of fact, along with the treatment of the issue by the D.C. Circuit. You may remember from the discussion in Chapter VI that the court of appeals held that, under Section 1, the technological tying practice should be analyzed under the rule of reason, not the per se rule[580]; here our focus will be on the heart of the court's Section 2 analysis.

## Findings of Fact, United States v. Microsoft Corp.

### 84 F. Supp. 2d 9 (D.D.C. 1999)

Judge Jackson.

[1] . . . Microsoft placed many of the routines that are used by Internet Explorer . . . into the same files that support [general Windows functionality]. Microsoft's primary motivation for this action was to ensure that the deletion of any file containing browsing-specific routines would also delete vital operating system routines and thus cripple Windows 95. Although some of the code that provided Web browsing could still be removed, without disabling the operating system, by entering individual files and selectively deleting routines used only for Web browsing, licensees of Microsoft software were, and are, contractually prohibited from reverse engineering, decompiling, or disassembling any software files. Even if this were not so, it is prohibitively difficult for anyone who does not have access to the original, human-readable source code to change the placement of routines into files, or otherwise to alter the internal configuration of software files, while still preserving the software's overall functionality.

[2] Microsoft's technical personnel implemented [the] "Windows integration" strategy in two [further] ways. First, they did not provide users with the ability to uninstall Internet Explorer from Windows 98. The omission of a browser removal function was particularly conspicuous given that Windows 98 did give users the ability to uninstall numerous features other than Internet Explorer—features that Microsoft also held out as being integrated into Windows 98. Microsoft took this action despite specific requests from Gateway that Microsoft provide a way to uninstall Internet Explorer 4.0 from Windows 98.

[3] The second way in which Microsoft's engineers implemented [the] strategy was to make Windows 98 override the user's choice of default browser in certain circumstances. As shipped to users, Windows 98 has Internet Explorer configured as the default browser. While Windows 98 does provide the user with the ability to choose a different default browser, it does not treat this choice as the "default browser" within the ordinary meaning of the term. Specifically, when a user chooses a browser other than Internet Explorer as the default, Windows 98 nevertheless requires the user to employ Internet Explorer in numerous situations that, from the user's perspective, are entirely unexpected. As a consequence, users who choose a browser other than Internet Explorer as their default face considerable uncertainty and confusion in the ordinary course of using Windows 98.

[4] Microsoft's refusal to respect the user's choice of default browser fulfilled Brad Chase's 1995 promise to make the use of any browser other than Internet Explorer on Windows "a jolting experience." By increasing the likelihood that using Navigator on Windows 98 would have unpleasant consequences for users, Microsoft further diminished the inclination of OEMs to pre-install Navigator onto Windows. The decision to override the user's selection of non-Microsoft software as the default browser also directly disinclined Windows 98 consumers to use Navigator as their default browser, and it harmed those Windows 98 consumers who nevertheless used Navigator.

## United States v. Microsoft Corp.

### 253 F.3d 34 (D.C. Cir. 2001)

Per curiam.

[1] [I]n late 1995 or early 1996, Microsoft set out to bind [Internet Explorer ("IE")] more tightly to Windows 95 as a technical matter.

[2] Technologically binding IE to Windows, the District Court found, both prevented OEMs from pre-installing other browsers and deterred consumers from using them. In particular, having the IE software code as an

[580] *See supra* § VI.E.

irremovable part of Windows meant that pre-installing a second browser would increase an OEM's product testing costs, because an OEM must test and train its support staff to answer calls related to every software product preinstalled on the machine; moreover, pre-installing a browser in addition to IE would to many OEMs be a questionable use of the scarce and valuable space on a PC's hard drive.

[3] Although the District Court, in its Conclusions of Law, broadly condemned Microsoft's decision to bind Internet Explorer to Windows with technological shackles its findings of fact in support of that conclusion center upon three specific actions Microsoft took to weld IE to Windows: excluding IE from the "Add/Remove Programs" utility; designing Windows so as in certain circumstances to override the user's choice of a default browser other than IE; and commingling code related to browsing and other code in the same files, so that any attempt to delete the files containing IE would, at the same time, cripple the operating system. As with the license restrictions, we consider first whether the suspect actions had an anticompetitive effect, and then whether Microsoft has provided a procompetitive justification for them. [. . .]

[4] As a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes. In a competitive market, firms routinely innovate in the hope of appealing to consumers, sometimes in the process making their products incompatible with those of rivals; the imposition of liability when a monopolist does the same thing will inevitably deter a certain amount of innovation. This is all the more true in a market, such as this one, in which the product itself is rapidly changing. Judicial deference to product innovation, however, does not mean that a monopolist's product design decisions are per se lawful.

[5] The District Court first condemned as anticompetitive Microsoft's decision to exclude IE from the "Add/Remove Programs" utility in Windows 98. Microsoft had included IE in the Add/Remove Programs utility in Windows 95, but when it modified Windows 95 to produce Windows 98, it took IE out of the Add/Remove Programs utility. This change reduces the usage share of rival browsers not by making Microsoft's own browser more attractive to consumers but, rather, by discouraging OEMs from distributing rival products. Because Microsoft's conduct, through something other than competition on the merits, has the effect of significantly reducing usage of rivals' products and hence protecting its own operating system monopoly, it is anticompetitive; we defer for the moment the question whether it is nonetheless justified.

[6] Second, the District Court found that Microsoft designed Windows 98 so that using Navigator on Windows 98 would have unpleasant consequences for users by, in some circumstances, overriding the user's choice of a browser other than IE as his or her default browser. Plaintiffs argue that this override harms the competitive process by deterring consumers from using a browser other than IE even though they might prefer to do so, thereby reducing rival browsers' usage share and, hence, the ability of rival browsers to draw developer attention away from the APIs exposed by Windows. Microsoft does not deny, of course, that overriding the user's preference prevents some people from using other browsers. Because the override reduces rivals' usage share and protects Microsoft's monopoly, it too is anticompetitive.

[7] Finally, the District Court condemned Microsoft's decision to bind IE to Windows 98 by placing code specific to Web browsing in the same files as code that provided operating system functions. Putting code supplying browsing functionality into a file with code supplying operating system functionality ensures that the deletion of any file containing browsing-specific routines would also delete vital operating system routines and thus cripple Windows. As noted above, preventing an OEM from removing IE deters it from installing a second browser because doing so increases the OEM's product testing and support costs; by contrast, had OEMs been able to remove IE, they might have chosen to pre-install Navigator alone.

[8] Microsoft denies, as a factual matter, that it commingled browsing and non-browsing code, and it maintains the District Court's findings to the contrary are clearly erroneous. According to Microsoft, its expert testified without contradiction that the very same code in Windows 98 that provides Web browsing functionality also performs essential operating system functions—not code in the same files, but the very same software code.

[9] Microsoft's expert did not testify to that effect "without contradiction," however. A Government expert, Glenn Weadock, testified that Microsoft designed IE so that some of the code that it uses co-resides in the same library

files as other code needed for Windows. Another Government expert likewise testified that one library file, SHDOCVW.DLL, is really a bundle of separate functions. It contains some functions that have to do specifically with Web browsing, and it contains some general user interface functions as well. One of Microsoft's own documents suggests as much.

[10] In view of the contradictory testimony in the record, some of which supports the District Court's finding that Microsoft commingled browsing and non-browsing code, we cannot conclude that the finding was clearly erroneous. Accordingly, we reject Microsoft's argument that we should vacate [the district court's relevant finding of fact] as it relates to the commingling of code, and we conclude that such commingling has an anticompetitive effect; as noted above, the commingling deters OEMs from pre-installing rival browsers, thereby reducing the rivals' usage share and, hence, developers' interest in rivals' APIs as an alternative to the API set exposed by Microsoft's operating system. [. . .]

[11] Microsoft proffers no justification for two of the three challenged actions that it took in integrating IE into Windows—excluding IE from the Add/Remove Programs utility and commingling browser and operating system code. Although Microsoft does make some general claims regarding the benefits of integrating the browser and the operating system, it neither specifies nor substantiates those claims. Nor does it argue that either excluding IE from the Add/Remove Programs utility or commingling code achieves any integrative benefit. Plaintiffs plainly made out a prima facie case of harm to competition in the operating system market by demonstrating that Microsoft's actions increased its browser usage share and thus protected its operating system monopoly from a middleware threat and, for its part, Microsoft failed to meet its burden of showing that its conduct serves a purpose other than protecting its operating system monopoly. Accordingly, we hold that Microsoft's exclusion of IE from the Add/Remove Programs utility and its commingling of browser and operating system code constitute exclusionary conduct, in violation of § 2.

[12] As for the other challenged act that Microsoft took in integrating IE into Windows—causing Windows to override the user's choice of a default browser in certain circumstances—Microsoft argues that it has "valid technical reasons." Specifically, Microsoft claims that it was necessary to design Windows to override the user's preferences when he or she invokes one of a few out of the nearly 30 means of accessing the Internet. According to Microsoft:

> The Windows 98 Help system and Windows Update feature depend on ActiveX controls not supported by Navigator, and the now-discontinued Channel Bar utilized Microsoft's Channel Definition Format, which Navigator also did not support. Lastly, Windows 98 does not invoke Navigator if a user accesses the Internet through "My Computer" or "Windows Explorer" because doing so would defeat one of the purposes of those features—enabling users to move seamlessly from local storage devices to the Web in the same browsing window.

[13] The plaintiff bears the burden not only of rebutting a proffered justification but also of demonstrating that the anticompetitive effect of the challenged action outweighs it. In the District Court, plaintiffs appear to have done neither, let alone both; in any event, upon appeal, plaintiffs offer no rebuttal whatsoever. Accordingly, Microsoft may not be held liable for this aspect of its product design.

## Conditional Dealing or Refusal to Deal?

FTC v. Facebook, Inc., 560 F. Supp. 3d 1 (D.D.C. 2021)

The conditional-dealing aspect of a tie ("I'll sell to you *if*...") can be found in practices that amount to other forms of monopolization, like exclusivity. A defendant with market power may announce a conditional-dealing policy, pursuant to which a desired product or service will be available, or available on preferred terms, to trading partners *only if they comply with a condition* that may harm competition. This condition could involve refraining from dealing with rivals (exclusivity), purchasing a tied product or service (tying), or purchasing all components of a bundle (bundling). We might therefore call all these forms of "conditional dealing."[581]

[581] *See generally* Daniel Francis, *Monopolizing by Conditioning*, 124 Colum. L. Rev. 1917 (2024).

In these cases, when there is harm to competition it comes primarily from the effect of the announced condition on behavior, not from the punishment that the monopolist applies or exacts if the trading partner will not play ball. In such cases, the impact of the threat / bribe on incentives, not the impact of an actual refusal, harms competition. *Lorain Journal* and *Dentsply* are good examples.[582]

The relationship between conditional dealing and refusal-to-deal is not always clear. In the FTC's 2020 monopolization case against Facebook, the FTC had alleged that Facebook's "platform policies" made access to its valuable APIs conditional upon its trading partners' refraining from either competing directly or working with Facebook's rivals, and that the announcement of this condition suppressed the incentives of actual and potential rivals to compete.

But the court disagreed. First, the court held that the policies did not violate existing refusal-to-deal law under *Trinko*. And then it went on to hold: "Plaintiff [*i.e.*, the FTC] gets no further by maintaining that Facebook's policies also violated antitrust rules against what they call 'conditional dealing.' As an initial matter, the FTC is wrong to argue that a monopolist violates that so-called doctrine whenever it 'induces trading partners or other firms not to compete with it by conditioning access to some resource of the monopolist. . . . [S]uch a broadly formulated rule would cover refusals to deal with competitors, thus contradicting [other cases]—such refusals can always be reframed as offers to deal only on the condition that the third party refrains from competing."

The court went on: "To the extent any scholarly commentary uses the term 'conditional dealing' . . . the phrase generally refers to actions such as tying or exclusive dealing. The key fact distinguishing such conduct from a standard refusal to deal is that it is not unilateral, but instead involves some assay by the monopolist into the marketplace that interferes with the relationship between rivals and third parties. Tying, for instance, occurs when a firm requires third parties to purchase a bundle of goods rather than just the ones they really want, thereby leveraging the monopolist's power in the 'tying' product market to harm its competitors (who lose access to customers) in the 'tied' product market. Exclusive dealing is similar: it refers to a monopolist's conditioning the sale of a product on the buyer's agreement not to deal with its competitors. Again, these 'conditional dealing' schemes are thus categorically different from unilateral conduct that involves only the monopolist's competitors, such as its refusal to deal with them. The distinction is critical, as antitrust law is far more tolerant of unilateral behavior."

## NOTES

1) Car dealers don't sell components like tires and steering wheels, or cars without them. You have to buy the whole car. Is this tying? Should it be illegal?
2) Under what circumstances do you think tying is most, and least, harmful to competition?
3) Should we have different rules for tying in "high technology" markets? If so, what should those rules be? If not, what's the strongest case for doing so and why is it wrong? (What is a "high technology" market anyway?)
4) Can you think of circumstances under which there might be good reasons for a business insisting that a consumer must use only its own complementary product (say, an app with a device, or repair services with an item of equipment)? What are those reasons? Could they be accommodated without a tying arrangement?
5) If a monopolist designs one of its products to work particularly well with another of its products, is that—or should it be—a "tie" in the antitrust sense? What if a monopolist makes a design choice in the knowledge that this design choice will impede interoperability with rivals' products?
6) Suppliers of devices or operating systems often include apps and software as well, for no additional cost. Is this tying? Under what circumstances should it be unlawful?
7) The interaction of tying law and refusal-to-deal law raises some oddities. Suppose that Windows had come with an app store, from which all software (including browsers) had to be obtained. Then suppose that Microsoft had not engaged in any traditional tying to get third parties to use Internet Explorer; instead, it simply refused to let Netscape or any other rival browsers into its app store. This has the same economic effects as Microsoft's tie, but it transforms the case into a pure refusal to deal. Thus, it would completely change the legal analysis--the court would focus on profit sacrifice and prior dealing, rather than ordinary

[582] *See supra* § VII.D.1.

tying/foreclosure analysis. Does that make sense? (Thanks to Erik Hovenkamp for this excellent question and hypothetical!)

## 3. Pricing Practices: Predation and Price Squeezes

We now turn to the most basic of all competitive decisions: choices about pricing. Alongside the right to refuse to deal, the right to set a price—even if in some sense too high for purchasers' comfort, or too low for competitors'—is strongly protected in modern antitrust law.

Contrary to what is sometimes popularly supposed, antitrust law does not condemn the mere charging of unconditional *high* prices: indeed, charging high prices makes entry easier and more attractive for competitors.[583] But in limited circumstances it does discipline the charging of *low* prices. This is the law of "predatory pricing." The core concern is that a monopolist may charge prices that are so low that its competitors cannot survive, are forced out, and then face barriers to re-entry, leading to an increase in monopoly power. (Why do the barriers to re-entry matter? In particular: can you see why there would be no contribution to monopoly power if there were no such barriers?) The basic theory of harm is thus a play in two acts: at time 1, the monopolist charges an unsustainably low price, driving rivals out past barriers to re-entry; at time 2, the monopolist enjoys increased (or protected) monopoly power which allows it to recoup its losses.

As you might expect, antitrust treads very carefully when it comes to punishing low prices: antitrust law is supposed to be encouraging firms to set attractive low prices to win business from their rivals, not punishing them for doing so, or deterring them from offering a "too good" price. Thus, as Dan Crane has pointed out: "Predatory pricing is a paradoxical offense. Although antitrust law values low prices and abhors high ones, the 'predator' stands accused of charging too low of a price—of doing too much of a good thing. Society considers predation socially harmful because the artificially low prices of today drive out competitors and allow the high prices of tomorrow.[584]

It is worth distinguishing clearly between the economic logic of predation and the economic logic of foreclosure that we see in most exclusivity and tying cases.[585] In the following extract, Steve Salop summarizes the difference between the two kinds of competitive concern.

### Steven C. Salop, The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test

**81 Antitrust L.J. 371 (2017)**

The two general paradigms of exclusionary conduct—predatory pricing and [raising rivals' costs ("RRC")] foreclosure—focus on different aspects of exclusionary conduct and take very different views of the relevant antitrust risks. In order to understand the law and economics of exclusionary conduct, and CPPs in particular, it is necessary to distinguish between these two paradigms.

Predatory pricing is one paradigmatic type of exclusionary conduct. In the simplest rendition, predatory pricing involves an across-the-board reduction in prices intended to permit a deep-pocket defendant to win a war of attrition against a less well-financed entrant or small competitor. The reduction in prices during the predatory phase of a predatory pricing strategy involves short-term profit-sacrifice or actual losses by the predator. These losses then might be recovered by supracompetitive prices during the recoupment period after the entrant exits from the market or is disciplined to raise price. Predatory pricing is a risky investment in exclusion because the predator sacrifices profits in the short-run but may be unable to recoup them in the long run. The predator may blink first in light of the fact that its profit-sacrifice (relative to more accommodative pricing) exceeds the losses

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583 The European Union takes a different approach. *See*, *e.g.*, Case C-177/16, Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v. Konkurences padome, ECLI:EU:C:2017:689, ¶¶ 35–38.

584 Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 Cornell L. Rev. 1, 2–3 (2005).

585 For some broader discussions of the economics of predation, *see generally*, *e.g.*, David Beanko, Ulrigh Doraszelski, & Yaroslav Kryukov, *The Economics of Predation: What Drives Pricing When There Is Learning-by-Doing?* 104 Am. Econ. Rev. 868 (2014); Jonathan B. Baker, *Predatory Pricing after* Brooke Group: *An Economic Perspective*, 62 Antitrust L.J. 585 (1994); Joseph F. Bradley & George A. Hay, *Predatory Pricing: Competing Economic Theories and The Evolution of Legal Standards*, 66 Cornell L. Rev. 738 (1981); Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 Yale L.J. 8 (1981).

borne by the entrant, as a result of the predator's higher market share. The entrant may merely reduce its output to conserve resources and wait out the attack. The entrant also may obtain the necessary financing to withstand the attack for a significant period of time and eliminate the credibility of further predatory pricing threats. Either way, the entrant may not exit. And, even if the entrant does exit, subsequent re-entry by either the entrant or competition from others may prevent the predator from recouping its profit sacrifice or losses. This reasoning led the Court in *Matsushita* to conclude that "predatory pricing schemes are rarely tried and even more rarely successful."

The impact on consumer welfare from such "deep-pocket" predatory pricing also is unclear, according to the paradigm. Consumers benefit from the lower prices during the predatory phase. These benefits potentially could exceed the harms suffered by consumers during the recoupment phase, particularly if the predatory pricing period continues for a long time. Moreover, there may never be a recoupment phase. Failed predatory pricing is a gift to consumers. [. . .]

The modern approach to foreclosure embodied in the RRC foreclosure paradigm is very different. The RRC foreclosure paradigm generally describes exclusionary conduct that totally or partially "forecloses" competitors from access either to critical inputs or customers, with the effect of causing them to raise their prices or reduce their output, thereby allowing the excluding firm to profit by setting a supracompetitive output price, with the effect of harming consumers. A rule of reason analysis, which is commonly applied to exclusivity arrangements and other exclusionary conduct with its burden-shifting test, is entirely consistent with the RRC foreclosure paradigm

. . . RRC foreclosure conduct is more likely to be attempted and more likely to harm consumers than is predatory pricing. [. . .]

There are several reasons for these heightened concerns. First, unlike the paradigmatic view of predatory pricing, successful RRC foreclosure does not require a risky investment or losses during an initial period that may only be recouped with some probability at some later point in the future. Instead, recoupment often occurs simultaneously with RRC conduct. Thus, it is more likely to succeed, which also means that it is more likely to be attempted.

Second, unlike predatory pricing, successful RRC conduct does not require the exit of rivals, or even the permanent reduction in competitors' production capacity. If the marginal costs of established competitors are raised, those competitors will have the incentive to raise their prices and reduce their output, even if they remain viable. This also means that RRC conduct is more likely to succeed, and therefore, is more likely to be attempted.

Third, unlike paradigmatic predatory pricing, RRC foreclosure conduct is not necessarily more costly to the monopolist than it is to the excluded rivals.

* * *

The leading case on price predation is the Court's decision in *Brooke Group*. The complaint in that case alleged that the cigarette market was dominated by a cozy oligopoly of six firms (R.J. Reynolds, Philip Morris, American Brands, Lorillard, Brooke Group (previously, and in the extract below, "Liggett"), and Brown & Williamson), until—unhappy with declining demand—Liggett disrupted the market by introducing a low-price "generic" cigarette. Brown & Williamson responded with its own aggressively priced generic cigarette, which, following a price war, it offered for sale at below-cost prices. Liggett alleged that the point of B&W's strategy was to punish Liggett's effort at disruptive competition, in an effort to restore discipline and preserve the supracompetitive oligopoly profits that B&W (and the other oligopolists) had previously enjoyed. Liggett prevailed at a jury trial; B&W moved for judgment notwithstanding the verdict. The case was presented under the Robinson-Patman Act (discussed in Chapter XIII), and therefore does not look like a traditional monopolization case, including because what is being allegedly protected is an oligopoly, not a single-firm monopoly. But the Court has since explained that its reasoning governs the treatment of predatory pricing under Section 2.[586]

[586] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 318 n.1 (2007); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) ("[W]hether [a] claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson–Patman Act, two prerequisites to recovery remain the same").

## Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.

**509 U.S. 209 (1993)**

Justice Kennedy.

[1] [There are two prerequisites for recovery for predatory pricing.] First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.[1] Although [the Court's previous decisions] reserved as a formal matter the question whether recovery should ever be available when the pricing in question is above some measure of incremental cost, the reasoning in both opinions suggests that only below-cost prices should suffice, and we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. We have adhered to this principle regardless of the type of antitrust claim involved. As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result.

[2] Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price cut: The antitrust laws then would be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition. Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy.

[3] The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. For the investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.

[4] That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors. . . . Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.

[5] For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market, or, as was alleged to be the goal here, causing them to raise their prices to supracompetitive levels within a disciplined oligopoly. This requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will. The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb.

[6] If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. The plaintiff must

[1] Because the parties in this case agree that the relevant measure of cost is average variable cost . . . we . . . decline to resolve the conflict among the lower courts over the appropriate measure of cost.

demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. As we have observed on a prior occasion, in order to recoup their losses, predators must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices.

[7] Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market. If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed. In certain situations—for example, where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create or purchase new capacity—summary disposition of the case is appropriate.

[8] These prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury. As we have said in the Sherman Act context, predatory pricing schemes are rarely tried, and even more rarely successful, and the costs of an erroneous finding of liability are high. The mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because cutting prices in order to increase business often is the very essence of competition; mistaken inferences are especially costly, because they chill the very conduct the antitrust laws are designed to protect. It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high. [. . .]

[9] In this case, the price and output data do not support a reasonable inference that Brown & Williamson and the other cigarette companies elevated prices above a competitive level for generic cigarettes. Supracompetitive pricing entails a restriction in output. In the present setting, in which output expanded at a rapid rate following Brown & Williamson's alleged predation, output in the generic segment can only have been restricted in the sense that it expanded at a slower rate than it would have absent Brown & Williamson's intervention. Such a counterfactual proposition is difficult to prove in the best of circumstances; here, the record evidence does not permit a reasonable inference that output would have been greater without Brown & Williamson's entry into the generic segment.

[10] Following Brown & Williamson's entry, the rate at which generic cigarettes were capturing market share did not slow; indeed, the average rate of growth doubled. During the four years from 1980 to 1984 in which Liggett was alone in the generic segment, the segment gained market share at an average rate of 1% of the overall market per year, from 0.4% in 1980 to slightly more than 4% of the cigarette market in 1984. In the next five years, following the alleged predation, the generic segment expanded from 4% to more than 15% of the domestic cigarette market, or greater than 2% per year.

[11] While this evidence tends to show that Brown & Williamson's participation in the economy segment did not restrict output, it is not dispositive. One could speculate, for example, that the rate of segment growth would have tripled, instead of doubled, without Brown & Williamson's alleged predation. But there is no concrete evidence of this. Indeed, the only industry projection in the record estimating what the segment's growth would have been without Brown & Williamson's entry supports the opposite inference. In 1984, Brown & Williamson forecast in an important planning document that the economy segment would account for 10% of the total cigarette market by 1988 if it did not enter the segment. In fact, in 1988, after what Liggett alleges was a sustained and dangerous anticompetitive campaign by Brown & Williamson, the generic segment accounted for over 12% of the total market. Thus the segment's output expanded more robustly than Brown & Williamson had estimated it would had Brown & Williamson never entered.

[12] Brown & Williamson did note in 1985, a year after introducing its black and whites, that its presence within the generic segment appears to have resulted in a slowing in the segment's growth rate. But this statement was made in early 1985, when Liggett itself contends the below-cost pricing was still in effect and before any anticompetitive contraction in output is alleged to have occurred. Whatever it may mean, this statement has little

value in evaluating the competitive implications of Brown & Williamson's later conduct, which was alleged to provide the basis for recouping predatory losses.

[13] In arguing that Brown & Williamson was able to exert market power and raise generic prices above a competitive level in the generic category through tacit price coordination with the other cigarette manufacturers, Liggett places its principal reliance on direct evidence of price behavior. This evidence demonstrates that the list prices on all cigarettes, generic and branded alike, rose to a significant degree during the late 1980's. From 1986 to 1989, list prices on both generic and branded cigarettes increased twice a year by similar amounts. Liggett's economic expert testified that these price increases outpaced increases in costs, taxes, and promotional expenditures. The list prices of generics, moreover, rose at a faster rate than the prices of branded cigarettes, thus narrowing the list price differential between branded and generic products. Liggett argues that this would permit a reasonable jury to find that Brown & Williamson succeeded in bringing about oligopolistic price coordination and supracompetitive prices in the generic category sufficient to slow its growth, thereby preserving supracompetitive branded profits and recouping its predatory losses.

[14] A reasonable jury, however, could not have drawn the inferences Liggett proposes. All of Liggett's data are based upon the list prices of various categories of cigarettes. Yet the jury had before it undisputed evidence that during the period in question, list prices were not the actual prices paid by consumers. As the market became unsettled in the mid-1980's, the cigarette companies invested substantial sums in promotional schemes, including coupons, stickers, and giveaways, that reduced the actual cost of cigarettes to consumers below list prices. This promotional activity accelerated as the decade progressed. Many wholesalers also passed portions of their volume rebates on to the consumer, which had the effect of further undermining the significance of the retail list prices. Especially in an oligopoly setting, in which price competition is most likely to take place through less observable and less regulable means than list prices, it would be unreasonable to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflect only list prices. [. . .]

[15] . . . [A]n inference of supracompetitive pricing would be particularly anomalous in this case, as the very party alleged to have been coerced into pricing through oligopolistic coordination denied that such coordination existed: Liggett's own officers and directors consistently denied that they or other firms in the industry priced their cigarettes through tacit collusion or reaped supracompetitive profits. Liggett seeks to explain away this testimony by arguing that its officers and directors are businesspeople who do not ascribe the same meaning to words like "competitive" and "collusion" that an economist would. This explanation is entitled to little, if any, weight. As the District Court found:

> This argument was considered at the summary judgment stage since these executives gave basically the same testimony at their depositions. The court allowed the case to go to trial in part because the Liggett executives were not economists and in part because of affidavits from the Liggett executives stating that they were confused by the questions asked by Brown & Williamson lawyers and did not mean to contradict the testimony of their economic expert Burnett. However, at trial, despite having consulted extensively with Burnett and having had adequate time to familiarize themselves with concepts such as tacit collusion, oligopoly, and monopoly profits, these Liggett executives again contradicted Burnett's theory.

[. . .]

[16] Not only does the evidence fail to show actual supracompetitive pricing in the generic segment, it also does not demonstrate its likelihood. At the time Brown & Williamson entered the generic segment, the cigarette industry as a whole faced declining demand and possessed substantial excess capacity. These circumstances tend to break down patterns of oligopoly pricing and produce price competition. The only means by which Brown & Williamson is alleged to have established oligopoly pricing in the face of these unusual competitive pressures is through tacit price coordination with the other cigarette firms.

[17] Yet the situation facing the cigarette companies in the 1980's would have made such tacit coordination unmanageable. Tacit coordination is facilitated by a stable market environment, fungible products, and a small number of variables upon which the firms seeking to coordinate their pricing may focus. Uncertainty is an oligopoly's greatest enemy. By 1984, however, the cigarette market was in an obvious state of flux. The

introduction of generic cigarettes in 1980 represented the first serious price competition in the cigarette market since the 1930's. This development was bound to unsettle previous expectations and patterns of market conduct and to reduce the cigarette firms' ability to predict each other's behavior.

[18] The larger number of product types and pricing variables also decreased the probability of effective parallel pricing. When Brown & Williamson entered the economy segment in 1984, the segment included Value-25s, black and whites, and branded generics. With respect to each product, the net price in the market was determined not only by list prices, but also by a wide variety of discounts and promotions to consumers and by rebates to wholesalers. In order to coordinate in an effective manner and eliminate price competition, the cigarette companies would have been required, without communicating, to establish parallel practices with respect to each of these variables, many of which, like consumer stickers or coupons, were difficult to monitor. . . . .

[19] In addition, [competitor] R.J. Reynolds had incentives that, in some respects, ran counter to those of the other cigarette companies. It is implausible that without a shared interest in retarding the growth of the economy segment, Brown & Williamson and its fellow oligopolists could have engaged in parallel pricing and raised generic prices above a competitive level. Coordination will not be possible when any significant firm chooses, for any reason, to go it alone. It is undisputed—indeed it was conceded by Liggett's expert—that R.J. Reynolds acted without regard to the supposed benefits of oligopolistic coordination when it repriced [its branded cigarette] at generic levels in the spring of 1984 and that the natural and probable consequence of its entry into the generic segment was procompetitive. Indeed, Reynolds' apparent objective in entering the segment was to capture a significant amount of volume in order to regain its number one sales position in the cigarette industry from Philip Morris. There is no evidence that R.J. Reynolds accomplished this goal during the period relevant to this case, or that its commitment to achieving that goal changed. Indeed, R.J. Reynolds refused to follow Brown & Williamson's attempt to raise generic prices in June 1985. The jury thus had before it undisputed evidence that contradicts the suggestion that the major cigarette companies shared a goal of limiting the growth of the economy segment; one of the industry's two major players concededly entered the segment to expand volume and compete.

[20] Even if all the cigarette companies were willing to participate in a scheme to restrain the growth of the generic segment, they would not have been able to coordinate their actions and raise prices above a competitive level unless they understood that Brown & Williamson's entry into the segment was not a genuine effort to compete with Liggett. If even one other firm misinterpreted Brown & Williamson's entry as an effort to expand share, a chain reaction of competitive responses would almost certainly have resulted, and oligopoly discipline would have broken down, perhaps irretrievably. . . . [. . .]

[21] Finally, although some of Brown & Williamson's corporate planning documents speak of a desire to slow the growth of the segment, no objective evidence of its conduct permits a reasonable inference that it had any real prospect of doing so through anticompetitive means. It is undisputed that when Brown & Williamson introduced its generic cigarettes, it offered them to a thousand wholesalers who had never before purchased generic cigarettes. The inevitable effect of this marketing effort was to expand the segment, as the new wholesalers recruited retail outlets to carry generic cigarettes. Even with respect to wholesalers already carrying generics, Brown & Williamson's unprecedented volume rebates had a similar expansionary effect. Unlike many branded cigarettes, generics came with no sales guarantee to the wholesaler; any unsold stock represented pure loss to the wholesaler. By providing substantial incentives for wholesalers to place large orders, Brown & Williamson created strong pressure for them to sell more generic cigarettes. In addition, as we have already observed, many wholesalers passed portions of the rebates about which Liggett complains on to consumers, thus dropping the retail price of generics and further stimulating demand. Brown & Williamson provided a further, direct stimulus, through some $10 million it spent during the period of alleged predation placing discount stickers on its generic cartons to reduce prices to the ultimate consumer. In light of these uncontested facts about Brown & Williamson's conduct, it is not reasonable to conclude that Brown & Williamson threatened in a serious way to restrict output, raise prices above a competitive level, and artificially slow the growth of the economy segment of the national cigarette market. [. . .]

[22] We understand that the chain of reasoning by which we have concluded that Brown & Williamson is entitled to judgment as a matter of law is demanding. But a reasonable jury is presumed to know and understand the law, the facts of the case, and the realities of the market. We hold that the evidence cannot support a finding that Brown & Williamson's alleged scheme was likely to result in oligopolistic price coordination and sustained

supracompetitive pricing in the generic segment of the national cigarette market. Without this, Brown & Williamson had no reasonable prospect of recouping its predatory losses and could not inflict the injury to competition the antitrust laws prohibit.

Justice Stevens, joined by Justice White and Justice Blackmun, dissenting.

[23] After 115 days of trial, during which it considered 2,884 exhibits, 85 deposition excerpts, and testimony from 23 live witnesses, the jury deliberated for nine days and then returned a verdict finding that B & W engaged in price discrimination with a reasonable possibility of injuring competition. The Court's contrary conclusion rests on a hodgepodge of legal, factual, and economic propositions that are insufficient, alone or together, to overcome the jury's assessment of the evidence. [. . .]

[24] As a matter of fact, the Court emphasizes the growth in the generic segment following B & W's entry. As the Court notes, generics' expansion to over 12% of the total market by 1988 exceeds B & W's own forecast that the segment would grow to only about 10%, assuming no entry by B & W. What these figures do not do, however, is answer the relevant question: whether the prices of generic cigarettes during the late 1980's were competitive or supracompetitive.

[25] On this point, there is ample, uncontradicted evidence that the list prices on generic cigarettes, as well as the prices on branded cigarettes, rose regularly and significantly during the late 1980's, in a fashion remarkably similar to the price change patterns that characterized the industry in the 1970's when supracompetitive, oligopolistic pricing admittedly prevailed. Given its knowledge of the industry's history of parallel pricing, I think the jury plainly was entitled to draw an inference that these increased prices were supracompetitive. [. . .]

[26] As a matter of economics, the Court reminds us that price cutting is generally pro-competitive, and hence a boon to consumers. This is true, however, only so long as reduced prices do not fall below cost, as the cases cited by the majority make clear. When a predator deliberately engages in below-cost pricing targeted at a particular competitor over a sustained period of time, then price cutting raises a credible inference that harm to competition is likely to ensue. None of our cases disputes that proposition.

[27] Also as a matter of economics, the Court insists that a predatory pricing program in an oligopoly is unlikely to succeed absent actual conspiracy. Though it has rejected a somewhat stronger version of this proposition as a rule of decision, the Court comes back to the same economic theory, relying on the supposition that an anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly. I would suppose, however, that the professional performers who had danced the minuet for 40 to 50 years would be better able to predict whether their favorite partners would follow them in the future than would an outsider, who might not know the difference between Haydn and Mozart. In any event, the jury was surely entitled to infer that at the time of the price war itself, B & W reasonably believed that it could signal its intentions to its fellow oligopolists, assuring their continued cooperation.

[28] Perhaps the Court's most significant error is the assumption that seems to pervade much of the final sections of its opinion: that Liggett had the burden of proving either the actuality of supracompetitive pricing, or the actuality of tacit collusion. In my opinion, the jury was entitled to infer from the succession of price increases after 1985—when the prices for branded and generic cigarettes increased every six months from $33.15 and $19.75, respectively, to $46.15 and $33.75—that B & W's below-cost pricing actually produced supracompetitive prices, with the help of tacit collusion among the players. But even if that were not so clear, the jury would surely be entitled to infer that B & W's predatory plan, in which it invested millions of dollars for the purpose of achieving an admittedly anticompetitive result, carried a "reasonable possibility" of injuring competition.

* * *

*Brooke Group* thus establishes a high bar for predation claims.[587] The Court confirmed that a similar analysis applies to claims of "predatory overbuying"—that is, the practice of overpaying for inputs and distribution so that competitors are excluded—in *Weyerhaeuser*.[588]

You may notice that the Court's jurisprudence on unconditional pricing decisions somewhat resembles its jurisprudence on refusal to deal: in both groups of cases, the respect for a monopolist's freedom of action is close to its height, and the Court's concern to avoid interfering with ordinary commercial activities is very clear.[589]

The two streams—refusal to deal and predatory pricing—collided in *Linkline*, the Court's seminal decision on "price squeeze" theories of harm. In a price squeeze, a vertically integrated monopolist charges a high price in an upstream market to its downstream rivals, and sets a low downstream price with which those rivals cannot compete. The competitive concern is that unintegrated rivals cannot compete downstream. But, as the Court pointed out in *Linkline*, if the high upstream price is not illegal, why should antitrust challenge be triggered by the additional fact of low-price supply in that downstream market? There is a healthy literature on such claims.[590]

## Pacific Bell Telephone Co. v. Linkline Communications, Inc.

### 555 U.S. 438 (2009)

Chief Justice Roberts.

[1] This case involves the market for digital subscriber line (DSL) service, which is a method of connecting to the Internet at high speeds over telephone lines. AT & T owns much of the infrastructure and facilities needed to provide DSL service in California. In particular, AT & T controls most of what is known as the "last mile"—the lines that connect homes and businesses to the telephone network. Competing DSL providers must generally obtain access to AT & T's facilities in order to serve their customers. [. . .]

[2] The plaintiffs are four independent Internet service providers (ISPs) that compete with AT & T in the retail DSL market. Plaintiffs do not own all the facilities needed to supply their customers with this service. They instead lease DSL transport service from AT & T pursuant to the merger conditions described above. AT & T thus participates in the DSL market at both the wholesale and retail levels; it provides plaintiffs and other independent ISPs with wholesale DSL transport service, and it also sells DSL service directly to consumers at retail.

[3] In July 2003, the plaintiffs brought suit in District Court, alleging that AT & T violated § 2 of the Sherman Act, by monopolizing the DSL market in California. The complaint alleges that AT & T refused to deal with the plaintiffs, denied the plaintiffs access to essential facilities, and engaged in a "price squeeze." Specifically, plaintiffs contend that AT & T squeezed their profit margins by setting a high wholesale price for DSL transport and a low retail price for DSL Internet service. This maneuver allegedly excluded and unreasonably impeded competition, thus allowing AT & T to preserve and maintain its monopoly control of DSL access to the Internet. [. . .]

[3] The challenge here focuses on retail prices—where there is no predatory pricing—and the terms of dealing—where there is no duty to deal. Plaintiffs' price-squeeze claims challenge a different type of unilateral conduct in which a firm "squeezes" the profit margins of its competitors. This requires the defendant to be operating in two markets, a wholesale ("upstream") market and a retail ("downstream") market. A firm with market power in the upstream market can squeeze its downstream competitors by raising the wholesale price of inputs while cutting its

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[587] For some discussion of how that bar might be cleared in practice, *see* C. Scott Hemphill & Philip J. Weiser, *Beyond* Brooke Group*: Bringing Reality to the Law of Predatory Pricing*, 127 Yale L.J. 2048 (2018).

[588] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 325 (2007) ("The first prong of Brooke Group's test requires little adaptation for the predatory-bidding context. A plaintiff must prove that the alleged predatory bidding led to below-cost pricing of the predator's outputs. That is, the predator's bidding on the buy side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs. . . . A predatory-bidding plaintiff also must prove that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."). *See also*, *e.g.*, Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L.J. 669, 672 (2005).

[589] *See supra* § VII.C.3.

[590] *See*, *e.g.*, Steven C. Salop, *Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist*, 76 Antitrust L.J. No. 709 (2010); Erik N. Hovenkamp & Herbert Hovenkamp, *The Viability of Antitrust Price Squeeze Claims*, 51 Ariz. L. Rev. 273 (2009); J. Gregory Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability*, 4 J. Comp. L. & Econ. 279 (2008).

own retail prices. This will raise competitors' costs (because they will have to pay more for their inputs) and lower their revenues (because they will have to match the dominant firm's low retail price). Price-squeeze plaintiffs assert that defendants must leave them a "fair" or "adequate" margin between the wholesale price and the retail price. In this case, we consider whether a plaintiff can state a price-squeeze claim when the defendant has no obligation under the antitrust laws to deal with the plaintiff at wholesale. [. . .]

[4] A straightforward application of our recent decision in *Trinko* forecloses any challenge to AT & T's wholesale prices. In *Trinko*, Verizon was required by statute to lease its network elements to competing firms at wholesale rates. The plaintiff—a customer of one of Verizon's rivals—asserted that Verizon denied its competitors access to interconnection support services, making it difficult for those competitors to fill their customers' orders. The complaint alleged that this conduct in the upstream market violated § 2 of the Sherman Act by impeding the ability of independent carriers to compete in the downstream market for local telephone service.

[5] We held that the plaintiff's claims were not actionable under § 2. Given that Verizon had no antitrust duty to deal with its rivals at all, we concluded that Verizon's alleged insufficient assistance in the provision of service to rivals did not violate the Sherman Act. *Trinko* thus makes clear that if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous.

[6] In this case, as in *Trinko*, the defendant has no antitrust duty to deal with its rivals at wholesale; any such duty arises only from FCC regulations, not from the Sherman Act. There is no meaningful distinction between the "insufficient assistance" claims we rejected in *Trinko* and the plaintiffs' price-squeeze claims in the instant case. The *Trinko* plaintiff challenged the quality of Verizon's interconnection service, while this case involves a challenge to AT&T's pricing structure. But for antitrust purposes, there is no reason to distinguish between price and nonprice components of a transaction. The nub of the complaint in both *Trinko* and this case is identical—the plaintiffs alleged that the defendants (upstream monopolists) abused their power in the wholesale market to prevent rival firms from competing effectively in the retail market. *Trinko* holds that such claims are not cognizable under the Sherman Act in the absence of an antitrust duty to deal.

[7] The District Court and the Court of Appeals did not regard *Trinko* as controlling because that case did not directly address price-squeeze claims. This is technically true, but the reasoning of *Trinko* applies with equal force to price-squeeze claims. AT & T could have squeezed its competitors' profits just as effectively by providing poor-quality interconnection service to the plaintiffs, as Verizon allegedly did in *Trinko*. But a firm with no duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors. If AT & T had simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act. Under these circumstances, AT & T was not required to offer this service at the wholesale prices the plaintiffs would have preferred.

[8] The other component of a price-squeeze claim is the assertion that the defendant's retail prices are "too low." Here too plaintiffs' claims find no support in our existing antitrust doctrine.

[9] Cutting prices in order to increase business often is the very essence of competition. In cases seeking to impose antitrust liability for prices that are too low, mistaken inferences are especially costly, because they chill the very conduct the antitrust laws are designed to protect. To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low. Specifically, to prevail on a predatory pricing claim, a plaintiff must demonstrate that: (1) the prices complained of are below an appropriate measure of its rival's costs; and (2) there is a dangerous probability that the defendant will be able to recoup its investment in below-cost prices. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.

[10] In the complaint at issue in this interlocutory appeal, there is no allegation that AT & T's conduct met either of the *Brooke Group* requirements. Recognizing a price-squeeze claim where the defendant's retail price remains above cost would invite the precise harm we sought to avoid in *Brooke Group*: Firms might raise their retail prices or refrain from aggressive price competition to avoid potential antitrust liability.

[11] Plaintiffs' price-squeeze claim, looking to the relation between retail and wholesale prices, is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level. If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price both of these services in a manner that preserves its rivals' profit margins. [. . .]

[11] Institutional concerns also counsel against recognition of such claims. We have repeatedly emphasized the importance of clear rules in antitrust law. Courts are ill suited to act as central planners, identifying the proper price, quantity, and other terms of dealing. No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremediable by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.

[12] It is difficult enough for courts to identify and remedy an alleged anticompetitive practice at one level, such as predatory pricing in retail markets or a violation of the duty-to-deal doctrine at the wholesale level. Recognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. And courts would be aiming at a moving target, since it is the interaction between these two prices that may result in a squeeze.

[13] Perhaps most troubling, firms that seek to avoid price-squeeze liability will have no safe harbor for their pricing practices. At least in the predatory pricing context, firms know they will not incur liability as long as their retail prices are above cost. No such guidance is available for price-squeeze claims.

[14] The most commonly articulated standard for price squeezes is that the defendant must leave its rivals a "fair" or "adequate" margin between the wholesale price and the retail price. One of our colleagues has highlighted the flaws of this test in Socratic fashion:

> How is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price "gap?" Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? And how should the court respond when costs or demands change over time, as they inevitably will? [. . .]

[Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, J.).]

[15] Amici assert that there are circumstances in which price squeezes may harm competition. For example, they assert that price squeezes may raise entry barriers that fortify the upstream monopolist's position; they also contend that price squeezes may impair nonprice competition and innovation in the downstream market by driving independent firms out of business.

[16] The problem, however, is that amici have not identified any independent competitive harm caused by price squeezes above and beyond the harm that would result from a duty-to-deal violation at the wholesale level or predatory pricing at the retail level. To the extent a monopolist violates one of these doctrines, the plaintiffs have a remedy under existing law. We do not need to endorse a new theory of liability to prevent such harm.

## NOTES

1) What are the dangers of an unduly lax predation standard? What about an unduly aggressive one?
2) How likely should "recoupment" be before courts impose liability? What evidence should we look for to determine whether it is sufficiently likely?[591]
3) Some writers have suggested that predatory pricing might be taking place in certain digital markets.[592] In what digital markets do you think there is a risk of predation, and how should we test for it? Should we have different standards for digital predation: if so, what should these be and why?

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[591] *See generally*, *e.g.*, Louis Kaplow, *Recoupment and Predatory Pricing Analysis*, 10 J. Leg. Analysis 46 (2018).

[592] *See*, *e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017).

4) In *Linkline* the Court concluded that if, the upstream refusal to deal is lawful and the downstream low price is lawful, then the combination—a price squeeze—must also be lawful. Do you agree that this conclusion is necessary? Can the combination of two practices, each in themselves lawful, ever create an antitrust violation? What risks and goals do you think the Court had in mind in articulating this rule? What would the consequences of a rule against price squeezes be?
5) Does a price squeeze result in an increase in market power?
6) Is the cost-based standard for predatory pricing the right one? What are the most plausible alternatives? What should we do in cases where costs are difficult to calculate?

## 4. Bundling

Bundling is closely related to tying. Where tying involves conditioning the sale of one (tying) product or service on the buyer agreeing also to purchase another (tied) product or service, bundling involves offering a price discount on doing so. Competitive concerns can arise when an integrated seller (*i.e.*, a seller that offers product A *and* product B) uses a bundled discount to exclude unintegrated rivals (*i.e.*, a seller that offers only A or only B) in a way that contributes to the acquisition or maintenance of monopoly power.[593]

Antitrust courts and commentators often talk about two kinds of bundling. "Fixed" or "pure" bundling involves selling two products *only* in the form of a bundle: this is usually just tying by another name. The distinctive economics of bundling come into play with "mixed" bundling: that is, when products are available for separate purchase, but a discount is offered for purchasing them together.

### The Power of Bundling

The economics of exclusionary bundling are best seen with a simple example. Suppose that firms X and Y both produce dinner forks, and that Y is more efficient: Y has costs of $2.50 for a dinner fork; X has costs of $3.00 to produce an identical fork. But suppose that X also holds market power in a market for dinner knives, with costs of $2.50 for each knife and a profit-maximizing monopoly price of $4.00. Assume further that anyone who needs a fork needs a knife. If all sales are individual and unbundled, and assuming no constraints on the capacity of either X or Y, consumers will likely buy forks from Y and knives from X. X will likely not be able to compete effectively in the market for forks.

But now suppose that X offers consumers a knife-and-fork bundle for a total price of $6.00, or a knife alone for $4.00. From the point of view of any individual consumer who needs a knife, the opportunity to get a fork as well for an additional $2.00—rather than the $2.50 that Y would charge—may be irresistible.

Notice that Y, despite its significantly superior efficiency in fork production, can't afford to meet a price of $2.00 for a fork given its costs of $2.50. The result is that X still makes money on every sale—with a total bundled sale price of $6.00 above costs of $5.50—but Y is completely driven out of the market. If re-entry into the fork market is difficult, X can end up holding monopoly power in the fork market, with the power to raise its prices significantly after Y has exited.

These numbers are fairly extreme for the sake of illustration: in practice, X would realize that it may only need to offer the bundle for $6.49 to exclude Y, as being cheaper by a penny is still cheaper assuming identical products.[594]

[593] For general discussion, *see*, *e.g.*, Roger D. Blair & Thomas Knight, *Bundled Discounts, Loyalty Discounts and Antitrust Policy*, 16 Rutgers Bus. L. Rev. 123 (2020); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397 (2009); Herbert Hovenkamp, *Discounts and Exclusions*, 2006 Utah L. Rev. 841 (2006); Barry Nalebuff, *Exclusionary Bundling*, 50 Antitrust Bull. 321 (2005).

[594] In the real world, brand loyalty and other forms of product differentiation would make things more complicated: we are stylizing for the sake of illustration.

As with tying, the products need not be complements for the conduct to have the relevant harmful effect, though in practice they often are.[595]

But the law moves with caution in condemning bundled discounts, for reasons similar to those we encountered in discussing predatory pricing. Competition is valued, in significant part, for its power to bring lower prices. Moreover, low bundled prices may reflect a variety of good things, including economies of scope (*i.e.*, supply-side savings from supplying multiple different products or services) and demand-side complementarities (*i.e.*, the fact that the profit-maximizing price for a set of complements is lower than the total of the profit-maximizing prices for each complement separately). Undue skepticism would harm consumers and punish desirable behavior.

The antitrust analysis of mixed bundling is the subject of a prominent circuit split between the Third and Ninth Circuits. We start with the Third Circuit's decision in *LePage's*. The case is sometimes criticized for failure to clearly specify a legal rule against which bundles can be measured: do you think that criticism is fair?

## LePage's Inc. v. 3M

### 324 F.3d 141 (3d Cir. 2003) (en banc)

Judge Sloviter.

[1] 3M, which manufactures Scotch tape for home and office use, dominated the United States transparent tape market with a market share above 90% until the early 1990s. It has conceded that it has a monopoly in that market. LePage's, founded in 1876, has sold a variety of office products and, around 1980, decided to sell "second brand" and private label transparent tape, i.e., tape sold under the retailer's name rather than under the name of the manufacturer. By 1992, LePage's sold 88% of private label tape sales in the United States, which represented but a small portion of the transparent tape market. Private label tape sold at a lower price to the retailer and the customer than branded tape.

[2] Distribution patterns and consumer acceptance accounted for a shift of some tape sales from branded tape to private label tape. With the rapid growth of office superstores, such as Staples and Office Depot, and mass merchandisers, such as Wal-Mart and Kmart, distribution patterns for second brand and private label tape changed as many of the large retailers wanted to use their "brand names" to sell stationery products, including transparent tape. 3M also entered the private label business during the early 1990s and sold its own second brand under the name "Highland."

[3] LePage's claims that, in response to the growth of this competitive market, 3M engaged in a series of related, anticompetitive acts aimed at restricting the availability of lower-priced transparent tape to consumers. It also claims that 3M devised programs that prevented LePage's and the other domestic company in the business, Tesa Tuck, Inc., from gaining or maintaining large volume sales and that 3M maintained its monopoly by stifling growth of private label tape and by coordinating efforts aimed at large distributors to keep retail prices for Scotch tape high. LePage's claims that it barely was surviving at the time of trial and that it suffered large operating losses from 1996 through 1999.

[4] LePage's brought this antitrust action asserting that 3M used its monopoly over its Scotch tape brand to gain a competitive advantage in the private label tape portion of the transparent tape market in the United States through the use of 3M's multi-tiered "bundled rebate" structure, which offered higher rebates when customers purchased products in a number of 3M's different product lines. LePage's also alleges that 3M offered to some of LePage's customers large lump-sum cash payments, promotional allowances and other cash incentives to encourage them to enter into exclusive dealing arrangements with 3M.

[5] LePage's asserted claims for unlawful agreements in restraint of trade under § 1 of the Sherman Act, monopolization and attempted monopolization under § 2 of the Sherman Act, and exclusive dealing under § 3 of

[595] Complementarity is particularly likely in these cases because the conduct is likely to harm competition in the secondary (*i.e.*, fork) market in proportion to the extent to which customers in that market are also customers in the primary (*i.e.*, knife) market with a need for the primary good. In other words, if most fork customers don't care about buying knives, then the ability to offer a discount on the price of a knife isn't likely to move many customers to buy a fork they don't prefer.

the Clayton Act. After a nine week trial, the jury returned its verdict for LePage's on both its monopolization and attempted monopolization claims under § 2 of the Sherman Act, and assessed damages of $22,828,899 on each. It found in 3M's favor on LePage's claims under § 1 of the Sherman Act and § 3 of the Clayton Act. 3M filed its motions for judgment as a matter of law and for a new trial, arguing that its rebate and discount programs and the other conduct of which LePage's complained did not constitute the basis for a valid antitrust claim as a matter of law and that, in any event, the court's charge to the jury was insufficiently specific and LePage's damages proof was speculative. The District Court granted 3M's motion for judgment as a matter of law on LePage's "attempted maintenance of monopoly power" claim but denied 3M's motion for judgment as a matter of law in all other respects and denied its motion for new trial. The Court subsequently entered a judgment for trebled damages of $68,486,697 to which interest was to be added. LePage's filed a cross appeal on the District Court's judgment dismissing its attempted maintenance of monopoly power claim.

[6] On appeal, the panel of this court before which this case was originally argued reversed the District Court's judgment on LePage's § 2 claim by a divided vote. This court granted LePage's motion for rehearing en banc and, pursuant to its practice, vacated the panel opinion. The appeal was then orally argued before the court en banc. [. . .]

[7] [W]e must evaluate 3M's contention that it was entitled to judgment as a matter of law on the basis of the decision in [*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 . . . (1993).] {*Eds.: in other words, 3M argued that the legality of a bundle should be analyzed under the predatory-pricing standard, by asking whether any component of the bundle is being supplied at a below-cost price.*} [. . . ]

[8] Assuming arguendo that *Brooke Group* should be read for the proposition that a company's pricing action is legal if its prices are not below its costs, nothing in the decision suggests that its discussion of the issue is applicable to a monopolist with its unconstrained market power. Moreover, LePage's, unlike the plaintiff in *Brooke Group*, does not make a predatory pricing claim. 3M is a monopolist; a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior.

[9] Nothing in any of the Supreme Court's opinions in the decade since the *Brooke Group* decision suggested that the opinion overturned decades of Supreme Court precedent that evaluated a monopolist's liability under § 2 by examining its exclusionary, *i.e.*, predatory, conduct. *Brooke Group* has been cited only four times by the Supreme Court, three times in cases that were not even antitrust cases for propositions patently inapplicable here. . . . [N]othing that the Supreme Court has written since *Brooke Group* dilutes the Court's consistent holdings that a monopolist will be found to violate § 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification.

[10] In considering LePage's conduct that led to the jury's ultimate verdict, we note that the jury had before it evidence of the full panoply of 3M's exclusionary conduct, including both the exclusive dealing arrangements and the bundled rebates which could reasonably have been viewed as effectuating exclusive dealing arrangements because of the way in which they were structured.

[11] Through a program denominated Executive Growth Fund ("EGF") and thereafter Partnership Growth Fund ("PGF"), 3M offered many of LePage's major customers substantial rebates to induce them to eliminate or reduce their purchases of tape from LePage's. Rather than competing by offering volume discounts which are concededly legal and often reflect cost savings, 3M's rebate programs offered discounts to certain customers conditioned on purchases spanning six of 3M's diverse product lines. The product lines covered by the rebate program were: Health Care Products, Home Care Products, Home Improvement Products, Stationery Products (including transparent tape), Retail Auto Products, and Leisure Time. In addition to bundling the rebates, both of 3M's rebate programs set customer-specific target growth rates in each product line. The size of the rebate was linked to the number of product lines in which targets were met, and the number of targets met by the buyer determined the rebate it would receive on all of its purchases. If a customer failed to meet the target for any one product, its failure would cause it to lose the rebate across the line. This created a substantial incentive for each customer to meet the targets across all product lines to maximize its rebates.

[12] The rebates were considerable, not "modest" as 3M states. For example, Kmart, which had constituted 10% of LePage's business, received $926,287 in 1997, Sealed App. at 2980, and in 1996 Wal–Mart received more than $1.5 million, Sam's Club received $666,620, and Target received $482,001. Just as significant as the amounts received is the powerful incentive they provided to customers to purchase 3M tape rather than LePage's in order not to forego the maximum rebate 3M offered. The penalty would have been $264,000 for Sam's Club, $450,000 for Kmart, and $200,000 to $310,000 for American Stores.

[13] 3M does not deny that it offered these programs although it gives different reasons for the discounts to each customer. Instead it argues that they were no more exclusive than procompetitive lawful discount programs. And, as it responds to each of LePage's allegations, it returns to its central premise that it is not unlawful to lower one's prices so long as they remain above cost.

[14] However, one of the leading treatises discussing the inherent anticompetitive effect of bundled rebates, even if they are priced above cost, notes that the great majority of bundled rebate programs yield aggregate prices above cost. Rather than analogizing them to predatory pricing, they are best compared with tying, whose foreclosure effects are similar. Indeed, the package discount is often a close analogy.

[15] The treatise then discusses the anticompetitive effect as follows:

> The anticompetitive feature of package discounting is the strong incentive it gives buyers to take increasing amounts or even all of a product in order to take advantage of a discount aggregated across multiple products. In the anticompetitive case, which we presume is in the minority, the defendant rewards the customer for buying its product B rather than the plaintiff's B, not because defendant's B is better or even cheaper. Rather, the customer buys the defendant's B in order to receive a greater discount on A, which the plaintiff does not produce. In that case the rival can compete in B only by giving the customer a price that compensates it for the foregone A discount.

[16] The authors then conclude:

> Depending on the number of products that are aggregated and the customer's relative purchases of each, even an equally efficient rival may find it impossible to compensate for lost discounts on products that it does not produce.

[Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 794 (2002) 83–84.]

[17] The principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer. We recognized this in our decision in *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978), where we held that conduct substantially identical to 3M's was anticompetitive and sustained the finding of a violation of § 2. . . . The defendant in *SmithKline*, Eli Lilly & Company, the pharmaceutical manufacturer, sold three of its cephalosporins to hospitals under the trade names Kefzol, Keflin and Keflex. Cephalosporins are broad spectrum antibiotics that were at that time indispensable to hospital pharmacies. Lilly had a monopoly on both Keflin and Keflex because of its patents. However, those drugs faced competition from the generic drug cefazolin which Lilly sold under the trade name Kefzol and which plaintiff SmithKline sold under the trade name Ancef.

[18] Lilly's profits on the patented Keflin were far higher than those it received from its sales of Kefzol where its pricing was constrained by the existence of SmithKline. To preserve its market position in Keflin and discourage sales of Ancef and even of its own Kefzol, Lilly instituted a rebate program that provided a 3% bonus rebate for hospitals that purchased specified quantities of any three of Lilly's five cephalosporins. SmithKline brought a § 2 monopolization claim, alleging that Lilly used these multi-line volume rebates to maintain its monopoly over the hospital market for cephalosporins.

[19] The district court . . . found that Lilly's pricing policy violated § 2. We affirmed by a unanimous decision. Although customers were not forced to select which cephalosporins they purchased from Lilly, we recognized that the effect of the rebate program was to induce hospitals to conjoin their purchases of Kefzol with Keflin and Keflex, Lilly's leading sellers. As we stated, although eligibility for the 3% bonus rebate was based on the purchase

of specified quantities of any three of Lilly's cephalosporins, in reality it meant the combined purchases of Kefzol and the leading sellers, Keflin and Keflex. The gravamen of Lilly's § 2 violation was that Lilly linked a product on which it faced competition with products on which it faced no competition.

[20] The effect of the 3% bundled rebate was magnified by the volume of Lilly products sold, so that in order to offer a rebate of the same net dollar amount as Lilly's, SmithKline had to offer purchasers of Ancef rebates of some 16% to hospitals of average size, and 35% to larger volume hospitals. Lilly's rebate structure combining Kefzol with Keflin and Keflex insulated Kefzol from true price competition with its competitor Ancef.

[21] LePage's private-label and second-tier tapes are, as Kefzol and Ancef were in relation to Keflin, less expensive but otherwise of similar quality to Scotch-brand tape. Indeed, before 3M instituted its rebate program, LePage's had begun to enjoy a small but rapidly expanding toehold in the transparent tape market. 3M's incentive was thus the same as Lilly's in SmithKline: to preserve the market position of Scotch-brand tape by discouraging widespread acceptance of the cheaper, but substantially similar, tape produced by LePage's.

[22] 3M bundled its rebates for Scotch-brand tape with other products it sold in much the same way that Lilly bundled its rebates for Kefzol with Keflin and Keflex. In both cases, the bundled rebates reflected an exploitation of the seller's monopoly power. Just as cephalosporins were carried in virtually every general hospital in the country [in *SmithKline*], the evidence in this case shows that Scotch-brand tape is indispensable to any retailer in the transparent tape market.

[23] Our analysis of § 2 of the Sherman Act in *SmithKline* is instructive here where the facts are comparable. Speaking through Judge Aldisert, we said:

> With Lilly's cephalosporins subject to no serious price competition from other sellers, with the barriers to entering the market substantial, and with the prospects of new competition extremely uncertain, we are confronted with a factual complex in which Lilly has the awesome power of a monopolist. Although it enjoyed the status of a legal monopolist when it was engaged in the manufacture and sale of its original patented products, that status changed when it instituted its bundled rebate program. The goal of that plan was to associate Lilly's legal monopolistic practices with an illegal activity that directly affected the price, supply, and demand of Kefzol and Ancef. Were it not for the bundled rebate program, the price, supply, and demand of Kefzol and Ancef would have been determined by the economic laws of a competitive market. Lilly's bundled rebate program blatantly revised those economic laws and made Lilly a transgressor under § 2 of the Sherman Act.

[24] The effect of 3M's rebates were even more powerfully magnified than those in *SmithKline* because 3M's rebates required purchases bridging 3M's extensive product lines. In some cases, these magnified rebates to a particular customer were as much as half of LePage's entire prior tape sales to that customer. For example, LePage's sales to Sam's Club in 1993 totaled $1,078,484, while 3M's 1996 rebate to Sam's Club was $666,620. Similarly, LePage's 1992 sales to Kmart were $2,482,756; 3M's 1997 rebate to Kmart was $926,287. The jury could reasonably find that 3M used its monopoly in transparent tape, backed by its considerable catalog of products, to squeeze out LePage's. 3M's conduct was at least as anticompetitive as the conduct which this court held violated § 2 in *SmithKline*.

* * *

*LePage's* is half of the circuit-split story; the other half (and indeed the majority approach) is mapped out by the Ninth Circuit in *PeaceHealth*. Here the legal rule seems clear—is it also appealing?

## Cascade Health Solutions v. PeaceHealth

### 515 F.3d 883 (9th Cir. 2008)

Judge Gould.

[1] McKenzie-Willamette Hospital ("McKenzie") filed a complaint in the district court against PeaceHealth asserting seven claims for relief. [. . .]

[2] In Lane County, PeaceHealth operates three hospitals while McKenzie operates one. McKenzie's sole endeavor is McKenzie–Willamette Hospital, a 114–bed hospital that offers primary and secondary acute care in Springfield, Oregon. McKenzie does not provide tertiary care. In the time period leading up to and including this litigation, McKenzie had been suffering financial losses, and, as a result, merged with Triad Hospitals, Inc. so that it could add tertiary services to its menu of care. {*Eds: Following this merger, McKenzie was renamed Cascade Health.*}

[3] The largest of PeaceHealth's three facilities is Sacred Heart Hospital, a 432–bed operation that offers primary, secondary, and tertiary care in Eugene, Oregon. PeaceHealth also operates Peace Harbor Hospital, a 21–bed hospital in Florence, Oregon and Cottage Grove Hospital, an 11–bed hospital in Cottage Grove, Oregon. In Lane County, PeaceHealth has a 90% market share of tertiary neonatal services, a 93% market share of tertiary cardiovascular services, and a roughly 75% market share of primary and secondary care services. [. . .]

[4] On McKenzie's monopolization and attempted monopolization claims, McKenzie's primary theory was that PeaceHealth engaged in anticompetitive conduct by offering insurers "bundled" or "package" discounts. McKenzie asserted that PeaceHealth offered insurers discounts of 35% to 40% on tertiary services if the insurers made PeaceHealth their sole preferred provider for all services—primary, secondary, and tertiary. McKenzie introduced evidence of a few specific instances of PeaceHealth's bundled discounting practices. [. . .]

[5] [B]undled discounts, while potentially procompetitive by offering bargains to consumers, can also pose the threat of anticompetitive impact by excluding less diversified but more efficient producers. These considerations put into focus this problem: How are we to discern where antitrust law draws the line between bundled discounts that are procompetitive and part of the normal rough-and-tumble of our competitive economy and bundled discounts, offered by firms holding or on the verge of gaining monopoly power in the relevant market, that harm competition and are thus proscribed by § 2 of the Sherman Act? [. . .]

[6] In this case, the district court used *LePage's* to formulate its jury instruction. Specifically, the district court instructed the jury that

> plaintiff . . . contends that defendant has bundled price discounts for its primary, secondary, and tertiary acute care products and that doing so is anticompetitive. Bundled pricing occurs when price discounts are offered for purchasing an entire line of services exclusively from one supplier. Bundled price discounts may be anti-competitive if they are offered by a monopolist and substantially foreclose portions of the market to a competitor who does not provide an equally diverse group of services and who therefore cannot make a comparable offer.

[7] As 3M did in *LePage's*, PeaceHealth argues that the jury instruction incorrectly stated the law because it allowed the jury to find that a defendant with monopoly power (or, in the case of an attempted monopolization claim, a dangerous probability of achieving monopoly power) engaged in exclusionary conduct by simply offering a bundled discount that its competitor could not match. The instruction did not require the jury to consider whether the defendant priced below cost. *LePage's*, PeaceHealth asserts, was wrongly decided because it allows the jury to conclude, from the structure of the market alone, that a competitor has been anticompetitively excluded from the market. . . .

[8] As the bipartisan Antitrust Modernization Commission ("AMC") recently noted, the fundamental problem with the *LePage's* standard is that it does not consider whether the bundled discounts constitute competition on the merits, but simply concludes that all bundled discounts offered by a monopolist are anticompetitive with respect to its competitors who do not manufacture an equally diverse product line. Antitrust Modernization Comm'n, REPORT AND RECOMMENDATIONS (2007) 97. The *LePage's* standard, the AMC noted, asks the jury to consider whether the plaintiff has been excluded from the market, but does not require the jury to consider whether the plaintiff was at least as efficient of a producer as the defendant. Thus, the *LePage's* standard could protect a less efficient competitor at the expense of consumer welfare. As Judge Greenberg explained in his *LePage's* dissent, the Third Circuit's standard risks curtailing price competition and a method of pricing beneficial to customers because the bundled rebates effectively lowered the seller's costs.

[9] The AMC also lamented that *LePage's* "offers no clear standards by which firms can assess whether their bundled rebates are likely to pass antitrust muster." The Commission noted that efficiencies, and not schemes to acquire or maintain monopoly power, likely explain the use of bundled discounts because many firms without

market power offer them. The AMC thus proposed a three-part test that it believed would protect procompetitive bundled discounts from antitrust scrutiny. The AMC proposed that:

> Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.

[10] We must decide whether we should follow *LePage*'s or whether we should part ways with the Third Circuit by adopting a cost-based standard to apply in bundled discounting cases. [. . .]

[11] [T]he Supreme Court has forcefully suggested that we should not condemn prices that are above some measure of incremental cost. In *Brooke Group*, the Court held that a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. In the course of rejecting the plaintiff's argument that a predatory pricing plaintiff need not prove below-cost pricing, the Court wrote that it has rejected the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws. . . . The Court went on to emphasize that "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." The Court also noted the broad application of the principle that only below-cost prices are anticompetitive, stating that "[w]e have adhered to this principle regardless of the type of antitrust claim involved." As a general rule, the Court concluded, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting. [. . .]

[12] Of course, in neither *Brooke Group* nor *Weyerhaeuser* did the Court go so far as to hold that in every case in which a plaintiff challenges low prices as exclusionary conduct the plaintiff must prove that those prices were below cost. But the Court's opinions strongly suggest that, in the normal case, above-cost pricing will not be considered exclusionary conduct for antitrust purposes, and the Court's reasoning poses a strong caution against condemning bundled discounts that result in prices above a relevant measure of costs.

[13] The Supreme Court's long and consistent adherence to the principle that the antitrust laws protect the process of competition, and not the pursuits of any particular competitor, reinforce our conclusion of caution concerning bundled discounts that result in prices above an appropriate measure of costs. . . . . [. . .]

[14] One of the challenges of interpreting and enforcing the amorphous prohibitions of §§ 1 and 2 of the Sherman Act is ensuring that the antitrust laws do not punish economic behavior that benefits consumers and will not cause long-run injury to the competitive process. A bundled discount, however else it might be viewed, is a price discount on a collection of goods. The Supreme Court has undoubtedly shown a solicitude for price competition. In *Weyerhaeuser*, Justice Thomas, writing for the Court, reminded us that, in *Brooke Group*, the Court had cautioned that the costs of erroneous findings of predatory-pricing liability were quite high because the mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition, and therefore, mistaken findings of liability would chill the very conduct the antitrust laws are designed to protect.

[15] Given the endemic nature of bundled discounts in many spheres of normal economic activity, we decline to endorse the Third Circuit's definition of when bundled discounts constitute the exclusionary conduct proscribed by § 2 of the Sherman Act. Instead, we think the course safer for consumers and our competitive economy to hold that bundled discounts may not be considered exclusionary conduct within the meaning of § 2 of the Sherman Act unless the discounts resemble the behavior that the Supreme Court in *Brooke Group* identified as predatory. Accordingly, we hold that the exclusionary conduct element of a claim arising under § 2 of the Sherman Act cannot be satisfied by reference to bundled discounts unless the discounts result in prices that are below an appropriate measure of the defendant's costs. [. . .]

[16] The next question we must address is how we define the appropriate measure of the defendant's costs in bundled discounting cases and how we determine whether discounted prices fall below that mark. Defining the appropriate measure of costs in a bundled discounting case is more complex than in a single product case. In a single product case, we may simply ask whether the defendant has priced its product below its incremental cost of producing that product because a rival that produces the same product as efficiently as the defendant should be able to match any price at or above the defendant's cost. However, as we discussed above, a defendant offering a bundled discount, without pricing below cost either the individual products in the bundle or the bundle as a whole, can, in some cases, exclude a rival who produces one of the products in the bundle equally or more efficiently than the defendant. Thus, simply asking whether the defendant's prices are below its incremental costs might fail to alert us to bundled discounts that threaten the exclusion of equally efficient rivals. Nonetheless, we are mindful that, in single product pricing cases, the Supreme Court has not adopted rules condemning prices above a seller's incremental costs. With these considerations in mind, we assess the rules the parties and amici propose for us to use in bundled discounting cases to determine the appropriate measure of a defendant's costs and whether a defendant has priced below that level.

[17] PeaceHealth and some amici urge us to adopt a rule they term the "aggregate discount" rule. This rule condemns bundled discounts as anticompetitive only in the narrow cases in which the discounted price of the entire bundle does not exceed the bundling firm's incremental cost to produce the entire bundle. PeaceHealth and amici argue that support for such a rule can be found in the Supreme Court's single product predation cases—*Brooke Group* and *Weyerhaeuser*.

[18] We are not persuaded that those cases require us to adopt an aggregate discount rule in multi-product discounting cases. As we discussed above, bundled discounts present one potential threat to consumer welfare that single product discounts do not: A competitor who produces fewer products than the defendant but produces the competitive product at or below the defendant's cost to produce that product may nevertheless be excluded from the market because the competitor cannot match the discount the defendant offers over its numerous product lines. This possibility exists even when the defendant's prices are above cost for each individual product and for the bundle as a whole. Under a discount aggregation rule, anticompetitive bundled discounting schemes that harm competition may too easily escape liability.

[19] Additionally, as commentators have pointed out, *Brooke Group*'s safe harbor for above-cost discounting in the single product discount context is not based on a theory that above-cost pricing strategies can never be anticompetitive, but rather on a cost-benefit rejection of a more nuanced rule. . . . That is, the safe harbor rests on the premise that any consumer benefit created by a rule that permits inquiry into above-cost, single-product discounts, but allows judicial condemnation of those deemed legitimately exclusionary, would likely be outweighed by the consumer harm occasioned by overdeterring nonexclusionary discounts. So, in adopting an appropriate cost-based test for bundled discounting cases, we should not adopt an aggregate discount rule without inquiring whether a rule exists that is more likely to identify anticompetitive bundled discounting practices while at the same time resulting in little harm to competition. [. . .]

[20] [A]s our cost-based rule, we adopt what amici refer to as a "discount attribution" standard. Under this standard, the full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products. If the resulting price of the competitive product or products is below the defendant's incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of § 2. This standard makes the defendant's bundled discounts legal unless the discounts have the potential to exclude a hypothetical equally efficient producer of the competitive product.[15] [. . .]

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[15] [An example] illustrates how the discount attribution standard condemns discounts that could not be matched by an equally or more efficient producer of the competitive product. . . . [T]he example involves A, a firm that makes both shampoo and conditioner. A's incremental cost of shampoo is $1.50 and A's incremental cost of conditioner is $2.50. A prices shampoo at $3 and conditioner at $5, if purchased separately. However, if purchased as a bundle, A prices shampoo at $2.25 and conditioner at $3. Purchased separately from A, the total price of one unit of shampoo and one unit of conditioner is $8. However, with the bundled discount, a customer can purchase both products from A for $5.25, a discount of $2.75 off the separate prices, but at a price that is still above A's variable cost of producing the bundle. Applying the discount attribution rule to the example, we subtract the entire discount on the package of products, $2.75, from the separate per unit price of the competitive product, shampoo, $3. The resulting effective

[21] The discount attribution standard provides clear guidance for sellers that engage in bundled discounting practices. A seller can easily ascertain its own prices and costs of production and calculate whether its discounting practices run afoul of the rule we have outlined. . . . [U]nder the discount attribution standard a bundled discounter need not fret over and predict or determine its rivals' cost structure.

[22] We are aware that liability under the discount attribution standard has the potential to sweep more broadly than under the aggregate discount rule . . . . However, there is limited judicial experience with bundled discounts, and academic inquiry into the competitive effects of bundled discounts is only beginning. By comparison, the Supreme Court's decision in *Brooke Group* . . . marked the culmination of nearly twenty years of scholarly and judicial analysis of the feasibility and competitive effects of single product predatory pricing schemes. The cost-based standard we adopt will allow courts the experience they need to divine the prevalence and competitive effects of bundled discounts and will allow these difficult issues to further percolate in the lower courts. As the Solicitor General noted in his amicus brief urging the denial of certiorari in *LePage's*:

> There is insufficient experience with bundled discounts to this point to make a firm judgment about the relative prevalence of exclusionary versus procompetitive bundled discounts. Relative to the practice of predatory pricing analyzed in *Brooke Group*, there is less knowledge on which to assess whether, or to what extent, the legal approach to a monopolist's allegedly exclusionary bundled discounts should be driven by a strong concern for false positives and low risk of false negatives. Further empirical development may shed light on that question.

[23] Pending further judicial and academic inquiry into the prevalence of anticompetitive bundled discounts, we think it preferable to allow plaintiffs to challenge bundled discounts if those plaintiffs can prove a defendant's bundled discounts would have excluded an equally efficient competitor.

[24] To summarize, the primary anticompetitive danger posed by a multi-product bundled discount is that such a discount can exclude a rival is who is equally efficient at producing the competitive product simply because the rival does not sell as many products as the bundled discounter. Thus, a plaintiff who challenges a package discount as anticompetitive must prove that, when the full amount of the discounts given by the defendant is allocated to the competitive product or products, the resulting price of the competitive product or products is below the defendant's incremental cost to produce them. This requirement ensures that the only bundled discounts condemned as exclusionary are those that would exclude an equally efficient producer of the competitive product or products. [. . .]

[25] . . . [T]he relevant inquiry is not whether PeaceHealth's pricing practices forced McKenzie to price below cost, but whether PeaceHealth priced its own services below an appropriate measure of its cost, as we have defined that concept using the discount attribution rule. In this case, we cannot conclude that the error in the jury instructions was harmless. We vacate the judgment entered in McKenzie's favor and remand for further proceedings consistent with our opinion.

## NOTES

1) The *PeaceHealth* price-cost test is a demanding one for plaintiffs. (Why do you think it is hard for the plaintiff to prove the various quantitative measures on which that test depends?) Is this justified as a policy matter by the dangers of deterring healthy competition? Is it compelled as a legal matter by *Brooke Group*?
2) Can you discern the rule that the court was applying in *LePage*'s to distinguish between lawful and unlawful bundles?
3) Do you think bundling should be approached through the lens of foreclosure (as in tying or exclusivity cases) or predation (as in predatory-pricing cases)?

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price of shampoo is thus $0.25, meaning that, if a customer must purchase conditioner from A at the separate price of $5, a rival who produces only shampoo must sell the shampoo for $0.25 to make customers indifferent between A's bundle and the separate purchase of conditioner from A and shampoo from the hypothetical rival. A's pricing scheme thus has the effect of excluding any potential rival who would produce only shampoo, and would produce it at an incremental cost above $0.25. However, as we noted above, A's incremental cost of producing shampoo is $1.50. Thus, A's pricing practices exclude potential competitors that could produce shampoo more efficiently than A (i.e., at an incremental cost of less than $1.50). A's discount could thus be considered exclusionary under our rule, supporting Sherman Act § 2 liability if the other elements were proved.

## 5. Torts, Misrepresentations, and Abuse of Process

Although it would be easy to think of monopolization as defined by its familiar, shoebox-like categories—exclusive dealing, tying, predatory pricing, and so on—this would be a mistake. There is no formal limit to the types and varieties of conduct that can, in principle, constitute monopolization.[596]

Among other things, this means that there is some overlap between monopolization and traditional torts, when committed by monopolists and sufficiently threatening to competition. Excluding rivals by smashing up their factories or display cases, for example, can violate Section 2 where it is sufficiently connected to the acquisition or maintenance of monopoly power. So too, under the right circumstances, can misrepresentations![597]

### *Torts and Misrepresentation*

Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002); National Ass'n of Pharmaceutical Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904 (2d Cir. 1988)

The overlap between Section 2 and the broader realm of business torts has been explored in a number of cases. In *Conwood*, a supplier of chewing tobacco (Conwood) sued its competitor (U.S. Tobacco Corp. or "USTC") for monopolization. Conwood alleged that USTC had misused its role as a "category manager" or "category captain"—in which capacity retailers asked for its help in arranging in-store displays of chewing tobacco, including not just those of USTC but also those of rival brands[598]—through a variety of practices, including the literal removal and destruction of Conwood's product display racks. USTC argued, among other things, that the conduct amounted to "isolated sporadic torts" and could not form the basis for antitrust liability.

But the Sixth Circuit disagreed. "Isolated tortious activity alone does not constitute exclusionary conduct for purposes of a § 2 violation, absent a significant and more than a temporary effect on competition, and not merely on a competitor or customer. Business torts will be violative of § 2 only in rare gross cases. [But] this is not to say that tortious conduct may never violate the antitrust laws. Moreover, merely because a particular practice might be actionable under tort law does not preclude an action under the antitrust laws as well. 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."[599]

Monopolists can even run afoul of Section 2 through exclusionary deception. In *Ayerst*, the Second Circuit confirmed that under certain circumstances a business might monopolize through deceptive advertising, but indicated that courts should apply "a presumption that the effect on competition of such a practice was de minimis." The court noted that: "while there is no redeeming virtue in deception, there is a social cost in litigation over it. Thus, because the likelihood of a significant impact upon the opportunities of rivals is so small in most observed instances—and because the prevalence of arguably improper utterance is so great—the courts would be wise to regard misrepresentations as presumptively de minimis for § 2 purposes." The court quoted, with apparent approval, the views of Professors Areeda and Turner that such a presumption could be overcome by a showing that the statements were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals.

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[596] *See*, *e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) ("[T]he means of illicit exclusion . . . are myriad."); Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998) (anticompetitive conduct comes "in too many different forms" for exhaustive definition).

[597] *See*, *e.g.*, Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114, 1127 (10th Cir. 2014); Am. Pro. Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Pro. Publications, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997); Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 371 (6th Cir. 2003); National Ass'n of Pharmaceutical Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904 (2d Cir. 1988). For a thoughtful discussion of liability for false advertising, *see* Michael A. Carrier & Rebecca Tushnet, *An Antitrust Framework for False Advertising*, 106 Iowa L. Rev. 1841 (2021).

[598] This may strike you as an odd-sounding practice, but it is common. *See*, *e.g.*, Bradley J. Lorden, *Category Management: The Antitrust Implications in the United States and Europe*, 23 Loyola Consumer L. Rev. 541 (2011).

[599] Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002).

In *Ayerst* itself, the plaintiff, Zenith, had alleged that the defendant, Ayerst, had unlawfully monopolized by distributing to customers a false and misleading letter that falsely claimed that the plaintiff's product was inferior to the defendant's. Noting that the Food and Drug Administration ("FDA") had already concluded that the letter in question was false and misleading, and that the plaintiff might be able to prove that the letter could not readily have been neutralized or corrected, the Second Circuit concluded that the plaintiff should be allowed to move ahead to discovery.

Under certain circumstances, too, the misuse of government and regulatory processes, or similar processes like those of private standard-setting organizations ("SSOs"), can constitute monopolization. But—as with refusal-to-deal cases and pricing cases—courts are often particularly reluctant to interfere with recourse to the machinery of government. Indeed, there are some sharp constitutional and other concerns with doing so.[600] For now, it is enough to know that conduct that involves petitioning any branch of the government—including the judiciary, administrative agencies, and so on—is constitutionally protected, and you have to clear a high bar to face antitrust trouble for doing so.

The classic abuse-of-process case is *Walker Process*, in which the defendant was alleged to have obtained a patent by fraud on the Patent Office. The Court confirmed that, at least in principle, monopolization liability was available in such cases. Of course, there are lots of other ways to misuse regulatory and similar processes. These include, for example, "sham litigation" (*i.e.*, litigation filed for the sole purpose of driving up a competitor's costs through the expenses and difficulties of defending the litigation),[601] as well as abuse of private standard-setting organizations (*i.e.*, misusing or abusing quasi-regulatory processes to exclude competitors).[602]

A key consideration in this area is "*Noerr-Pennington* immunity," which provides defendants with robust immunity for most conduct that involves petitioning the government (including the executive, judicial, and legislative branches). We will meet this immunity, and others, in Chapter IX.

## Walker Process Equipment Inc v Food Machinery & Chemical Corp.

### 382 U.S. 172 (1965)

Justice Clark.

[1] The question before us is whether the maintenance and enforcement of a patent obtained by fraud on the Patent Office may be the basis of an action under s 2 of the Sherman Act, and therefore subject to a treble damage claim by an injured party . . . . The respondent, Food Machinery, & Chemical Corp. (hereafter Food Machinery), filed this suit for infringement of its patent No. 2,328,655 covering knee-action swing diffusers used in aeration equipment for sewage treatment systems. Petitioner, Walker Process Equipment, Inc. (hereafter Walker), denied the infringement and counterclaimed for a declaratory judgment that the patent was invalid. After discovery, Food Machinery moved to dismiss its complaint with prejudice because the patent had expired. Walker then amended its counterclaim to charge that Food Machinery had illegally monopolized interstate and foreign commerce by fraudulently and in bad faith obtaining and maintaining its patent well knowing that it had no basis for a patent. It alleged fraud on the basis that Food Machinery had sworn before the Patent Office that it neither knew nor believed that its invention had been in public use in the United States for more than one year prior to filing its patent application when, in fact, Food Machinery was a party to prior use within such time. The counterclaim further asserted that the existence of the patent had deprived Walker of business that it would have otherwise enjoyed. Walker prayed that Food Machinery's conduct be declared a violation of the antitrust laws and sought recovery of treble damages.

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[600] *See infra* § IX.B. (discussing the *Noerr-Pennington* doctrine).

[601] *See*, *e.g.*, FTC v. AbbVie Inc., 976 F.3d 327, 346 (3d Cir. 2020); Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60–61 (1993); *see also* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Covad Communications Co. v. Bell Atlantic Corp., 398 F.3d 666, 676–77 (D.C. Cir. 2005) (evaluating sham infringement litigation claim).

[602] *See*, *e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Radiant Burners, Inc. v. Peoples Gas Co., 364 U.S. 656 (1961).

[2] The District Court granted Food Machinery's motion and dismissed its infringement complaint along with Walker's amended counterclaim, without leave to amend and with prejudice. The Court of Appeals for the Seventh Circuit affirmed. We granted certiorari. We have concluded that the enforcement of a patent procured by fraud on the Patent Office may be violative of s 2 of the Sherman Act provided the other elements necessary to a s 2 case are present. In such event the treble damage provisions of s 4 of the Clayton Act would be available to an injured party. [. . .]

[3] Both Walker and the United States, which appears as amicus curiae, argue that if Food Machinery obtained its patent by fraud and thereafter used the patent to exclude Walker from the market through "threats of suit" and prosecution of this infringement suit, such proof would establish a prima facie violation of s 2 of the Sherman Act. On the other hand, Food Machinery says that a patent monopoly and a Sherman Act monopolization cannot be equated; the removal of the protection of a patent grant because of fraudulent procurement does not automatically result in a s 2 offense. Both lower courts seem to have concluded that proof of fraudulent procurement may be used to bar recovery for infringement, . . . but not to establish invalidity. As the Court of Appeals expressed the proposition, only the government may annul or set aside a patent. It went on to state that no case had decided, or hinted that fraud on the Patent Office may be turned to use in an original affirmative action, instead of as an equitable defense. Since Walker admits that its anti-trust theory depends on its ability to prove fraud on the Patent Office, it follows that Walker's second amended counterclaim failed to state a claim upon which relief could be granted. [. . .]

[4] Walker's counterclaim alleged that Food Machinery obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office. Proof of this assertion would be sufficient to strip Food Machinery of its exemption from the antitrust laws. By the same token, Food Machinery's good faith would furnish a complete defense. This includes an honest mistake as to the effect of prior installation upon patentability—so-called "technical fraud."

[5] To establish monopolization or attempt to monopolize a part of trade or commerce under s 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition. It may be that the device—knee-action swing diffusers—used in sewage treatment systems does not comprise a relevant market. There may be effective substitutes for the device which do not infringe the patent. This is a matter of proof, as is the amount of damages suffered by Walker.

[6] As respondent points out, Walker has not clearly articulated its claim. It appears to be based on a concept of per se illegality under s 2 of the Sherman Act. But in these circumstances, the issue is premature. . . . [T]he area of per se illegality is carefully limited. We are reluctant to extend it on the bare pleadings and absent examination of market effect and economic consequences.

[7] However, even though the per se claim fails at this stage of litigation, we believe that the case should be remanded for Walker to clarify the asserted violations of s 2 and to offer proof thereon. The trial court dismissed its suit not because Walker failed to allege the relevant market, the dominance of the patented device therein, and the injurious consequences to Walker of the patent's enforcement, but rather on the ground that the United States alone may "annul or set aside" a patent for fraud in procurement. The trial court has not analyzed any economic data. Indeed, no such proof has yet been offered because of the disposition below. In view of these considerations, as well as the novelty of the claim asserted and the paucity of guidelines available in the decided cases, this deficiency cannot be deemed crucial. Fairness requires that on remand Walker have the opportunity to make its s 2 claims more specific, to prove the alleged fraud, and to establish the necessary elements of the asserted s 2 violation.

Justice Harlan, concurring.

[8] We hold today that a treble-damage action for monopolization which, but for the existence of a patent, would be violative of s 2 of the Sherman Act may be maintained under s 4 of the Clayton Act if two conditions are satisfied: (1) the relevant patent is shown to have been procured by knowing and willful fraud practiced by the defendant on the Patent Office or, if the defendant was not the original patent applicant, he had been enforcing

the patent with knowledge of the fraudulent manner in which it was obtained; and (2) all the elements otherwise necessary to establish a s 2 monopolization charge are proved. Conversely, such a private cause of action would not be made out if the plaintiff: (1) showed no more than invalidity of the patent arising, for example, from a judicial finding of 'obviousness,' or from other factors sometimes compendiously referred to as 'technical fraud'; or (2) showed fraudulent procurement, but no knowledge thereof by the defendant; or (3) failed to prove the elements of a s 2 charge even though he has established actual fraud in the procurement of the patent and the defendant's knowledge of that fraud.

[9] It is well also to recognize the rationale underlying this decision, aimed of course at achieving a suitable accommodation in this area between the differing policies of the patent and antitrust laws. To hold, as we do, that private suits may be instituted under s 4 of the Clayton Act to recover damages for Sherman Act monopolization knowingly practiced under the guise of a patent procured by deliberate fraud, cannot well be thought to impinge upon the policy of the patent laws to encourage inventions and their disclosure. Hence, as to this class of improper patent monopolies, antitrust remedies should be allowed room for full play. On the other hand, to hold, as we do not, that private antitrust suits might also reach monopolies practiced under patents that for one reason or another may turn out to be voidable under one or more of the numerous technicalities attending the issuance of a patent, might well chill the disclosure of inventions through the obtaining of a patent because of fear of the vexations or punitive consequences of treble-damage suits. Hence, this private antitrust remedy should not be deemed available to reach s 2 monopolies carried on under a nonfraudulently procured patent.

**NOTES**

1) When a court considers whether to impose monopolization liability for a particular act, should it matter whether that act also constitutes a tort? What about conduct that constitutes a breach of contract? IP infringement? A crime? An immoral act?
2) Do you think courts and agencies should be particularly skeptical of monopolization claims premised on misrepresentation, compared to other monopolization claims?
3) How, if at all, should monopolization law constrain advertising by a monopolist? Are there any special policy concerns in so doing?
4) Should subjective intent matter more in monopolization-by-tort cases than in other cases?
5) When, if ever, should misleading omissions give rise to antitrust liability? Are there circumstances where supplying a product or service involves an implicit representation about the product's safety, legality, etc.?

# E. Attempt and Conspiracy

Section 2 also prohibits attempts and conspiracies to monopolize. Of these, the most important in practice is the attempt offense, as—among other things—conspiracies to monopolize tend to fall within the ambit of Section 1.[603] The leading case on attempt is *Spectrum Sports*.

## Spectrum Sports, Inc. v. McQuillan

### 506 U.S. 447 (1993)

Justice White.

[1] While § 1 of the Sherman Act forbids contracts or conspiracies in restraint of trade or commerce, § 2 addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize. Section 2 does not define the elements of the offense of attempted monopolization. Nor is there much guidance to be had in the scant legislative history of that provision, which was added late in the legislative process. The legislative history does indicate that much of the interpretation of the necessarily broad principles of the Act was to be left for the courts in particular cases.

[603] *See*, *e.g.*, NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 132 (1998) (overlapping Section 1 and conspiracy-to-monopolize theories).

[2] This Court first addressed the meaning of attempt to monopolize under § 2 in *Swift & Co. v. United States*, 196 U.S. 375 (1905). The Court's opinion, written by Justice Holmes, contained the following passage:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.

[3] The Court went on to explain, however, that not every act done with intent to produce an unlawful result constitutes an attempt. It is a question of proximity and degree. *Swift* thus indicated that intent is necessary, but alone is not sufficient, to establish the dangerous probability of success that is the object of § 2's prohibition of attempts.

[4] The Court's decisions since *Swift* have reflected the view that the plaintiff charging attempted monopolization must prove a dangerous probability of actual monopolization, which has generally required a definition of the relevant market and examination of market power. In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965), we found that enforcement of a fraudulently obtained patent claim could violate the Sherman Act. We stated that, to establish monopolization or attempt to monopolize under § 2 of the Sherman Act, it would be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. The reason was that without a definition of that market there is no way to measure the defendant's ability to lessen or destroy competition.

[5] Similarly, this Court reaffirmed in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), that Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur. Thus, the conduct of a single firm, governed by § 2, is unlawful only when it threatens actual monopolization.

[6] The Courts of Appeals other than the Ninth Circuit have followed this approach. Consistent with our cases, it 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. In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.

[7] [T]he Court of Appeals in this case reaffirmed its prior holdings {*Eds.: those earlier holdings took a more expansive view of liability, based on the Ninth Circuit's earlier opinion in* Lessig v. Tidewater Oil Co*., 327 F.2d 459 (9th Cir. 1964)*}; indeed, it did not mention either this Court's decisions discussed above or the many decisions of other Courts of Appeals reaching contrary results. Respondents urge us to affirm the decision below. We are not at all inclined, however, to embrace [a more expansive] interpretation of § 2, for there is little, if any, support for it in the statute or the case law, and the notion that proof of unfair or predatory conduct alone is sufficient to make out the offense of attempted monopolization is contrary to the purpose and policy of the Sherman Act. [. . .]

[8] In support of its determination that an inference of dangerous probability was permissible from a showing of intent, the *Lessig* opinion cited, and added emphasis to, this Court's reference in its opinion in *Swift* to "intent and the consequent dangerous probability." But any question whether dangerous probability of success requires proof of more than intent alone should have been removed by the subsequent passage in *Swift* which stated that "not every act that may be done with intent to produce an unlawful result constitutes an attempt. It is a question of proximity and degree." [. . .]

[9] It is also our view that *Lessig* and later Ninth Circuit decisions refining and applying it are inconsistent with the policy of the Sherman Act. The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. Thus, this Court and other courts

have been careful to avoid constructions of § 2 which might chill competition, rather than foster it. It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by § 1, which inherently is fraught with anticompetitive risk. For these reasons, § 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in "unfair" or "predatory" tactics. Such conduct may be sufficient to prove the necessary intent to monopolize, which is something more than an intent to compete vigorously, but demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market. [. . .]

[10] We hold that petitioners may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize. In this case, the trial instructions allowed the jury to infer specific intent and dangerous probability of success from the defendants' predatory conduct, without any proof of the relevant market or of a realistic probability that the defendants could achieve monopoly power in that market. In this respect, the instructions misconstrued § 2, as did the Court of Appeals in affirming the judgment of the District Court. Since the affirmance of the § 2 judgment against petitioners rested solely on the legally erroneous conclusion that petitioners had attempted to monopolize in violation of § 2 and since the jury's verdict did not negate the possibility that the § 2 verdict rested on the attempt to monopolize ground alone, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

## NOTES

1) What is the value of an attempted-monopolization offense?
2) What should *Spectrum Sports*' "dangerous probability" standard mean?[604] The Third Circuit has said that "[i]n a determination of dangerous probability . . . factors such as significant market share coupled with anticompetitive practices, barriers to entry, the strength of competition, the probable development of the industry, and the elasticity of consumer demand may be considered. No single factor is dispositive."[605] Do you agree with that approach?
3) Why do we need a conspiracy-to-monopolize offense, given the existence of Section 1? What conspiracy to monopolize would not also be an anticompetitive restraint of trade?
4) Under what circumstances, if any, should a monopolist be held liable for attempted monopolization if—with the sole purpose and intention of defending and increasing its monopoly—it:
    a. actually acquires a startup that the monopolist wrongly believes is a serious threat to its monopoly?
    b. unsuccessfully invites a key supplier to enter into an exclusive contract that would lock out the monopolist's competitors?
    c. destroys a wax model of its only competitor's sole factory in the earnest (but false) belief that this will destroy the factory? or
    d. acquires (or raises the costs of) a rival under circumstances where it is plausible, but not likely, that the effect may have been to augment monopoly power?
5) Does—or should—Section 2 prohibit an attempt (or invitation) to conspire to monopolize? What would that look like?
6) Why should specific intent to monopolize be a requirement for attempts to monopolize but not for monopolization itself? Can you think of cases involving anticompetitive conduct where a plaintiff would not be able to show the required specific intent?

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[604] *See*, *e.g.*, Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., 20 F.4th 466, 484 (9th Cir. 2021) ("We have held that a market share as low as forty-four percent is sufficient to support a finding that a party was dangerously close to monopoly power where barriers to entry were high and competitors could not expand their short-run output."); Colorado Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 694 (10th Cir. 1989) ("[A] 41% market share typically indicates that a firm has substantial economic power in the market, and, therefore, has the tools at its disposal to elevate its market share to monopolistic levels. . . . However, proximity to monopolistic status is not enough; the defendant must also have the ability to propel itself to monopolistic control over the market.").

[605] Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 318(3d Cir. 2007).