16. Introduction to Unilateral Conduct Offenses

Antitrust Law

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Topics

- The statutory offenses
  - Monopolization
  - Attempted monopolization
  - Conspiracy to monopolize
  - No other offenses
  - Separability of offenses
- Elements of the statutory offenses
  - Monopoly power
  - Exclusionary acts
  - Proximity to monopolization
  - Intent
- The seminal cases

The Statutory Offenses

Sherman Act § 2

- The statutory language

> 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.[1]

- Contrasts with Sherman Act § 1
  - Section 1 requires concerted action; Section 2 reaches unilateral as well as joint conduct
  - “Unlike Section 1, which requires no fundamental alteration of market structure, Section 2 is "aimed primarily not at improper conduct but at a pernicious market structure in which the concentration of power saps the salubrious influence of competition.”[2]
- Section 2 creates three offenses:
  - Monopolization
  - Attempted monopolization
  - Conspiracy to monopolize

[1] 15 U.S.C. § 2.
[2] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979).

Elements of the Prima Facie Case

- Monopolization (*Grinnell*)[1]
  1. "[T]he 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."
- Attempted monopolization (*Spectrum Sports*)[2]
  - the defendant must have engaged in predatory or anticompetitive conduct with
  - a specific intent to monopolize, and
  - a dangerous probability of achieving monopoly power.
- Conspiracy to monopolize (*American Tobacco*)[3]
  - the existence of a combination or conspiracy,
  - an overt act in furtherance of the conspiracy, and
  - specific intent to monopolize

[1] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
[2] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).
[3] American Tobacco Co. v. United States, 328 U.S. 781, 788, 809 (1946).

Elements of the Prima Facie Case

- Summary

	Intent	Exclusionary Act	Monopoly Power
Monopolization	General	Required	Actual
Attempted monopolization	Specific	Required	Dangerous probability of achieving
Conspiracy to monopolize	Specific	Required	[If successful, must result in monopoly power]*

* Not required in the traditional formulations, but should be.

No Other Offenses

- *Trinko* footnote 4:

> The Court of Appeals also thought that respondent's complaint might state a claim under a "monopoly leveraging" theory (a theory barely discussed by respondent. We disagree. To the extent the Court of Appeals dispensed with a requirement that there be a "dangerous probability of success" in monopolizing a second market, it erred, *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 459 [(1993)]. In any event, leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected.[1]

- Monopoly leveraging was a violation of Section 2 recognized by some courts (especially the Second Circuit) that involved the use of monopoly power in one market to achieve an advantage in a related market
  - Did not depend on whether the defendant achieved or had a dangerous probability of achieving a monopoly in the second market
- The *Trinko* footnote is widely regarded as telling the lower courts that *every* violation of Section 2 must fall within one of the three Section 2 statutory violations and satisfy every element of that violation

[1] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 n.4 (2004).

Separability of Offenses

- General rules
  - Two offenses are separate (and may be punished separately) when one offense requires proof of a fact that the other does not
  - An attempt ultimately merges into the competed offense, so a defendant cannot be found liable on both
- Monopolization/attempted monopolization
  - Attempted monopolization is the inchoate version of monopolization, so a defendant cannot be liable for both monopolization and attempted monopolization of the same relevant market
- Monopolization/Section 2 conspiracy
  - Separate offenses, even if effectuated by the same overt acts

	Monopolization	Conspiracy
Concerted action	Unnecessary	Necessary
Monopoly power	Necessary	Unnecessary
Specific intent to monopolize	Unnecessary	Necessary
Exclusionary overt act	Necessary	Necessary

Elements of the Statutory Offenses

Monopoly power

- Monopoly power
  - Classic *du Pont* formulation: “Monopoly power is the *power* to control prices or exclude competition.”[1]
    - More precisely, monopoly power exists when the firm profitably can maintain price substantially above the competitive level for a significant period of time
  - General idea
    - The idea is that a monopolist is able to alter the market structure so as to enable it to charge higher prices by restricting output and creating an artificial scarcity in the market, so that customers that value the product the most bid up the market-clearing price
      - "If a firm can profitably raise prices without causing competing firms to expand output and drive down prices, that firm has monopoly power.“[2]
    - Monopoly power is just a more pronounced form of market power
      - The line when market power turns into monopoly power is not well-demarcated
      - The usual tests in practice depend on the firm’s share of the relevant market in issue
  - Critical distinction
    - Section 2 is directed against the *attainment* and *maintenance* of monopoly power, not its *exercise*

[1] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) (emphasis added).
[2] Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007).

Monopoly power

- Relevant market
  - As a general rule, the defendant's actual or desired monopoly power must be located in some relevant market
    - As a result, proof of the relevant market is generally regarded as an essential element of the plaintiff's prima facie case
  - Proof of the relevant market
    - The dimensions of the relevant market in a Section 2 case are proved using the same concepts and tools as in a Clayton Act § 2 case
      - Reasonable interchangeabilty of use
      - High cross-elasticity of demand
    - Where market power is proved through direct evidence (see below)

Monopoly power

- Relevant market
  - The *Cellophane* fallacy[1]
    - No profit-maximizing firm sets prices to be in the inelastic portions of its (residual) demand curve, since an increase in price will increase the firm's profits
      - Accordingly, a monopoly will increase its price until it is in the elastic portion of its demand curve
      - Remember that, in the typical case, as price increases other products because substitutes, which increases the elasticity of the demand curve
    - Implication for market definition
      - At the prevailing monopoly price, a monopolist may find itself in a broader market with many substitutes
      - Consequently, using prevailing prices in market definition may disguise a monopolist
    - The *Cellophane* case
      - The DOJ sued du Pont, alleging that it monopolize the manufacture and sale of cellophane
      - Du Pont had a 75% share of national cellophane
      - The DOJ alleged that cellophane was in a distinct market given its transparency, strength, and cost
      - Du Pont's argument
        - At prevailing prices, cellophane had a high cross elasticity of demand competed with many other flexible packaging materials
          - Including as glassine, greaseproof and vegetable parchment papers, waxed papers, sulphite papers, aluminum foil, cellulose acetate, and Pliofilm and other films
        - du Pont had less than a 20% share of a flexible packaging market, and so had no power to exclude competitors or raise prices
      - The Supreme Court agreed with du Pont and affirmed dismissal of the complaint

[1] *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) ("Cellophane")

Monopoly power

- Relevant market
  - The *Cellophane* fallacy
    - The *Cellophane* case
      - The dissent (Warren, C.J., joined by Black and Douglas): Cellophane was its own distinct market
        - Important distinct physical characteristics
        - Experienced phenomenal growth against other packaging material
        - High pre-tax profits (31%), but did not participate expansion or entry
        - Made significant efforts to control imports (by successfully lobbying for high import duties)
        - Settled patent infringement suit with Sylvania, limiting Sylvania to 20% of the market
        - Price increases generated more profits did not participate expansion or entry into cellophane
        - The dissent also observed:

> Du Pont's independent pricing policy and the great profits consistently yielded by that policy leave no room for doubt that it had power to control the price of cellophane. The findings of fact cited by the majority cannot affect this conclusion. For they merely demonstrate, that during the period covered by the complaint, du Pont was a “good monopolist,” i.e., that it did not engage in predatory practices and that it chose to maximize profits by lowering price and expanding sales. Proof of enlightened exercise of monopoly power certainly does not refute the existence of that power.[1]

      - Query: If prevailing prices cannot be used in a hypothetical monopolist market definition test, then how should markets be tested in monopolization cases?

[1] *Du Pont*, 351 U.S. at 423 (Warren, C.J., dissenting) (footnote omitted)

Proof of Monopoly Power

- Direct evidence
  - Supracompetitive prices accompanied by evidence of restricted market output
    - But proving prices are above (and output below) the competitive level can be challenging even when true since there is no ready standard for determining competitive prices or output levels
    - One method that court reject:
      - Mere showing of prices significantly in excess of marginal costs and a drop in price in the wake of new entry is not sufficient, at least not without an analysis of price in relation to total costs (including any fixed development costs) and perhaps without evidence of restricted output
    - One method that has worked:
      - Continuous annual price increases with loss of business and without regard to economic conditions
    - Another related method that should work:
      - The defendant has significantly decreased its own output, with the result that market output also contracted significantly, prices increased over a meaningful period of time, and incumbent firms did not materially expand output and new firms did not enter
  - Actual exclusion of competitors from the relevant market
    - E.g., by cutting off or significantly raising price to an essential input or channel of distribution over which the defendant has control

Proof of Monopoly Power

- Circumstantial evidence
  - The more common method is to prove monopoly power through
    - Proof of the dimensions of the relevant market in which the defendant is alleged to posses monopoly power,
    - Proof of a sufficiently high market share within that market, and
    - Proof a sufficiently high barriers to entry that would enable the defendant to control market supply and so raise price without attracting incumbent firm expansion or new entry in the short run
      - Remember: Monopoly power does not have to be exercised to exist, so in fact the defendant may not have contracted market output or increased market prices
  - Relevant market
    - Proved in the same way as a relevant market in a Clayton Act § 7 case
    - Rigor is required in market definition when shares in the market are being used to infer the existence of monopoly power

Proof of Monopoly Power

- Circumstantial evidence
  - Sufficiently high market share
    - The Alcoa test1
      - Over 90% — Sufficient
      - 60% — Doubtful
      - 33% — Not sufficient
    - Modern practice
      - Over 70% — Sufficient without more
      - 50% - 70% — Sufficient with addition showing of barriers to entry and expansion
      - Under 50% — Insufficient as a matter of law

[1] United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (Learned Hand, J.).

Proof of Monopoly Power

- Circumstantial evidence
  - Barriers to expansion and entry
    - Sufficiently high market shares only provide a rebuttable presumption of monopoly power
      - Key is to show that the defendant controls market output so that it can reduce supply and so raise price
    - So plaintiff must also establish that the relevant market exhibits barriers to expansion by incumbent firms and entry by new firms sufficiently high to prevent these firms from expanding output and substantially offsetting the defendant's reduction
      - Remember: In the general case, all firms are assumed to act independently in their own economic self-interest
    - Proof that barriers to expansion and entry are low enough that incumbent firms and new entrants are likely to offset the defendant's output reduction will rebut proof of monopoly power based on high market share
    - Some examples of barriers to expansion and entry
      - Regulatory requirements
      - High capital costs
      - Technological requirements
      - Reputation
      - Network effects
      - Limited access to essential inputs, personnel, or channels of distribution

Proof of Monopoly Power

- (Negative) defenses
  - Lack of barriers to expansion and entry (discussed above)
- Not defenses
  - Conduct inconsistent with the exercise of monopoly power
    - Recall that it is the *possession*, not the *exercise*, of monopoly power that is the element of the prima facie case
    - Since a firm that acts inconsistently with the exercise of market power may nonetheless possess it, such conduct does not negate the finding of monopoly power[1]
      - Although such evidence may still be relevant and should not be excluded from the trial record
  - Declining market shares
    - In *U.S. Steel*, the Supreme Court rejected a finding of monopoly power because the defendant's share had been steadily declining over time[1]
      - The Court interpreted this to mean that the defendant lacked the power to exclude competitors, and so did not have market power
    - Modern courts recognize that a gradually declining share is consistent with the possession of monopoly power
      - Barriers to expansion and entry may not be so high as to exclude all expansion and entry,
      - But if expansion and entry are only gradually eroding the defendant's market share, it may still be possessing (and exercising) monopoly power until its share drops low enough

[1] *See* United States v. Microsoft Corp., 253 F.3d 34, 57 (D.C. Cir. 2001).

Exclusionary Acts

- Importance
  - The conduct requirement is probably the most important aspect of a Section 2 offense
- Definition
  - Conduct that "attempts to exclude rivals on some basis other than efficiency or when it competes on some basis other than the merits"[1]
    - Competition on the merits includes exclusion resulting from "growth or development as a consequence of a superior product, business acumen, or historic accident."[2]
    - As a result, sometimes call "anticompetitive exclusionary acts"
  - There is some indication in the case law that competition on the merits "in an unnecessarily restrictive way" may constitute an anticompetitively exclusionary act[3]
  - But conduct that merely harms competitors but not the competitive process is not an exclusionary act
    - Damage to individual competitors is rarely sufficient to establish harm to competition
    - Harm to competition typically requires increase in market prices, decreases in market output, or a reduction in the rate of technological innovation or product improvement

[1] West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 108-09 (3d Cir. 2010) .
[2] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
[3] *See, e.g.*, *West Penn*, 627 F.2d at 108 ("Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive.").

Exclusionary Acts

- Required in all three statutory offenses (Including conspiracy to monopolize)
  - Must have the effect of either *obtaining* or *maintaining* monopoly power
  - Contrast with Section 1 conspiracy, where the agreement is the gravamen of the offense

Exclusionary Acts

- Historical foundation
  - The prerogative grant, which was defined by the power to exclude competitors
    - The power to raise price was secondary
  - *Griffith* formulation (1948)
    - "[T]o foreclose competition, *to gain a competitive advantage*, or to destroy a competitor"[1]
      - ""Gain a competitive advantage" follows the *ALCOA's* aggressive approach to Section 2
      - Fallen out of favor, although cited by the Supreme Court as late at 1992 in *Kodak*[2]
  - Over time, the power to raise price has assumed greater importance
    - But the defendant must still engage in some exclusionary act that gives it the power to raise price

- Modern approach
  - Focused less on the precise formulation and more on whether the allegedly exclusionary acts materially contributed to obtaining or maintaining monopoly power
    - A "competitive advantage" over competitors may or may not materially contribute, depending on the circumstances

[1] United States v. Griffith, 334 U.S. 100 (1948) (emphasis added).
[2] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482-83 (1992).

Exclusionary Acts

- Lawful monopoly
  - A firm with a lawful monopoly—that is, a monopoly acquired through competition on the merits or innovation resulting in a patent grant—is free to exploit that monopoly
    - In particular, the firm may charge a monopoly price
    - *NB*: Charging a monopoly price is not exclusionary—if anything, it encourages entry
  - Contrast with EC competition law, which prohibits an abuse of a dominant position

[1] United States v. Griffith, 334 U.S. 100 (1948) (emphasis added).
[2] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482-83 (1992).

Exclusionary Acts

- Examples
  - Exclusive dealing arrangements that foreclose competitors from an essential input or channel of distribution (addressed in Unit 20)
  - Tying arrangements that foreclose competitors in the tied product from customer demand (addressed in Unit 22)
  - Some “below-cost” (predatory pricing) (addressed in Unit 17)
  - Some “mixed bundling” discounting arrangements (discussed in Unit 22)
  - Perhaps some innovation and design changes (discussed in Unit 18)
    - But so long as the innovation/design change has some procompetitive benefit, courts will not weigh the benefit against the alleged harm to competition
  - Obtaining a patent by fraud on the Patent Office (*Walker Process*[1])

But acts are exclusionary only if they harm competition

[1] Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

Exclusionary Acts

- Not exclusionary
  - Charging high prices
    - "High prices" encourage expansion and entry and hence are not exclusionary
    - Compare Article 102 of the Treaty on the Functioning of the European Union, which prohibits "abuse[s] . . . of a dominant position"
  - Refusals to deal
    - Exception 1: A vertically integrated firm that refuses to provide an essential input or access to an essential distribution channel at one level to its competitors at the other level
      - This is the same theory of anticompetitive harm as in the foreclosure theory of vertical mergers
    - Exception 2: Termination of a profitable, historical course of dealing with a competitor solely to harm the competitor and permit the defendant to dominate the market (*Aspen Skiing*[1]) (discussed in Unit 18)
  - Disparagement
    - Making false statements is rarely an anticompetitively exclusionary act.
      - May injury a competitor, but is unlikely to harm competition
      - Most circuits have adopted a presumption that disparagement is not anticompetitive
    - Test: The defendant's statements must be:
      - "(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 to neutralization or other offset by rivals."

[1] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

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- The "paranoid monopolist"
  - Consider a monopolist that lawfully obtained its monopoly and is protected by natural barriers to expansion and entry from any serious challenge
  - *Query*: If the monopolist engages in acts designed to further ensure that it will be able to maintain its monopoly position, is it guilty of monopolization? (Think *Microsoft*)

[1] Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114, 1127 (10th Cir.2014); *accord* Duty Free Americas, Inc. v. Estee Lauder Cos., 797 F.3d 1248, 1269 (11th Cir. 2015).

Proximity to Monopolization

- Three Section 2 offenses
  - *Monopolization*: Requires complete offense
  - *Attempted monopolization*: Requires a “dangerous probability of success” of attaining the completed offense
  - *Conspiracy to monopolize*:
    - Traditional formulations silent
    - But should require that, if successful in its objectives, the conspirators will attain (joint) monopolization

Proximity to Monopolization

- "Dangerous probability of success" in attempted monopolization
  - *Source*: The common law of attempt, as interpreted by Justice Holmes in *Swift & Co. v. United States*[1]
  - Proof
    - Usually inferred from a suitably high market share in light of the defendant's intent, exclusionary acts, and market conditions
    - Rule of thumb thresholds
      - Over 50% Triggers presumption
      - 30% - 50% Usually insufficient, except where conduct is separately show to likely achieve a monopoly
      - Under 30% Strong presumption that there is no dangerous probability of success
  - All defenses available in monopolization apply to attempted monopolization
    - No barriers to expansion or entry
    - Challenged conduct is insufficiently exclusionary to achieve monopoly power
    - *Special case*: Where the defendant has been engaged in the challenged conduct for some material period of time and its market share has not increased, courts usually will find no dangerous probability of success

[1] 196 U.S. 375 (1905).

Intent

- Section 2 offenses
  - Monopolization: Requires only general intent
  - Attempted monopolization: Requires specific intent to achieve monopolization
  - Conspiracy to monopolize: Requires specific intent to achieve monopolization
- General intent
  - *Definition*: The intent to do the act, and the reasonably foreseeable consequences that follow, that causes the violation
    - NB: Not necessary for the defendant to know that its conduct is unlawful
  - Usually not included as an explicit element of monopolization
- Specific intent
  - *Definition*: Intent to destroy competition in the market in order to achieve a monopoly
  - Proof
    - Direct evidence
      - But no matter how bad the intent, without accompanying exclusionary conduct that has a dangerous probability of success in attaining monopolization is necessary for a violation
      - And the intent to eliminate competitor through competition on the merits is not specific intent to monopolize
    - Circumstantial evidence
      - Inferred from exclusionary conduct coupled with the firm's market power

Private Section 2 Actions

- Causes of action
  - Clayton Act § 4 creates a private cause of action for treble damages
  - Clayton Act § 16 creates a private cause of action for injunctive relief
- Typical private plaintiffs
  - Customers confronting higher prices
  - Competitors that have been excluded (or threatened with exclusion)
- Prudential standing requirements—Usual rules apply
  - Proximate cause
  - Antitrust injury under *Brunswick* and *Monfort*
  - Antitrust standing under *Associated General Contractors*

The Seminal Cases

Swift & Co. v. United States[1]

- Background
  - General challenge to the "Beef Trust" under Sections 1 and 2
    - "Big Three" and other defendants controlled 60% of the fresh meat business in the U.S.
  - Filed on May 10, 1902, two months after Northern Securities was filed
  - Allegations
    - No bidding against each other in the purchase of livestock
    - Artificially bid up prices to induce cattle owners to shop to stockyards
    - Seller price fixing of fresh meat
    - Obtained rebates from railroads
- District court
  - Overruled demurrers/combination declared illegal/injunction entered
- Supreme Court
  - Short decision by Justice Oliver Wendell Holmes
  - Rejected challenge to demurrers
    - In analzying the challenge to the court's subject matter jurisdiction, Holmes created what became known as the "stream of commerce" doctrine
    - In analyzing the demurrers to the Section 2 attempted monopolization count, Holmes imported the specific intent and dangerous probability of success requirements of common law attempt
  - Affirmed with slight modification to injunction
    - Eliminated injunction with respect to purely intrastate sales

[1] 196 U.S. 375 (1905).

United States v. United States Steel Co.

- Background
  - In 1901, U.S. Steel was formed as holding company for
    - Andrew Carnegie’s Carnegie Steel Company
    - J.P. Morgan’s Federal Steel Company (run by Judge Elbert H. Gary)
  - Theodore Roosevelt regarded as a “good trust”
  - Challenged by William Howard Taft on October 27, 1911 as a *Standard Oil*-type combination
    - Controlled more than 50% of the iron and steel in the U.S.
    - Acquired numerous competitors
    - Eliminated competition among members of the combination
    - Eliminated competition with competitors through price-fixing agreements
- District court: Dismissed by four circuit judges with two contradictory opinions
    - Buffington
      - U.S. Steel not formed with intent to monopolize
      - Did not have effect of unduly restricting competition
      - Natural evolution given changing metallurgical developments
      - Any price-fixing now over
    - Woolley
      - No compelled by natural evolution of the industry
      - Originally had illegal purpose to monopolize
      - But despite absolute and relative size, lacked power to succeed by itself (as shown by the need to engage in price-fixing with independent competitors)
    - Both opinions clear that U.S. Steel never achieved monopoly

United States v. United States Steel Co.

- Supreme Court
  - Majority (McKenna)
    - Price fixing
      - Abandoned 9 months before suit out of futility
      - No "dangerous probability" of resumption
    - Section 2 claims
      - Accepted finding that U.S. Steel did not achieve monopoly (no power over price)
      - Competition grew in the roughly ten years since the combination was formed
      - Mere size not an offense; must have anticompetitive overt acts or at least intent
      - *Standard Oil*/*Tobacco* distinguished: they had power and performed anticompetitive acts
      - Government called no customer witnesses; U.S. Steel called 200 witnesses that supported the combination
  - Day (dissenting)
    - While size not per se unlawful, U.S. Steel formed by unlawful combination (*Northern Securities*)
    - U.S. Steel had the capacity and resources to control prices
    - The fact that U.S. Steel did not use this power was irrelevant

- Criticism
  - The majority relied heavily on evidence that competition had grown and U.S. Steel market share had decreased over time to conclude that U.S. Steel did not have the power to exclude competitors or control price
  - More likely, U.S. Steel had the power—and was exercising it to some degree—by the barriers to expansion and entry were sufficiently porous to permit competitors to increase output

United States v. Aluminum Co. of Am.[1]

- Background
  - History
    - Aluminum was commercialized in 1889; Alcoa got patent (exp. 1906)
    - Bradley improvement patent (required no external heat for smelting) effectively extended legal monopoly until it expired in 1909
    - Extraction of aluminum from alumina require large amounts of electricity; Alcoa secured power under restrictive covenants not permitting electricity utilities to sell to competitor
    - Alcoa participated in foreign cartels restricting imports into U.S. until a ____ consent decree
  - DOJ challenge
    - Filed on April 23, 1937, alleging a monopoly of the manufacture of virgin aluminum and the sale of various aluminum products and seeking dissolution
- District court (S.D.N.Y.): Dismissed
  - After a bench trial, finding that the defendants had not violated the Sherman Act
- Supreme Court: Direct appeal under the Expediting Act—But no quorum
  - Justices Murphy, Reed, Jackson, and Stone had all at one time or another worked on the government's case against ALCOA, so they were recused, leaving the Court without a quorum
  - Congress amended the Expediting Act to provide that in such circumstances the Court should certify the case to the appropriate circuit court of appeals, and the decision of the circuit court of appeals would be final and unreviewable. The Supreme Court certified the case to the Circuit Court of Appeals for the Second Circuit.

[1] 148 F.2d 416 (2d Cir. 1945).

United States v. Aluminum Co. of Am.

- Second Circuit
  - The panel
    - Judges Learned Hand, Thomas Walter Swan, and Augustus N. Hand (L. Hand's cousin)
    - Learned Hand wrote the opinion for a unanimous court
      - L. Hand has been quoted more often by legal scholars and by the Supreme Court of the United States than any other lower-court judge
    - Because of its procedural posture and the eminence of the panel, the Second Circuit's opinion has been treated as hiving the status of a Supreme court opinion
  - The decision
    - Alcoa's position
      - Virgin production alone: Over 90% (averaged over 1934-1938) (10% foreign imports)
      - Virgin production and secondary supply: 64%
      - Virgin production sold in merchant market plus secondary supply: 33%
    - On possession of monopoly power

> That percentage [90%] 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. Hence it is necessary to settle what he shall treat as competing in the ingot market.[1]

      - Concluded that the virgin ingot market in which Alcoa was the proper relevant market, so Alcoa had monopoly power

United States v. Aluminum Co. of Am.

- Second Circuit
  - The decision
    - On exercise of monopoly power:
      - Even if Alcoa had not abused its monopoly power and only earned a “fair” profit, that would be legally irrelevant
        - It is the possession of the power, not its exercise, that it relevant
    - On the “thrust upon” defense
      - But the possession of monopoly power by itself is not unlawful—the monopolist may merely be only survivor of an active group of competition, due to its "superior skill, foresight and industry“
      - But Alcoa was not a “passive beneficiary” of a competitive process
        - Agreed with foreign firms to limit exports to the U.S. until 1912
        - Sought to occupy the market, building new plants and significantly and continuously increased production from 42M# in 1912 to 327M# in 1934, an 8-fold increase:

> “The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market. It seems to us that that question scarcely survives its statement. It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it 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 maneuvres 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.”[1]

[1] 148 F.2d at 431.

United States v. Aluminum Co. of Am.

- Second Circuit
  - The decision
    - On intent
      - Only general intent is required for monopolization; specific intent is required for attempted monopolization:

> “In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific,' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing. So here, ‘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. So far as the judgment held that it was not within § 2, it must be reversed.”[1]

    - Conclusion on monopolization of the virgin ingot market
      - Since Alcoa had—
        - Monopoly power
        - Had general intent to obtain that monopoly power, and
        - Was not the “passive beneficiary” of the competitive process but actively sought to obtain and maintain its monopoly position

      Alcoa was liable for monopolization under Section 2.

[1] 148 F.2d at 432.

United States v. Aluminum Co. of Am.

- As a precedent
  - The leading authority on—
    - Market share thresholds for inferring monopoly power
    - The irrelevance of the exercise of monopoly power for Section 2 as long as it is possessed
    - The requirement of only general intent for monopolization
  - Often quoted (and not that much anymore) and rarely followed
    - The narrow construction of the "thrust upon" defense
    - "[I]n the more than three decades since that case was decided, courts have consistently found monopolization only in circumstances where predatory or exclusionary conduct was proven. In most successfully prosecuted section 2 monopolization cases, predatory or exclusionary practices held to constitute a violation of section 1 of the Sherman Act have also been present."[1]
    - This has been even more true over the succeeding 20 years

[1] MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081, 1108 n.35 (7th Cir. 1983) (citations omitted).

United States v. Microsoft Corp.

- Background
  - 1995 DOJ consent decree
    - No “per processor” contracts with OEMs (which charged OEMs on the number of processors they installed in computers, not the number of computers using Windows)
    - No Windows licensing conditioned on the licensing of any other product, but allowed Microsoft to expand the functionality of its products and develop integrated products
  - 1997 consent decree civil contempt proceeding
    - DOJ alleged that Microsoft breached the 1995 consent decree by conditioning the licensing of Windows 95 OEM Release 1 on the licensing of IE (integrated into the operating system but also available as a separate product)
    - District court: No contempt
      - Requires “clear and convincing evidence” of a “clear and unambiguous” violation of the decree
      - Decree ambiguous in its application to this situation
      - Order
        - Appoint special master to construe the consent decree
        - Enter preliminary injunction restraining Microsoft from including IE in the OS pending construction
    - D.C. Circuit:
      - No contempt
      - Error to appoint special master over Microsoft’s objection for a dispositive interpretation
      - Error to enter preliminary injunction without notice and opportunity to be heard
      - Error on implicit construction of the consent decree on which the preliminary injunction rested
        - Should construe consent decree as prohibiting unlawful tying arrangements and suggests that “the Department may well regard further pursuit of the case as unpromising”—DOJ drops action

United States v. Microsoft Corp.

- 1998 DOJ monopolization case (joined by 20 states and the District of Columbia)[1]
  - Basic idea
    - Anticompetitive acts to exclude the emergence of third-party multiplatform browsers (especially Netscape), which were enable with Java, which in turn had its own APIs to which applications could connect
    - In other words, applications could write to java-enabled browsers and not have to write specifically to Windows, significantly opening up competition in the operating system market
  - Factual allegations
    - Offered IE at zero cost (predatory pricing)
    - Restrictive covenants prevented OEMs installing Windows from removing IE or installing 3P browsers
    - Prohibiting OEMs from deleting certain items from the desktop and Start menu (alleging making it harder for consumers to choose Netscape Navigator)
    - Made IE difficult to remove
      - Integrate code with Windows
      - Did not include IE in the Add/Remove Programs utility
    - Priced IE at zero (although it cost $100 million a year to develop and maintain it)
  - Claims
    - Monopolization of the PC operating system market through unlawful maintenance
      - No DOJ claim that Microsoft illegally obtained its original monopoly
    - Attempted monopolization of the browser market
    - Illegal tying of Internet Explorer to the Windows operating system
    - Exclusive dealing with PC OEMs as to browser software
  - Prayer: Breakup of Microsoft into an operating system company and an applications company

[1] 253 F.3d 34 (D.C. Cir. 2001), *aff'g in part, rev'g in part, and remanding in part*, 87 F. Supp. 2d 30 (D.D.C. 2000)

United States v. Microsoft Corp.

- Microsoft's response
  - Did not have monopoly power
    - Market broader than PC operating systems and did not have monopoly share in broader market
      - Included hand-held devices and servers
    - In any event, competed in a rapidly evolving industry against known and unknown threats
  - Actions were not predatory or exclusionary
    - Improving its own products
    - Efficiencies in integrating Windows and IE
    - Zero price for IE on development path for integrating Windows and IE
    - OEM restrictions justified in order to "preserve the quality and speed of the start-up process"
    - Netscape was not cut off from essential channels of distribution and in fact continue to grow
      - Could and did successfully distribute Netscape through web downloads
  - Did not price at short-run monopoly levels
    - Government did show that Microsoft's actions were not profit-maximizing apart from any predatory motives
    - Could have priced Windows much higher

United States v. Microsoft Corp.

- Monopolization of the PC operating system market
  - District court: Found monopolization
    - Relevant market: Operating systems for PCs (excluding non-PCs and Java)
    - Microsoft share: Over 90% (other PC operating systems: IBM’s OS/2 and Linux)
    - High barriers to entry due to network effects
      - “Applications barriers to entry”
        - Consumers want operating systems with large number of applications
        - Application writers want to write applications for operating systems with a large installed base
    - Microsoft engaged in anticompetitively exclusionary acts to maintain monopoly
  - D.C. Circuit: Affirmed

[1] 253 F.3d 34 (D.C. Cir. 2001), *aff'g in part, rev'g in part, and remanding in part*, 87 F. Supp. 2d 30 (D.D.C. 2000)

United States v. Microsoft Corp.

- Attempted monopolization of the browser market
  - Claim:

[1] 253 F.3d 34 (D.C. Cir. 2001), *aff'g in part, rev'g in part, and remanding in part*, 87 F. Supp. 2d 30 (D.D.C. 2000)

United States v. Microsoft Corp.

- Illegal tying of Internet Explorer to the Windows operating system
  - District court: Found per se illegal tying
  - D.C. Circuit: Reversed
    - Rule of reason, not per se rule, applies to technological tying
    - Must weigh harms to competition in the web browser market outweighed the benefits of integrating a browser into the operating system

[1] 253 F.3d 34 (D.C. Cir. 2001), *aff'g in part, rev'g in part, and remanding in part*, 87 F. Supp. 2d 30 (D.D.C. 2000)

United States v. Microsoft Corp.

- Exclusive dealing with PC OEMs as to browser software
  - District court: Rejected
    - Browsers had other channels through which to reach PC owners
    - Netscape continue to expand throughout the period of the allegedly exclusionary acts
    - Not foreclosed form a substantial share of the market
  - D.C. Circuit

[1] 253 F.3d 34 (D.C. Cir. 2001), *aff'g in part, rev'g in part, and remanding in part*, 87 F. Supp. 2d 30 (D.D.C. 2000).

United States v. Microsoft Corp.

- *Prayer*: Breakup of Microsoft into an operating system company and an applications company
  - District court: Agreed
  - D.C. Circuit: Reversed and remanded in light of its disposition of the substantive claims
    - But made known its dislike for a structural solution

- Settlement
  - Administrations changed at the beginning of 2001
  - Bush administration negotiated settlement agreement
    - Sought to prohibit Microsoft from foreclosing the OEM channel by prohibiting restrictive licensing agreements and retaliatory measures
    - Sought to keep the ISP distribution channel open by placing limits on Microsoft's ability to discourage companies from promotion of other middleware
    - Imposed various compliance measures whose goal is to enforce the terms of the settlement agreement
  - District court
    - New judge
    - Accepted proposal over objections (including nine plaintiff states), but strengthened compliance provisions
  - Nine states objected

[1] 253 F.3d 34 (D.C. Cir. 2001), *aff'g in part, rev'g in part, and remanding in part*, 87 F. Supp. 2d 30 (D.D.C. 2000)