

6-6-2008

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Recommended Citation

Hovenkamp, Herbert J., "The Antitrust Standard for Unlawful Exclusionary Conduct" (2008). *Faculty Scholarship*. 1777.
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THE ANTITRUST STANDARD FOR UNLAWFUL EXCLUSIONARY CONDUCT

Herbert Hovenkamp*

This essay gives a very general definition of unlawful exclusionary conduct under §2 of the Sherman Act, considers some alternatives, and then explains what is and is not involved in assessing conduct under the given definition.

General definition of anticompetitive exclusion

We define monopolistic conduct as acts that:

(1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and

(2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits.

In addition, the practice must be reasonably susceptible to judicial control, which means that the court must be able to identify the conduct as anticompetitive and either fashion an appropriate deterrent or an equitable remedy likely to improve competition.¹

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¹See Herbert Hovenkamp, *The Harvard and Chicago Schools and the Dominant Firm*, in *Conservative Economic Influences on U.S. Antitrust Policy* (Robert Pitofsky, ed., Oxford University Press, 2008); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 *Univ. Chicago L.Rev.* 147 (2005). In *Microsoft* the D.C. Circuit defined a test of equivalent generality, although in considerably more detail, and including allocation of proof burdens:

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.

Second, the plaintiff, on whom the burden of proof of course rests, ... must

Clause (1) of the test ensures that the conduct is both exclusionary and "substantial," in the sense that it is reasonably capable of creating or prolonging monopoly. Clause (2a) deals with the easiest case for identifying anticompetitive exclusion; namely where no consumer benefit whatsoever can be shown. Clause (2b) deals with situations where a less restrictive alternative might produce equivalent benefits, and clause number (2c) deals with the small number of situations thought to require some kind of balancing of harms and gains. For example, in a reasonably close predatory pricing case one may have to determine whether monopoly pricing during a post-predation "recoupment" period are sufficient to offset any short run benefits that accrue to consumers during a period of very low prices.²

demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect.... [I]n 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....

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

United States v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001), cert. denied, 534 U.S. 952 (2001) (to the extent it is relevant, HH was consulted by the United States and some state AGs). See 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1617 (3d ed. 2008).

²See *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (assessing these requirements); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S.Ct. 1069 (2007) (reiterating them in a case involving allegedly predatory buying).

Alternative definitions

The given definition of monopolistic conduct is very general, in the sense that it does not provide precise tests for specific practices, such as improper patent infringement suits³ or predatory pricing.⁴ We leave those essential details for later. Numerous definitions of exclusionary conduct have been proposed that are more focused or more technical than our stated definition. Many of these are more useful for analyzing specific exclusionary practices than our own general definition. However, these definitions are also "incomplete," in the sense that they do not account for every type of exclusionary conduct that the law of monopolization should condemn.

Further, alternative tests for monopolization are not merely technically different. Some of them reflect judgments quite different than ours about when conduct by a monopolist should be regarded as unlawfully exclusionary, or different judgments about the ability of antitrust tribunals to detect and remedy exclusionary conduct.

We begin, however, by examining the broadest criteria for identifying anticompetitive conduct -- namely, "total welfare" and "consumer welfare" tests.

"Welfare" tests for monopolization -- "total welfare" and "consumer welfare"

In economics a welfare test purports to measure how well off people are, perhaps as a result of a particular practice. Such welfare tests typically use "willingness to pay" as a welfare criterion. The "purest" welfare definition in neoclassical economics is the Pareto test, which declares that a state of affairs is efficient if no further movement exists that could benefit at least one person without also injuring someone else. Because virtually all legal policies produce both gainers and losers pure Paretianism is much too strict a standard for evaluating legal policy. Rather, economists sometimes use a variation called "potential Pareto efficiency," or Kaldor-Hicks

³See 3 Antitrust Law ¶1706.

⁴See Ch. 7C.

efficiency,⁵ which states that an economic change is efficient if those who gain from the change gain enough so that they can fully compensate any losers.

Under this test, which is the basis of modern cost-benefit analysis, a practice is efficient, or welfare increasing, if the sum of all gains, measured in some constant unit of value, exceeds the sum of all losses. For example, a market movement from competition to monopoly harms welfare in this sense: although the monopolist gains, its gains are less than consumers lose.⁶ It can be shown mathematically that perfect competition in a perfectly functioning market maximizes Welfare in the Pareto sense.⁷ Such a market is also Kaldor-Hicks efficient.

Since competitive markets are the goal of antitrust, one is tempted to say that the proper definition of an unlawful exclusionary practice is one that reduces welfare, which should be the same as making the market less competitive. Robert Bork argued in 1978 that the proper test for antitrust practices is something which he called "consumer welfare," but by which he really meant "total welfare," or the sum of the welfare of all affected persons, including both consumers and producers.⁸

There are good reasons, grounded in both policy and

⁵See Nicholas Kaldor, *Welfare Propositions in Economics and Interpersonal Comparisons of Utility*, 49 *Econ.J.* 545 (1939); John R. Hicks, *The Foundations of Welfare Economics*, 49 *Econ. J.* 696 (1939).

⁶In the standard illustration of monopoly the monopolist's gain in higher prices is precisely offset by the consumer's loss from the same higher prices. However, there is also a "deadweight" loss consisting of unmade sales that do not profit the monopolist, and that harm consumers by forcing inferior choices. Because the deadweight loss triangle is a loss to consumers too, aggregate consumer losses exceed the monopolist's gains. See 2B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶403 (3d ed. 2007); and Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice* §§1.2a, 2.3c (3d ed. 2005).

⁷This is the First Welfare Theorem. See Kenneth J. Arrow and Gerard Debreu, *The Existence of an Equilibrium for a Competitive Economy*, 22 *Econometrica* 265 (1954).

⁸See Robert H. Bork, *The Antitrust Paradox* 90, 107-115 (1978) (consumer welfare is "merely another term for the wealth of the nation").

administration, why total welfare in this sense is not a useful antitrust test. First, while any move from monopoly to competition may be thought to increase welfare, this begs the question when we are looking for a legal test. Surely an antitrust tribunal cannot measure and trade off all of the gains and losses that result from any specific practice except in the easiest and most unambiguous cases. Antitrust policy requires workable tests for making judgments about competitive effects. Further, these tests must be reasonably administrable by the courts.

That is not to say that the concept of welfare is useless to antitrust analysis. A practice that benefits consumers while doing no harm to producers, or that harms consumers greatly while producing only small benefits to producers can readily be identified as competitive or anticompetitive with little analysis. But in most reasonably close cases ambiguities and tradeoffs make serious netting of gains and losses impossible.

Another objection to total welfare tests is that they are indifferent as between consumer and producer gains. A practice that results in significantly higher prices to consumers would be lawful under a total welfare test if the gains that accrued to the monopolist (or cartel) were slightly greater than the losses suffered by consumers and no one else was affected.⁹ But the broadest constituency in our economy is consumers and the strong direction of antitrust policy has been to weigh consumer welfare higher than producer welfare, although perhaps this point should not be pushed too far.¹⁰ While this political objection seems weighty when applied to joint ventures or mergers, observable transactions that we tolerate because they benefit certain constituencies, it does seem less weighty when applied to the unilateral conduct of a monopolist.

An alternative to total welfare tests is the so-called "consumer

⁹See Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 *Geo.Wash.L.Rev.* 1 (1982). Hovenkamp, *Federal Antitrust Policy*, note 6, §2.3c.

¹⁰Historically, while consumers represent the broadest interest group in the economy producer groups have been much more effective lobbyists. Many statutory rules, including the antitrust laws, are best explained as favoring the special interests of politically powerful or clever producer groups. On this point, see Hovenkamp, *Federal Antitrust Policy* note 6, §2.1; Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, Ch. 2 (2006).

welfare" principle, which declares that antitrust practices should be evaluated by considering the impact on consumers, largely ignoring effects on producers or others.¹¹ Under this test a practice that imposes consumer losses would be unlawful, even if it provided greater gains to the monopolist than the losses consumers encountered.

Such a test for monopolistic practices seems both overdeterrent and underdeterrent. First, it would condemn practices that are not capable of excluding anyone. Suppose that Microsoft, which has a monopoly in its Windows operating system, should develop a new version that was particularly buggy and prone to crashes. Clearly, consumers as a group would be harmed because they have few good alternatives to Windows. But developing a bad version of Windows is not a monopolistic practice because no one is excluded. Microsoft's mistake might permit other firms to come in and steal sales, or it might simply impose harm on consumers until Microsoft fixed the problems and restored the status quo, but the one thing that the practice would clearly not do is exclude rivals from the market. As a result, the practice is not "monopolistic," even though it causes consumer harm.

One might say that this is merely a technical objection. The real intent of a consumer welfare test is to identify practices that *both* exclude rivals from the market and harm consumers. But in that case the test is underdeterrent because antitrust must be able to identify and condemn harmful practices long before actual consumer

¹¹See Steven C. Salop, Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard, presented to the Antitrust Modernization Commission (Nov. 4, 2005), available at http://www.amc.gov/public_studies_fr28902/exclus_conduct_pdf/051104_Salop_Mergers.pdf.

See also Jonathan B. Baker, Competition Policy as a Political Bargain, 73 Antitrust L.J. 483, 518 (2006) (advocating a modified general welfare test that is solicitous of consumer welfare:

antitrust enforcers and courts should seek to maximize aggregate surplus, so long as consumers and producers sufficiently share the efficiency gains, at least on average....

And see Robert H. Lande, Wealth Transfers Should Guide Antitrust, 58 Antitrust L.J. 631 (1988).

harm has occurred. Consider the monopolist who files a wrongful patent infringement suit in order to maintain its monopoly.¹² Such a lawsuit must be addressed by antitrust tribunals long before any consumer harm has resulted. Indeed, under existing rules such claims are treated as compulsory counterclaims, which means that they must be evaluated at the same time as the monopolist's infringement action itself is evaluated.¹³

Here again, one might say that the consumer welfare standard works because even though no actual consumer harm results, such harm is in prospect: it will occur if the monopolist succeeds in its infringement action. But in that case we are not measuring anything at all. Rather, we are observing that no principle of patent policy protects fraudulently obtained patents, so there is nothing to place on the monopolist's side of the ledger. Consumer harm may or may not occur, depending on the fortunes of the small firm who is saved from market exclusion by antitrust intervention. As a result, we are dealing with a case in which an action excludes a rival without any consumer benefit.¹⁴ Measurement of consumer harm is not necessary to condemnation.

To be sure, there is an important sense in which consumer harm is essential to our analysis of antitrust practices. Antitrust should not be in the business of condemning conduct that does not harm consumers. But the measurement of consumer harm cannot serve as the basis for considering whether conduct violates §2 of the Sherman Act.

The remaining proposed tests discussed here are all designed to simplify §2 analysis by avoiding some of the measurement difficulties that "welfare" tests incur.

"Sacrifice"

In *Aspen* the Supreme Court condemned conduct when the defendant

¹²See 3 Antitrust Law ¶1706.

¹³See 3 Antitrust Law ¶1706e.

¹⁴See part 2A of our test for monopolization, text at note 1.

was not motivated by efficiency concerns and ... was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.¹⁵

So-called "sacrifice" tests for exclusionary conduct look at the defendant's willingness to sacrifice short-term revenues or profits in exchange for larger revenues anticipated to materialize later when a monopoly has been created or the dominant firm's position strengthened. The strongest example of such a test is the recoupment test for predatory pricing given in the *Brooke Group* case, although it appeared in lower court opinions and the academic literature much earlier.¹⁶

The sacrifice test is also useful in unilateral refusal to deal cases to the extent that, if we wish to condemn refusals to deal at all, we must have a mechanism for identifying the very small subset of refusals that are anticompetitive.¹⁷ In *Trinko* the government relied on a sacrifice theory in arguing that the alleged refusal to deal did not

¹⁵*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-611 (1985).

¹⁶*Brooke Group*, note 2; *A. A. Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396, 1400-1401 (7th Cir. 1989), cert. denied, 494 U.S. 1019 (1990) (advocating recoupment test).

See also Phillip E. Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697, 698 (1975):

"... the classically-feared case of predation has been the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition.")

See also the first edition of *Antitrust Law*: Phillip E. Areeda and Donald F. Turner, *Antitrust Law* ¶711b at 151 (1978) (similar); Richard A. Posner, *Antitrust Law: An Economic Perspective* 184 (1976) (similar). The current law is described in 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶725-730 (3d ed. 2008).

¹⁷See 3B *Antitrust Law*, Ch. 7D-3.

satisfy any Sherman Act standard of illegality.¹⁸

The sacrifice test does not require balancing of gains and harms. One looks at things exclusively from the defendant's perspective and asks whether the defendant has sacrificed short term profits in exchange for the benefits of monopoly down the road. One does not need to net out gains to the monopolist against loss to consumers, competitors, or the general economy.

A particular problem with sacrifice tests is that most substantial investments involve a short term "sacrifice" of dollars in anticipation of increased revenue at some future point. The automobile manufacturer who constructs a new plant is certainly in such a position. It spends money on the plant during a lengthy period of planning and construction, hoping to realize higher profits several years later after the plant goes into production. To be sure, the profitability of the new plant need not "depend on" harmful effects on a rival, but in a concentrated market it is certainly likely to have such effects. Further, the new plant might not succeed unless rivals were forced to reduce their own output; nevertheless, building a new plant under such circumstances is almost always procompetitive.

Likewise, product innovations are always costly to the defendant, and their success may very well depend on their ability to exclude rivals from the market, but neither of these factors is or should be decisive in subsequent antitrust litigation. All innovation is costly, and many successful innovations succeed only because consumers substitute away from rivals' older versions and toward the innovator's version. The goal of innovation is increased sales, and one increases one's sales either by bringing new customers into the market or else by taking customers from rivals. As a result, willingness to "sacrifice" short-term profits in anticipation of later monopoly profits does not distinguish anticompetitive from procompetitive uses of innovation. The distinction lies in the

¹⁸See Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, 2003 WL 21269559, at *16-17, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) ("conduct is exclusionary where it involves a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power"); and *id.* at *19-20 ("If such a refusal involves a sacrifice of profits or business advantage that makes economic sense only because it eliminates or lessens competition, it is exclusionary and potentially unlawful.").

character of the innovation itself.¹⁹

The sacrifice test seems to work poorly in areas of §2 law unrelated to predatory pricing or refusal to deal. Some exclusionary practices, such as exclusive dealing or tying, exclude immediately and are likely to be profitable to the dominant firm from the onset of the practice, so neither short term sacrifice nor subsequent recoupment is necessary to make the practice profitable.²⁰ The same thing might be said of restrictive IP licensing practices, many of which are best analogized to either exclusive dealing or tying.²¹

¹⁹See 3B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1776 (3d ed. 2008).

²⁰See, e.g., 11 Herbert Hovenkamp, *Antitrust Law* ¶1802 (2d ed. 2004) (exclusive dealing foreclosing rivals); *id.*, ¶1803 (same; output contract); *id.*, ¶1804 (same; raising rivals' costs).

In *Rambus, Inc.*, 2006 WL 2330117 (FTC, Aug. 2, 2006), *rev'd* on other grounds, 522 F.3d 456 (D.C.Cir. 2008), the FTC held that the "sacrifice" test for exclusionary conduct did not apply. Rambus reasoned that because its refusal to share information with JEDEC provided immediate benefit to Rambus, it would not qualify as conduct that involved the immediate sacrifice of profits in anticipation of exclusion of rivals, or that made no economic sense except for the elimination of competition. The Commission opined that those tests might make sense in the context of refusal to deal or predatory pricing claims, but not here. As the Commission explained:

As a matter of law, we recognize that the sacrifice test may be well-suited to certain types of Section 2 claims where the risk of interfering with vigorous competitive activity is heightened, but the test is not appropriate here. It misses conduct that reduces consumer welfare, but happens to be inexpensive to execute, and therefore does not involve a significant profit sacrifice. For example, defrauding the PTO in order to secure a patent that confers a monopoly demands little profit sacrifice, yet the Supreme Court has held that such fraud can violate Section 2. Likewise, in this case, without reducing prices, forgoing sales, or even spending substantial funds beyond what it otherwise would have spent, Rambus's conduct may have imposed substantial costs on rivals and contributed significantly to the creation of monopoly power. In cases such as this, the *Microsoft* analysis -- with its focus on determining "whether the monopolist's conduct on balance harms competition" -- is the proper lens for scrutinizing allegedly exclusionary conduct.

(numerous citations omitted) (to the extent it is relevant, HH was consulted by the defendant after the FTC's remedial order was entered).

²¹See Ch. 17G-2; Ch. 20E.

Other practices, such as improper infringement suits, are often costly to the defendant in the short-run whether or not they are anticompetitive. Indeed, the improper patent infringement suit is likely to be most costly to the dominant firm when the infringement defendant has the resources to defend it; and may not be particularly costly when the infringement defendants are nascent firms who are easily excluded from the market.

"No Economic Sense"

The "no economic sense" test, which is similar to the sacrifice test in many respects, would refuse to condemn exclusionary single firm conduct "unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition."²² The "no economic sense" test offers good insights into when aggressive actions by a single firm go too far, but it can lead to erroneous results unless complicating qualifications are added. Like the "sacrifice" test, it does not seek to measure general welfare or consumer welfare, nor does it seek to "balance" gains to the monopolist against losses to consumers, rivals, or others. Theoretically, an act might benefit the defendant very slightly while doing considerable harm to the rest of the economy, and it would be lawful. Or conceivably, an act could be unlawful because its only benefit accrued from a lessening of competition, but the benefit was greater than any losses that lessened competition imposed.

Not all monopolizing conduct that we might wish to condemn is "irrational" in the sense that the only explanation that makes it seem profitable is destruction or discipline of rivals. Indeed, monopolizing conduct is not necessarily costly to the defendant. For example, supplying false information or failing to disclose important information to a government official or standard setting organization need not cost any more than supplying truthful information, but it can create monopoly under appropriate circumstances.²³ Indeed, the

²²Brief for the United States and Federal Trade Commission as Amici Curiae Supporting Petitioner at 15, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). See Gregory Werden, *The "No Economic Sense" Test for Exclusionary Conduct*, 31 *J.Corp.L.* 293 (2006); A Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct -- are There Unifying Principles*, 73 *Antitrust L.J.* 375 (2006).

²³E.g., *Walker Process Equipment, Inc. v. Food Mach. & Chem. Corp.*, 382

provision of false information may be less costly than provision of truthful information, for false information is easier and cheaper to manufacture. Further, the provision of such information to a government official might be profitable (i.e., "make sense") whether it destroys a rival or merely if it results in increased output to the defendant. For example, the firm that acquires a patent by making false statements to the patent examiner and then brings infringement actions against rivals might be dominant and bent on protecting that position.²⁴ But it might also be one of many firms in a product differentiated market, seeking to do no more than protect its sales from a close substitute. In either case the restraint on innovation and resulting harm to consumers is clear.

Other conduct, such as tying or exclusive dealing, can be profitable to the defendant from the onset but may also be anticompetitive if it excludes rivals and thereby injures consumers.²⁵ Such conduct makes "economic sense" if it merely enlarges the defendant's output but may be even more profitable if it raises rivals' costs or injures them so that they cannot compete effectively with the defendant.

Conduct capable of excluding equally efficient rival

Judge Posner's definition of exclusionary conduct requires the plaintiff to show:

that the defendant has monopoly power and ... that the challenged practice is likely in the circumstances to exclude from the defendant's market an equally or more efficient

U.S. 172 (1965) (maintaining infringement suit on patent obtained by fraud); *Rambus, Inc.*, 2006 WL 2330117 (FTC, Aug. 2, 2006) (providing false information to private standard setting organization with the result that organization unknowingly adopts standards protected by defendant's IP rights). See also *Netflix, Inc. v. Blockbuster, Inc.*, 2006 WL 2458717 (slip copy) (N.D.Cal. Aug 22, 2006) (NO. C06-02361 WHA) (refusing to dismiss *Walker Process* style counterclaim against Netflix on business method patent, based on Netflix's alleged failure to disclose prior art in patent application).

²⁴E.g., *Walker Process*, id.

²⁵E.g., *United States v. Dentsply Int'l., Inc.*, 399 F.3d 181, 191 (3d Cir. 2005), cert. denied, 546 U.S. 1089 (2006) (condemning exclusive dealing in action brought by government).

competitor. The defendant can rebut by proving that although it is a monopolist and the challenged practice exclusionary, the practice is, on balance, efficient.²⁶

This definition has enjoyed some recognition in the case law. For example, in condemning the targeted package discounts at issue in *LePage's*, the Third Circuit observed that "even an equally efficient rival may find it impossible to compensate for lost discounts on products that it does not produce."²⁷ As we show elsewhere, a specifically tailored discount aggregated over multiple products can exclude an equally efficient rival that makes only one or a subset of the products in question.²⁸

The "equally efficient rival" test has also found acceptance in predatory pricing cases, particularly in discussions of how to identify a price as predatory. It is not so obviously related to the "recoupment" requirement in predation cases.²⁹

The reasoning behind the equally efficient rival test is that a firm should not be penalized for having lower costs than its rivals and pricing accordingly. As a result, a price is predatory only if it is reasonably calculated to exclude a rival who is at least as efficient as the defendant.³⁰ Judge Posner's own examples in defense of his definition pertain to pricing. He writes that it

²⁶Richard A. Posner, *Antitrust Law* 194-195 (2d ed. 2001).

²⁷*LePage's, Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003) (en banc), cert. denied, 542 U.S. 953 (2004).

²⁸See 3A *Antitrust Law* ¶1749.

²⁹See 3A *Antitrust Law* ¶¶725-727.

³⁰See, e.g., *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (noting that an "avoidable" or "incremental" cost test for predatory pricing is irrational because it would be less costly for the defendant to halt production; and moreover, "equally efficient competitors cannot permanently match this low price and stay in business."). See also *MCI Communic. Corp. v. AT&T*, 708 F.2d 1081, 1113 (7th Cir.), cert. denied, 464 U.S. 891 (1983) (similar, predatory pricing); *Borden, Inc. v. FTC*, 674 F.2d 498, 515 (6th Cir. 1982), vacated on other grds., 461 U.S. 940 (1983) (same, predatory pricing); *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories*, 920 F.Supp. 455, 466-467 (S.D.N.Y. 1996) ("below-cost pricing, unlike pricing at or above that level, carries with it the threat that the party so engaged will drive equally efficient competitors out of business, thus setting the stage for recoupment at the expense of consumers").

would be absurd to require the firm to hold a price umbrella over less efficient entrants.... [P]ractices that will exclude only less efficient firms, such as the monopolist's dropping his price nearer to (but now below) his cost, are not actionable, because we want to encourage efficiency.³¹

Clearly we do not want low cost firms to hold their prices above their costs merely to suffer a rival to become established in the market.

The equally efficient rival definition of exclusionary conduct can be underdeterrent in situations where the rival that is most likely to emerge is less efficient than the dominant firm. Consider the filing of fraudulent or otherwise improper IP infringement claims.³² The value of infringement actions as entry deterrence devices is greatest when the parties have an unequal ability to bear litigation costs. This will typically be before or soon after the new entrant has begun production. The filing of a fraudulent patent infringement suit, unlike setting one's price at or a little above marginal cost, is a socially useless practice. But the strategy might not be effective against an equally efficient rival, who could presumably defend and win the infringement claim. In this case Judge Posner's definition of exclusionary conduct seems unreasonably lenient. It exonerates the defendant in precisely those circumstances when the conduct is most likely to be unreasonably exclusionary.

Raising Rivals' Costs (RRC)

Several anticompetitive actions by dominant firms are best explained as efforts to limit rivals' market access by increasing their costs. Such strategies may succeed where more aggressive ones involving the complete destruction of rivals might not. Once rivals' costs have been increased the dominant firm can raise its own price or increase its market share at their expense.³³

³¹Posner, *Antitrust Law*, note 26 at 196.

³²See 3 Antitrust Law ¶1706.

³³See Thomas Krattenmaker & Steven Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 Yale L.J. 209 (1986); Steven C. Salop & David T. Scheffman, Raising Rivals' Costs, 73 Am.Econ.Rev. 267 (1983). See also Herbert Hovenkamp, Post-Chicago Antitrust: A Review and

RRC theories show that certain practices that have traditionally been subjected to antitrust scrutiny can be anticompetitive even though they do not literally involve the destruction of rivals. Situations in which rivals stay in the market but their costs increase may be more likely to occur and exist in a wider variety than those in which rivals are destroyed. Further, cost raising strategies might be less detectable and less likely to invite prosecution. Indeed, a strategy of raising rivals' costs need not injure a rival severely at all if the dominant firm increases its own prices to permit smaller firms a price hike that compensates them for their cost increase. As a result, RRC augments older antitrust theories of "foreclosure," but without some of the conceptual problems that accompanied foreclosure theories. Many cases brought under both §§1 and 2 of the Sherman Act have acknowledged the theory.³⁴

Critique, 2001 Col. Bus. L. Rev. 257.

For a critique, see Posner, *Antitrust Law* note 26 at 196. However, Judge Posner's first objection is that reducing one's own costs may raise a rivals' costs by denying the latter the ability to exploit relevant scale economies. While that is true, it does not suggest that every RRC strategy involves cost reductions to the dominant firm. Second, Judge Posner notes, a strategy such as predatory pricing does not really raise a rival's costs but rather denies it revenue.

Closely related to RRC except more aggressive is the standard proposed in Einer Elhauge, *Defining Better Monopolization Standards*, 56 *Stan. L. Rev.* 253 (2003), which queries "whether the alleged exclusionary conduct succeeds in furthering monopoly power (1) only if the monopolist has improved its own efficiency or (2) by impairing rival efficiency whether or not it enhances monopolist efficiency." The second part of this test would condemn a firm for using practices that lowered its own costs if, in the process, they denied scale economies to a rival. See, e.g., Elhauge, *id.* 324 (arguing that even if economies of scale are very substantial, above a 50% market share, the firm cannot use exclusive contracts to increase its output but must simply set its price). The Elhauge test would also condemn a firm who used a practice that increased its sales beyond the point that its scale economies topped out, if in so doing it denied scale economies to a rival. See *id.* at 324 (illustration of firm whose tie, exclusive deal, or other agreement requires customers to purchase 70% of the market from it, even though its economies of scale top out at 40%). Assuming such tests were desirable, they make severe demands on tribunals to measure relevant scale economies. See 2A *Antitrust Law* ¶408.

³⁴E.g., *Microsoft*, note 1, 253 F.3d at 70 (defendant's exclusionary contracts relegated rival Netscape to higher cost distribution channels); *Dentsply*, note 25, 399 F.3d at 191 (similar; defendant's exclusive dealing arrangements relegated

Of course, the law has never required complete market exclusion as a prerequisite to suit. Indeed, some successful §2 plaintiffs have both grown their market shares and earned high profits even through the period that the exclusionary practices were occurring.³⁵

RRC is a sometimes useful but also incomplete definition of exclusionary practices. Further, many practices that raise rivals' cost, such as innovation that either deprives rivals or revenue or forces them to innovate in return, are also welfare enhancing. As a result, "raising rivals' costs" can never operate as a *complete* test for exclusionary conduct.³⁶ One must always add "unreasonably," but that invariably requires some kind of balancing or trade off.

rivals to inferior distribution alternatives, citing 11 Antitrust Law ¶1802c); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778-779 (7th Cir.1999) (members of cartel may have paid off suppliers to charge cartel rivals significantly higher prices, thus creating a price umbrella under which the cartel could operate); *Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 614 (7th Cir. 1997), cert. denied, 522 U.S. 1123 (1998) (similar); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997), aff'd on nonantitrust grounds, 525 U.S. 299 (1999) (health care provider's policy of shifting indigent patients to rivals could have effect of raising their costs); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540, 1553 (10th Cir.1995) (dominant firm's practice of scheduling its own full slate of classes so as to conflict with rivals' specialized classes could have had effect of raising the rival's cost of distributing its own product); *Premier Elec. Const. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358 (7th Cir. 1987) (alleged agreement between union and contractors' association under which union would obtain fee from all employers without whom it had collective bargaining agreements, whether or not they were association members, to be paid to the association, probably intended to raise the costs of non-member contractors). Cf. *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1340 (7th Cir. 1986) (rejecting RRC claim that Blue Cross forced hospitals to submit lower bids for taking care of BC patients, with result that it had to impose higher charges on non-BC patients).

³⁵E.g., *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 784 (6th Cir. 2002), cert. denied, 537 U.S. 1148 (2003). The plaintiff claimed that its market share would have grown even faster and that it would have earned even more profits but for the exclusionary conduct.

³⁶This is apparently the source of Judge Posner's objection. See Posner, *Antitrust Law* note 26 at 196, referring to RRC as "not a happy formula" because one way of raising rivals' costs is to be more efficient than the rival, thus denying it scale economies.

Summary

The development of a verbally simple monopolization test is more than an exercise in logic. It requires numerous experience-based judgments about the incentives that dominant firms face, the danger of false positives or occasionally negatives, and the measurement limitations of antitrust tribunals. Each of the previously discussed definitions of anticompetitive unilateral conduct has much to be said for it, and each is helpful in the analysis of some types of exclusionary behavior. However, none accounts for every type of behavior that we would wish to be addressed by §2. Others might think differently.

Formulations Requiring "Purpose" or "Intent"

In describing the conduct element of the monopolizing offense, numerous cases have employed terms such as "purpose," "intent," "willfulness," or "not inevitable." For example, in the early *Standard Oil* decision,³⁷ Chief Justice White noted the defendant's anticompetitive behavior but felt compelled to speak of intent:

[Defendant's many acquisitions and mergers give rise] in the absence of countervailing circumstances, . . . to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination . . . with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce. . . .

[This] *prima facie* presumption of intent to restrain trade . . . to bring about monopolization . . . is made conclusive by considering [other elements of defendant's behavior in addition to the mergers and acquisitions]. . . .³⁸

³⁷*Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

³⁸*Id.* at 75.

And in the first *Tobacco* case, he found it necessary to speak of both "wrongful purpose and illegal combination."³⁹

One might have supposed that any requirement of wrongful purpose was later obviated by Judge Learned Hand's declaration in *Alcoa* that

We disregard any question of "intent." . . . [Because we are satisfied that illegality does not depend upon a showing of practices that are unlawful in and of themselves and apart from the existence of monopoly power,] the issue of intent ceases to have any importance; no intent is relevant except that which is relevant to any liability, criminal or civil: i.e., an intent to bring about the forbidden act. . . . In order to fall within §2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read [this] as demanding any "specific" intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing. . .

⁴⁰

The Supreme Court endorsed *Alcoa's* general approach in the second *Tobacco* case.⁴¹ And in *Griffith* the Court found specific intent necessary only in attempt cases:

It is . . . not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. . . . Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act. . . .⁴²

At the same time, however, the *Griffith* Court also said:

³⁹*United States v. American Tobacco Co.*, 221 U.S. 106, 182 (1911).

⁴⁰*United States v. Aluminum Co. (Alcoa)*, 148 F.2d 416, 431-432 (2d Cir. 1945).

⁴¹*American Tobacco Co. v. United States*, 328 U.S. 781, 814 (1946).

⁴²*United States v. Griffith*, 334 U.S. 100, 105 (1948).

[T]he existence of power "to exclude competition when it is desired to do so" is itself a violation of §2, provided it is coupled with the purpose or intent to exercise that power.⁴³

And later in the *Grinnell* case the Court said that:

The offense of monopoly . . . 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.⁴⁴

Finally, in *Professional Real Estate* the Supreme Court concluded that alleged monopolizing conduct in the filing of an allegedly baseless copyright infringement suit could be evaluated only by considering the antitrust defendant's "subjective motivation" in bringing the suit.⁴⁵

Not only are these formulations inconsistent, they are also not helpful and sometimes misleading. To be sure, in some cases the defendant's "purpose or intent" may be enlightening. For example, in cases of ambiguity "knowledge of intent may help the court to interpret facts and to predict consequences."⁴⁶

⁴³Id. at 107.

⁴⁴*United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966).

⁴⁵*Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993):

Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor.... (citations omitted).

⁴⁶*Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). See also *Taylor Pub. Co. v. Jostens*, 216 F.3d 465 (5th Cir. 2000) (intent evidence useful for helping the court to characterize ambiguous conduct, quoting 11 Antitrust Law ¶806e in the previous edition). See use of intent evidence to interpret ambiguous conduct, see ¶b2.

Thus knowledge of intent may be more helpful in cases involving practices such as refusal to deal, which can have numerous explanations and are very difficult to characterize as competitive or anticompetitive. In its *Aspen* decision, which was such a situation, the Supreme Court elaborated. In the case of attempt to monopolize, the plaintiff must show the defendant's "specific intent" to accomplish the forbidden objective." By contrast, in the case of monopolization "intent is merely relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'"⁴⁷

In *Brooke*, which involved predatory pricing, the Supreme Court spoke of intent as nothing more than Judge Hand's consciousness of what one is doing.⁴⁸ The Court referred repeatedly to the "intended victim" of predatory pricing, without elaborating on the nature of any intent showing that might be required.⁴⁹ But the Court also made clear that, even if the defendant had intended anticompetitive consequences, the plaintiff's failure to show objective evidence of recoupment defeated its claim.⁵⁰

⁴⁷*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). The Court's subsequent *Trinko* decision, note 18, said little about subjective intent, except to observe that in that particular situation involving an alleged refusal to deal:

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.

Trinko, 540 U.S. at 409.

⁴⁸See text at note 40 (quoting *Alcoa*, 148 F.2d at 431-432).

⁴⁹See, e.g., *Brooke Group*, 509 U.S. at 225 ("intended effects on the firm's rivals"); *ibid.* ("intended victim" and "intended target").

⁵⁰*Id.* at 231:

Although Brown & Williamson's entry into the generic segment could be regarded as procompetitive in intent as well as effect, the record contains sufficient evidence from which a reasonable jury could conclude that Brown & Williamson envisioned or intended this anticompetitive course of events.... Liggett has failed to demonstrate competitive injury as a matter of law, however, because its proof is flawed in a critical respect: The evidence is inadequate to show that in pursuing this scheme, Brown & Williamson had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics.

Antitrust appraisal of conduct depends on an understanding of its likely anticompetitive consequences as well as its possible social benefits. In most cases an inquiry into subjective intent is unnecessary. But sometimes the benefits of the defendant's conduct will not be apparent or persuasive unless the defendant identifies its purpose in so acting, shows the legitimacy of that purpose in terms of antitrust objectives, and that the challenged action is an appropriate and perhaps the least restrictive way of achieving that legitimate purpose. The critical point is that the nature and consequences of a particular practice are the vital consideration, not the purpose or intent. Qualifying anticompetitive conduct must always be established first by objective facts about the relevant market and the defendant, quite apart from any manifestation of intent.

Further, any competitively energetic firm "intends" to prevail over its actual or potential rivals. The firm that drives out or excludes rivals by selling a superior product or producing at substantially lower costs certainly intends to do so. But to find the requisite "purpose or intent" in such conduct would be to read the behavior requirement out of the monopolization offense altogether and make monopoly unlawful *per se*. This the courts clearly have not done. More importantly, it confuses the "intent" to behave competitively with the intent to monopolize. Indeed, in most circumstances the "intent" to do one cannot be distinguished from the intent to do another. For example, the dominant firm who cuts price in order to increase its own sales undoubtedly knows -- and thus "intends"⁵¹ -- that the result will be increased pressure on rivals, declining sales, or perhaps even their exit from the market.⁵² In concentrated markets

Accord *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S.Ct. 1069, 1071 (2007), which spoke of anticompetitive predatory buying as being for "anticompetitive purposes," but insisted on a test that measured market structure (recoupment) and required prices below cost.

⁵¹The common law often infers intent from knowledge. See, e.g., Restatement (Second) Torts §825 (1977), defining an "intentional" invasion of property as occurring when the actor either (a) "acts for the purpose of causing it" or (b) "knows that it is resulting or is substantially certain to result from his conduct."

⁵²See generally, 3A Antitrust Law, Ch. 7C (3d ed. 2008).

the "intent" to increase one's own sales substantially is equivalent to the "intent" to take sales from rivals; spending resources to distinguish the two is pointless and silly. Further, even socially beneficial behavior can yield monopoly.

In a perfectly competitive market each firm "intends" to maximize its own profits and is completely unconcerned about responses from rivals.⁵³ In that case it may be quite meaningful to speak of a firm as "intending" to increase its own profits, but not as "intending" to harm any particular rival. But in the more concentrated markets in which most plausible monopolization claims are made, firms cannot act rationally without considering effects on, and responses of, particular rivals. It becomes quite meaningless to speak, for example, of General Motors as "intending" to increase its own sales of pickup trucks, but not as "intending" to take those sales from Ford, Chrysler, or Toyota.⁵⁴ As a result, any formulation which permits GM to "intend" to increase its own sales or profits, but that prohibits it from "intending" to injure rivals is nonsense.

In the great majority of antitrust cases talk of "purpose or intent" is largely diversionary or redundant. Thus, in *Standard Oil* and the first *Tobacco* cases, Chief Justice White conclusively inferred wrongful purpose from wrongful conduct. The result would have been the same and the analysis clearer had he spoken exclusively of conduct and avoided any incorporation of "intent."

The same may be said of the term "willful." The *Grinnell* Court stated the formula for the §2 offense as being monopoly plus "willful acquisition or maintenance." Although willfulness usually connotes something about intent, the Court contrasted "willful" with "justifiable." It indicated that a monopoly achieved or maintained because defendant's products were superior is not "willful." This is a misuse of language: a firm that deliberately creates and markets an overpoweringly superior product has "willfully" acquired the resultant monopoly. Further, every firm "willfully" maintains its profits or

⁵³On perfect competition, see 2B Antitrust Law ¶402.

⁵⁴To be sure, one can imagine a situation where all increased sales come from new customers and none are taken from rivals, but such a situation does not exist when the strategizing firm and its rivals are in the same properly defined relevant market.

market share, or "wilfully" refuses to yield market share to new rivals.⁵⁵

In sum, in defining the behavioral component of the monopolization offense, one must concentrate on conduct and define the characteristics of conduct that are undesirable. Despite loose language, this is in fact what the courts have attempted to do. They have focused on conduct while talking about intent.

Ambiguous conduct

The ambiguity problem most often arises when conduct did not or may not have had its intended consequences. For example, a firm does not violate §2 by innovating a better product, even if the innovation has the effect of expanding or maintaining monopoly power. Some innovations both harm rivals and fail to benefit consumers. However, the consequences of innovation are difficult to predict, and even a dominant firm cannot be required to expand or innovate at its peril. This suggests two things: first, *ex ante* rather than *ex post* analysis is the most helpful. Second, considerations of subjective intent are sometimes essential, provided that exclusion has been objectively proven.

In the *C.R. Bard* case defendant Bard was found to have a

⁵⁵Both *Alcoa* and *United Shoe Machinery* also used the term "not inevitable." See *Alcoa*, note 40 at 431 ("It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them"); and *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 341 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (speaking of Judge Hand's *Alcoa* decision as concluding that a firm had "monopolized" if, regardless of its intent, it had achieved a monopoly by maneuvers which, though 'honestly industrial', were not economically inevitable, but were rather the result of the firm's free choice of business policies.") Later in the same opinion Judge Wyzanski spoke of the source of USM's market power as not "an adaptation to inevitable economic laws" (*id.* at 343) -- something that would presumably characterize a natural monopoly market. But if these formulations are meant to be a definition of monopolizing conduct they suffer from the same basic defect of failing to distinguish between socially beneficial and socially harmful conduct. It is also not inevitable that a firm exclude rivals by building a better mousetrap or by building it more cheaply: to make "inevitability" the touchstone would thus be to condemn the very kind of conduct that it is the purpose of antitrust law to promote. Clearly Judge Wyzanski was not using the phrase in this perverse sense. And it would have been clear that Judge Hand was not either, except for his condemnation of *Alcoa* for expanding capacity to meet demand.

monopoly position in a patented "gun" for taking tissue samples from patients.⁵⁶ While the gun itself was durable hardware, it used disposable, one-use needles, and these were originally supplied by both Bard and others, including the plaintiff. Bard then modified the gun so that it would take only proprietary needles manufactured by Bard. This exclusion of rival needle makers was the basis of the §2 claim, in which a divided panel of the Federal Circuit affirmed liability.

A *nondominant* maker of biopsy guns would have no incentive to make a gun incompatible with others' needles unless the gun/needle combination were a significant improvement over prior technology. The nondominant firm maximizes its profits, *ceteris paribus*, by maximizing compatibility.⁵⁷ As a result, a finding of strong dominance of a properly defined relevant market is essential.

Further, both the patent laws and the general policy of the antitrust laws would permit Bard to innovate to make a better gun, even if the result were a re-designed needle that was incompatible with the needles of rivals. Further, innovation is risky and undertaken under great uncertainty. Many planned innovations do not meet with market success. As a result, one cannot look *ex post*, proclaim that the innovated gun is no better than the earlier gun, and conclude that the innovation is anticompetitive. The real question is what the innovator had in mind. If Bard's intent was to develop a superior gun, but this required a unique needle, then Bard should not be penalized because its new gun/needle combination ended up working no better (or only a little better) than the old combination did.

Thus *Aspen* emphasized that the defendant did not refuse to participate in the skiing joint venture because it could offer a better product on its own or because customers had rejected the joint venture's offerings.⁵⁸ To the contrary, customers preferred the joint venture. Ski Co. did what it did *only* in order to injure a rival. Thus the Court approved a jury instruction to the effect that exclusionary conduct by a dominant firm is unlawful when it "unnecessarily

⁵⁶*C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340 (Fed. Cir. 1998), cert. denied, 526 U.S. 1131 (1999).

⁵⁷See the discussion *infra*.

⁵⁸*Aspen*, note 15.

excludes or handicaps competitors."⁵⁹ This includes "conduct which does not benefit consumers by making a better product or service available--or in other ways--and instead has the effect of impairing competition."⁶⁰ The courts often say that such conduct lacks a "legitimate business purpose."⁶¹ What this means is that if the dominant firm marketed or structured its product in a way that made it more difficult for rivals or potential rivals to sell their product, and if this marketing or restructuring was not reasonably necessary to improve the defendant's own product, or if it produced more harm than reasonably necessary, then the dominant firm has violated §2.⁶²

Injury to Rivals

A *sine qua non* of anticompetitive conduct is that it enlarges (or preserves) the defendant's market share at the expense of rivals. Thus the first requirement for exclusionary conduct is injury to rivals. Exclusionary behavior must be conduct that prevents actual or potential rivals from competing or which impairs their opportunities to do so effectively.

But this term and the root idea are much too broad, for they embrace competitive as well as anticompetitive behavior: *all*

⁵⁹ *Aspen*, note 15, 472 U.S. at 597.

⁶⁰ See, e.g., *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987).

⁶¹ *Aspen*, 472 U.S. at 597; *Multistate Legal Studies*, note 34, 63 F.3d at 1550 (conduct not unlawful unless it lacks a "legitimate business justification"); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987) (equating conduct "without a legitimate business purpose" with conduct "that makes sense only because it eliminates competition"). Other courts sometimes distinguish conduct that merely injures competitors from conduct that harms the "competitive process." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990), cert. denied, 499 U.S. 931 (1991).

⁶² See, e.g., *Multistate Legal Studies*, note 34, 63 F.3d at 1550, where the defendant offered both a general bar review course, in which it had a dominant position, and a complementary professional responsibility course, while the plaintiff offered only the latter. The court denied summary judgment on evidence that the defendant intentionally scheduled sessions of its general bar review course so as to conflict with the only times that the plaintiff's PR course could be offered, thus forcing students to take the defendant's PR course.

successful competitive moves tend to exclude, particularly in oligopoly markets. Nevertheless, while some novel term might be preferable, we shall use the term "exclusionary" as a short-hand description of "monopolizing" conduct, even though it is not precisely descriptive.

So the first step in defining "exclusionary" conduct is to state what it clearly is not. Our concern about monopoly and the opportunities of rivals must not be allowed to obscure the objective of antitrust law, which seeks to protect the process of competition on the merits and the economic results associated with workable competition.⁶³ Accordingly, aggressive but non-predatory pricing, higher output, improved product quality, energetic market penetration, successful research and development, cost-reducing innovations, and the like are welcomed by the Sherman Act. They are therefore not to be considered "exclusionary" for §2 purposes even though they tend to exclude rivals and may even create a monopoly.⁶⁴

We attempt no further catalogue of desirable behavior at this point, but rest for the moment on the desirability of behavior

⁶³Later discussions will show numerous instances where both courts and enforcement authorities appear to have sacrificed competitive objectives in order to protect particular competitors.

⁶⁴We find quite unhelpful and even counterproductive the formulation given in some decisions that a §2 violation occurs when the monopolist uses its market power to "obtain a competitive advantage" over a rival. Read literally, the "competitive advantage" formulation condemns any attempt by a dominant firm to take advantage of economies unavailable to smaller rivals. The relevant question is not *whether* the monopolist uses its position to obtain a "competitive advantage," but *how* it does so.

The "competitive advantage" formulation was given in *Griffith*, note 42 at 107, in reference to non-monopolistic "leveraging." See 3 Antitrust Law ¶1652. But the *Griffith* statement was then quoted in *Kodak* in reference to monopolization itself. See *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 482-483 (1992) (to the extent it is relevant, H.H. was consulted by the defendant after remand). See also *Poster Exchange v. National Screen Service Corp.*, 431 F.2d 334, 339 n. 13 (5th Cir.1970), cert. denied, 401 U.S. 912 (1971) (monopolist's decision to charge retail prices to competing wholesaler was unlawful if done "to gain a competitive advantage"); and *Great Western Directories v. Southwestern Bell Tel.*, 63 F.3d 1378, 1386 (5th Cir. 1995) (apparently approving *Poster Exchange* formulation).

constituting competition on the merits -- the superior skill, foresight, and industry of which Judge Hand spoke. Antitrust law should not impose sanctions for the very conduct it would encourage. Behavior that is no more restrictive of rivals' opportunities than is reasonably necessary to effect competition on the merits is and should be approved by Sherman Act §2.⁶⁵ Such behavior is, after all, indispensable if the antitrust laws are to achieve their objective. Thus, "exclusionary" comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

Cost-reducing conduct

Conduct that reduces the defendant's costs typically injures rivals, except in highly competitive markets, but it virtually always benefits consumers. Identifying the rare case where it does not taxes the tribunal's measurement capabilities so severely that it cannot be controlled without discouraging socially beneficial behavior.

One can imagine a scenario in which a firm builds a large plant that enables it to undersell rivals, does so for a period of time and then raises price after rivals have been destroyed. At that point the firm might enjoy both reduced costs and monopoly prices, which may be higher than the preceding competitive price. But such conduct has been analyzed under the rubric of above cost predatory pricing and universally rejected by the courts.⁶⁶

Output Increasing Conduct

Consumers are generally benefitted by higher output, which is nearly always accompanied by lower prices. As a result considerable care must be exercised before conduct that clearly increases the defendant's output is condemned as monopolistic. When a firm is earning positive returns on each unit an output

⁶⁵This approximates Judge Wyzanski's formulation in *United Shoe*, note 55. See 3 Antitrust Law ¶1614.

⁶⁶Cf. *DuPont (Titanium-Dioxide)*, 96 F.T.C. 653 (1980). See 3A Antitrust Law ¶¶737d, 741.

increase is profitable, quite aside from impact on competitors. Since output increases are presumptively in the best interest of consumers as well a court must be wary of condemning above cost output increasing conduct. Thus Judge Hand erred in *Alcoa* when he condemned the aluminum monopolist for embracing every competitive opportunity by building a larger plant with greater capacity to meet new demand.⁶⁷

These observations are not categorical. For example, predatory pricing involves a significant increase in output which must accompany price cuts to below cost levels. But the increased output in a properly defined strategy of predatory pricing is only temporary, for the predation period will be followed by a "recoupment" period in which output will be reduced and prices increased.⁶⁸

Further, an output increase by the dominant firm does not necessarily correspond with a marketwide output increase, and only the latter benefits consumers. For example, extreme cases of tying, exclusive dealing, package discounts, or similar practices can produce an output increase for the defendant at above cost prices but also cause competitive harm.⁶⁹ Or an improperly brought patent infringement suit might oust a nascent rival and enable the dominant firm to keep its own output higher, but overall market output would decline for lack of competition.⁷⁰

Actual or Prospective Consumer Harm; Balancing

Not all conduct that injures rivals is anticompetitive -- indeed,

⁶⁷*United States v. Aluminum Co.*, 148 F.2d 416, 431 (2d Cir. 1945):

It was not inevitable that it [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them. . . . [W]e 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.

⁶⁸See 3A Antitrust Law ¶¶725-727.

⁶⁹On tying, see 9-10 Antitrust Law, Ch. 17; exclusive dealing, *id.*, Ch. 18; package discounts, 3A Antitrust Law ¶749.

⁷⁰See 3 Antitrust Law ¶706.

most is not. The conduct that §2 brands as anticompetitive must additionally cause or threaten harm to consumers from lower market output, higher prices, reduced innovation, or some other indicator of diminished competitiveness. We consider whether this consumer harm must actually have occurred, or whether it may merely be threatened, and if the latter, the degree of the threat. We also comment briefly on the nature of the proof and the relation to remedies.

Relation to Plaintiff and Requested Relief

Monopoly harms consumers by producing higher prices, restricting innovation, or reducing the array of choices that consumers would face under more competitive conditions. Properly defined monopolizing conduct harms consumers by creating monopoly, increasing its amount, or extending its duration. Thus an expectation of consumer harm must always be at the logical end of any determination that a particular act "monopolizes," and thus satisfies §2's conduct requirement.

But this is not the same thing as showing that consumer harm has in fact resulted from the challenged practice. This is clearest in the case of the government suit. The government generally sues to "enforce" the antitrust laws, not to obtain recompense for completed harms. The social cost of any harmful practice is minimized when the practice is apprehended before it occurs or in an early stage. Clearly the government must show that a certain instance of conduct is likely to cause consumer harm in the form of increased or prolonged monopoly, and that this conduct is not accompanied by an offsetting social benefit. But to delay suit until consumer harm has actually occurred would be to increase the social cost of monopoly unnecessarily. The proviso, of course, is that it may be more difficult to identify conduct as anticompetitive when the results have not yet materialized.

This principle is hardly unique to antitrust law. For example, while the private plaintiff may sue the drunken driver only to recompense a completed wrong, such as wrongful death or property damage, the government may arrest and condemn the drunken driver who has not yet caused harm to anyone. The point is that drunken driving is highly likely to cause social harm and it is less socially costly to arrest such a driver before rather than after that

harm occurs.

The private plaintiff suing only in equity resembles the government's position more closely but is still distinct. The statute permits such a plaintiff to enjoin "threatened" harms.⁷¹ The main difference with the government's position is proximity. For example, a dominant firm's fraudulent procurement and enforcement of patents might cause consumer harm only in several years, after the market sees the result of reduced competitiveness. A particular consumer in this market might not be able to show sufficiently proximate injury to maintain even an equity suit. But the government could do so, presumably without any showing of immediate harm to consumers. By contrast, a competitor excluded by a fraudulent patent suit could sue immediately -- and may be required to do so via a compulsory counterclaim⁷² -- even though consumer injury had not yet occurred. Indeed, we would not make the competitor's lawsuit depend on a showing that consumer harm would occur in the particular case. The targets of improper infringement suits are often nascent firms which may or may not succeed in the market. Antitrust goals are furthered by deterring such suits if they are improper, a fact which does not depend on proof that the competitor, if not victimized by the wrongful suit, would have succeeded in making the market more competitive.

Both consumers and competitors seeking damages must show actual harm. Consumers must generally show actual harm in the form of higher prices or reduced innovation. By contrast, competitors must show actual harm both to themselves and to the ordinary market processes that could otherwise be expected to produce or maintain competition. Once again, however, consumer harm may be threatened rather than realized. For example, the rival who successfully prosecutes a §2 counterclaim to an infringement suit based on an invalid patent will be able to obtain damages even though the consumer harm from this wrongful infringement suit is

⁷¹See 15 U.S.C. §26 ("Any person ... shall be entitled to sue for and have injunctive relief ... against threatened loss or damage by a violation of the antitrust laws...."); see 2A Antitrust Law ¶1326.

⁷²See *Critical-Vac Filtration Corp. v. Minuteman Intl., Inc.*, 233 F.3d 697 (2d Cir. 2000), cert. denied, 532 U.S. 1019(2001) (antitrust counterclaim to patent infringement suit was compulsory and thus could not be brought after infringement suit was completed).

threatened rather than actual.⁷³

But these differences in the nature of proof should not obscure the basic point: in all cases the plaintiff must show conduct that either has or is reasonably calculated to create, enlarge, or prolong monopoly, without substantial offsetting benefits. In such cases consumer harm is always in prospect, even though it has not already occurred.

Unjustified Conduct

Even though monopolistic conduct requires proof of actual or threatened consumer harm, the proof need not invariably be elaborate. The easiest case is conduct by a monopolist that clearly injures rivals and has no business justification. In that case consumer harm can sometimes be inferred from the injury to competitors itself.⁷⁴ For example, little purpose would be served by requiring proof of consumer harm in a case where the defendant brought an infringement action on a fraudulently obtained patent.⁷⁵ The only purpose in bringing such a suit is improper exclusion of rivals. About the best that can be said for such an action is it might fail and result in no harm at all, but it is not likely to produce a social benefit.

Balancing Generally to be Avoided; Burden-shifting

The law of exclusionary practices lies at the center of antitrust's rule of reason, where it is often said that the court must "balance" the threat of competitive harm against consumer gains. We question that assumption.⁷⁶ Many practices capable of creating or maintaining a monopoly by impairing the opportunities of rivals create no benefits at all. For many others the claimed benefits could readily be achieved by a less harmful alternative.

⁷³See 3 Antitrust Law ¶1706.

⁷⁴On this point, see Jonathan B. Baker, Promoting Innovation Competition Through the *Aspen/Kodak* Rule, 7 *Geo. Mason L. Rev.* 495 (1999).

⁷⁵See 3 Antitrust Law ¶1706.

⁷⁶See generally Ch. 15.

In *Microsoft* the D.C. Circuit appeared to state a balancing requirement for close cases. If the plaintiff had shown a qualifying exclusionary act with an anticompetitive effect and the defendant had presented an un rebutted justification, then "the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."⁷⁷ Interestingly, however, the court never attempted any real balancing. In most cases it either condemned the conduct when the defendant had not offered an adequate justification, or refused to condemn it once the justification had been accepted.

Nevertheless, in at least a few cases conduct that causes some benefit and unavoidably threatens harm must be evaluated. On the one hand, the tribunal must have a way of deciding how to weigh them against each other. On the other, no court could quantify the economic harm that might result from the defendant's exercise of market power and balance this against any efficiency gains said to result from it, at least not in close cases. Of course, balancing need not be difficult in every case; one does not need a fine set of scales to know what will happen when an elephant sits on one side of a see-saw and a mouse on the other.

A burden-shifting analysis should enable courts to avoid "close" balancing in most situations. The rule of reason applied in cases involving unilateral conduct need not differ significantly from that applied to multilateral conduct.⁷⁸ The principal difference between §1 and §2 is that the existence of an agreement among competitors shifts the scale against the defendants. As a result, in close cases it is proper to condemn the arrangement by resolving uncertainties against the defendant. By contrast, when the challenged conduct is unilateral the court must be somewhat more cautious. We would be inclined to resolve close cases in favor of the defendant. But we re-emphasize, as *Microsoft* suggests, that cases involving (a) a truly exclusionary practice, (b) offset by a compelling efficiency explanation, and (c) with no less restrictive alternative will be uncommon.

⁷⁷*Microsoft*, note 1, 253 F.3d at 59.

⁷⁸See 8 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1512 (2d ed. 2005).

The most important exception is predatory pricing. Some balancing of benefits and harms may be essential because aggressive pricing appears to confer short-term benefits but may harm consumers in the long run. In price predation cases the Supreme Court requires the dual showing of prices below cost and a reasonable prospect of "recoupment" during a subsequent period of monopoly prices. In such a case the requirement of harms disproportionate to the benefits is met if the monopoly profits earned during the recoupment period exceed the cost of charging below-cost prices, which constitutes the saving to consumers.⁷⁹

Conduct Rational Only for Dominant Firm; Creation vs. Maintenance of Monopoly

Most exclusionary conduct by dominant firms is strategic. Nondominant firms acting unilaterally typically lack the market position to make much strategic conduct work. Consider the *Microsoft* litigation.⁸⁰ A nondominant seller of computer operating systems would have every incentive to maximize compatibility with other types of software, such as internet browsers or word processors, even if it sold these applications itself. After all, it would be competing in the market with sellers of other operating systems, and customer choice would be heavily driven by compatibility concerns. But a market dominating seller of operating systems stands in a different position: by limiting compatibility with rivals' software applications it can force buyers to switch to its own applications. Thus it becomes important to restrain the innovations of others or keep them out of the market.

In other cases conduct challenged as exclusionary could be profitable for either a monopolist or a non-monopolist. For example, even a relatively small oligopolist in a product differentiated market might profit from fraudulent patent infringement suits calculated to protect its particular product variation from close copying.⁸¹

But both types of conduct are covered by the statute, which is

⁷⁹These matters are taken up in Ch. 7C.

⁸⁰See note 1.

⁸¹On such suits, see 3 Antitrust Law ¶706.

concerned with the maintenance, or prolongation, or monopoly as well as with its creation. For example, *Grinnell* and later *Trinko* spoke of the offense as "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."⁸²

Substantiality

To find that a monopolist's act may improperly impair rivals' opportunities and threaten consumer welfare does not say how substantial a contribution that act has made or may make to achieving or maintaining the monopoly. The effect may in fact be marginal or even inconsequential. The act may be incapable of making a significant contribution, abandoned before it could have had any such effect, or seem on balance not to have been significant when compared to scale economies or superior skill as sources of the particular defendant's power.

However, because monopoly will almost certainly be grounded in part in factors other than a particular exclusionary act, no government seriously concerned about the evil of monopoly would condition its intervention solely on a clear and genuine chain of causation from exclusionary act to the presence of monopoly. And so it is sometimes said that doubts should be resolved against the person whose behavior created the problem.⁸³ When we cannot truly find as a fact that an exclusionary act was significant to the defendant's monopoly, it is said, the defendant must bear the risk of

⁸²*Grinnell*, note 44, 384 U.S. at 570-571 (emphasis added). The Supreme Court restated this formulation in *Verizon Communications v. Trinko*, 540 U.S. at 407. See also *Aspen*, note 15, 472 U.S. at 602 (speaking of the "purpose to create or maintain a monopoly," quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). These formulations are widely quoted or paraphrased. See, e.g., *Kodak*, note 64, 504 U.S. at 483 (§2 violated by wilful actions designed to maintain defendant's monopoly position when not supported by valid business justifications); *Christianson v. Colt Indus.*, 486 U.S. 800, 810 (1988) (§2 violated by wilful maintenance of monopoly power as opposed to growth or development that results from a superior product, business acumen, or historic accident); *Hanover Shoe v. United Shoe Machinery Corp.*, 391 U.S. 481, 486 (1968) (noting and approving lower court's conclusion that restrictive lease policies were designed to maintain defendant's monopoly); *C.R. Bard*, note 56, 157 F.3d at 1371 (similar).

⁸³Cf. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) (damages).

the ignorance created by its own misconduct. The conclusion has merit, but the reasoning needs to be restated.

Any one exclusionary act may seem trivial. Indeed, we shall often be unable to find that several such acts, taken together, probably "caused" or contributed significantly to a defendant's power. Yet, such acts can determine the often marginal choice of an actual or potential rival deciding whether to enter or expand. In that event, it may be fitting to presume the exclusionary act "significant" or "causally related" to the monopoly power being challenged. That is the sense in which the defendant is made to suffer the uncertain consequences of its own undesirable conduct.

But before such a formula can properly be used against the defendant, it must at least appear plausible to an informed observer that the exclusionary act could have had, or would probably have, a significant relationship to the defendant's monopoly. In sum, "exclusionary" behavior should be taken to mean conduct other than competition on the merits, or other than restraints reasonably "necessary" to competition on the merits, that reasonably appear capable of making a significant contribution to creating or maintaining monopoly power.

Business Torts or Unfair Methods of Competition

State laws on "unfair competition" or business torts provide remedies for a variety of competitive practices thought to be offensive to proper standards of business morality. Under these laws, false and misleading advertising, trade disparagement, and "misappropriation" of trade values created by another may entitle victimized buyers or competing sellers to damages and equitable relief. Section 5 of the Federal Trade Commission Act empowers the Commission to terminate (1) "unfair methods of competition," and (2) "unfair and deceptive acts or practices."⁸⁴ Particularly since 1938, when Clause (2) was added by amendment, the courts have given the Commission extremely wide latitude in expanding the scope of enjoined conduct without any showing of injury to competition.⁸⁵

⁸⁴Section 5 is also a jurisdictional vehicle for FTC action against violations of the Sherman and Clayton Acts.

⁸⁵See, e.g., 83 Cong. Rec. 3287 (1938) ("... under this section the Commission may stop false advertising with reference to all products. They have

Even if one defines "exclusionary" conduct with an eye only toward injunction, most conduct that is "unfair" under state tort law or FTCA §5 fails to be "exclusionary" under Sherman Act §2. The FTC Act was clearly conceived as a supplement to the Sherman Act, a vehicle for evolving, through administrative expertness, prohibitions of conduct thought contrary to important consumer interests in honesty and fair dealing quite aside from monopoly. There is no private right of action for violations of the FTC Act, and the act is not part of the "antitrust laws" for violation of which private parties may sue and recover treble damages.

Thus automatically identifying practices "unfair" under the FTC Act or business tort law as "exclusionary" under §2 is not consistent with the statutory scheme. The Sherman Act was deemed a vehicle for incorporating common law notions of restraint of trade, but certainly not the whole common law of business torts. The concern of §2 is with monopoly, not unfairness or deception. Accordingly, it is not enough under §2 to find that a firm has engaged in "unfair" conduct; the antitrust tribunal must also decide that the conduct has had, or is likely to have, the effect of significantly impairing the ability of rivals to compete.

The first and perhaps most important difference between the common law of business torts and the Federal Trade Commission Act's coverage of unfair and deceptive acts is the lack of any requirement of market power or competitive effects. Most of the law in this category focuses exclusively on conduct, and thus no inquiry is made whether the conduct is reasonably calculated to create or preserve a monopoly, or indeed, if monopoly is even plausible in the market under scrutiny.

always used that power; but in the past they have had to show that the false advertisement was injurious to some competitor. We are doing away with that requirement in this bill and are providing that if an advertisement is false and deceptive it may be stopped if it is injurious to the public." (Mr. Wheeler). See also *Pep Boys-Manny, Moe & Jack v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941) ("The failure to mention competition in the latter phrase ["unfair or deceptive acts or practices"] shows a legislative intent to remove" the requirement of injury to competition, and "the Commission can now center its attention on the direct protection of the consumer where formerly it could protect him only indirectly through the protection of the competitor.").

Of course, in the presence of substantial market power, some kinds of tortious behavior could anticompetitively create or sustain a monopoly, and it would then warrant condemnation under §2.⁸⁶ As a result, it is wrong categorically to condemn such practices under §2 or categorically to excuse them. But the important point is that the law of business torts or unfair practices was developed without regard to its tendency to create a monopoly, and there is little more than an accidental overlap between the kinds of practices thought to be unfair or tortious and the kind that can support a §2 offense.

Thus many if not most misrepresentations or other practices held actionable in tort or under §5 do not qualify as anticompetitive or exclusionary for §2 purposes, even when done by a dominant firm. In many instances, few buyers are misled. The FTC is entitled to insist "upon a form of advertising clear enough so that . . . 'wayfaring men, though fools, shall not err therein.'"⁸⁷ In other instances, the effects are transitory, either because the misrepresentation was episodic or because buyers quickly learn the truth. For example, much of the law of business torts or misrepresentation is targeted at the firm that comes quickly into business, makes numerous sales on the basis of false claims, and then disappears or becomes judgment proof before consumers can obtain redress. That government intervention in such cases is appropriate can be deemed beyond controversy, but the relief to be given would not be relief from any real or threatened monopoly.

In other cases, such as those requiring disclosure of facts wholly unrelated to product qualities, antitrust might well view the order rather than the conduct to be "anticompetitive."⁸⁸ And proof of compensable injury to particular buyers for misleading representations does not necessarily establish significant damage to competing sellers, whose conduct may, for example, have been no more exemplary.

⁸⁶See Ch. 7E.

⁸⁷*GM v. FTC*, 114 F.2d 33, 36 (2d Cir. 1940).

⁸⁸For example, *Mohawk Refining Co. v. FTC*, 263 F.2d 818 (3rd Cir. 1959) (not only prohibiting petitioner from failing to disclose that its oil was reclaimed from previously used oil, but also from selling such oil at all, notwithstanding a finding that the product was "identical with all other finished motor oils as to composition, quality, and utility.").

Thus, while tort or FTC law provides some learning and experience that can be used by antitrust courts in identifying undesirable practices that *may* properly be deemed "exclusionary," the mere fact that the practices are undesirable in this sense is not enough.⁸⁹

Relationship to Other Antitrust Offenses

It is accepted law that a monopolist violates the Sherman Act if it "has acquired or maintained . . . monopoly . . . by means of those restraints of trade which are cognizable under §1 [of the Sherman Act]." ⁹⁰ But this does not mean that all violations of §1 necessarily establish the "monopolizing" offense under §2. The monopoly must be acquired or maintained "by means of" the conduct proscribed under §1, and not all violations of §1 have the requisite causal effect. Take, for example, a case in which a monopolist has imposed minimum resale price maintenance agreements on its distributors. Such agreements were traditionally per se unlawful under §1, but they do not create or enhance the monopolist's market power by curtailing the opportunities of its actual or potential competitors.⁹¹ If anything, the higher retail prices on the monopolist's goods enhance their opportunities.

⁸⁹An additional problem with incorporating state business tort law is that it varies, and sometimes widely, from state to state. It would be unseemly for an antitrust court to seek and then apply the law of the state most hostile to a particular practice. Even if the injury were confined to states accounting for a significant portion of the monopolist's business, diversity would in all likelihood remain; and even if not, it makes no sense to treat two monopolists differently under §2 because of fortuitous differences in state tort law. In short, antitrust courts would at the least have to formulate a "federal" law of business torts. But rather than engage in such an exercise, it seems far more sensible to deal directly with the question of what is "exclusionary" in light of the purposes of §2.

⁹⁰*Griffith*, note 42 at 106.

⁹¹See generally Ch. 16B. The per se rule against resale price maintenance was overruled by the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007). It is conceivable that the high retail margin protected by minimum resale price agreements would lead retailers to prefer handling the monopolist's product to that of any newcomer who would thereby fail to obtain adequate retail representation. But this would be a rare case. Our point is that a Sherman Act §1 violation is not automatically or necessarily an "exclusionary" act for §2 purposes.

Similar caution must be taken with violations of the Clayton Act: price discrimination,⁹² exclusive dealing⁹³ and tying arrangements,⁹⁴ and acquisitions⁹⁵, in violation of §§2, 3, and 7 respectively. A monopolist from whom large buyers have coerced discriminatorily low prices has not by such price discrimination augmented its monopoly power; rather, the discrimination reflects a weakening of its power. A tying arrangement does not usually increase monopoly power in the tying-product market, and one that affects a small percentage of sales of the tied product does not significantly impair the opportunities of rivals in that market.⁹⁶

In sum, whether or not violations of other antitrust provisions also constitute monopolizing conduct depends on the factual and analytical reasons behind those other proscriptions. They must be assessed in terms of §2 purposes. The other side of the coin is that practices that harm rivals unnecessarily may be violations of §2 when committed by a dominant firm, even though they would not be violations of other provisions when no dominant firm is involved. For example, forced bundling by the monopolist can violate §2 even when the "separate product" requirement that tying law imposes on nonmonopolists is not present.⁹⁷ The monopolist's refusal to deal may be unlawful even when lack of agreement precludes any finding of a "boycott".⁹⁸ Upon a few occasions courts have condemned price discrimination by a monopolist when the technical requirements of the Robinson-Patman Act could not have been met.⁹⁹

⁹²See 14 Antitrust Law, Ch. 23.

⁹³See 11 Antitrust Law, Ch. 18.

⁹⁴See 9 & 10 Antitrust Law, Ch. 17.

⁹⁵See 4-5 Antitrust Law, Chs. 9 - 11.

⁹⁶See 9 Antitrust Law, Ch. 17B-2.

⁹⁷See 3B Antitrust Law ¶1777.

⁹⁸See 3B Antitrust Law, Ch.7D.

⁹⁹E.g., *United Shoe*, note 55 at (condemning USM's price discrimination in lease terms; leases are not reachable by the Robinson-Patman Act, which covers only sales).

The point is that §2's highly general proscription of "monopolistic" practices is not cabined by any specific statutory formulation, and thus can be both less than or more than the prohibitions of the other antitrust laws. As noted previously, this gives the courts more flexibility to fashion legal doctrine respecting dominant firms; but it also makes the statute more difficult to apply, particularly to novel conduct.

Power Essential

The definition of anticompetitive conduct by the dominant firm must be flexible and not too categorical. Defining exclusionary conduct as conduct that harms rivals unnecessarily can dispense with technical requirements that are essential in the law of price-fixing, tying or exclusive dealing, or other practices. Such an approach is appropriate, for anticompetitive strategic behavior by dominant firms comes in many kinds, many of which may not be known or even anticipated today.

But defining monopoly conduct in a flexible manner places a premium on unambiguous establishment of substantial and durable power. If courts find monopoly power too readily, they may be correspondingly unwilling to condemn exclusionary practices that are anticompetitive when practiced by a true monopolist, but ambiguous or harmless when the defendant is not a monopolist. These rules will then be applied to true monopolists as well. Worse yet, courts may condemn practices that are harmless or even beneficial when practiced by non-monopolists.

As a court's confidence increases that the defendant before it is a true and durable monopolist, it can also more confidently condemn practices that harm rivals unnecessarily. As a result, "monopoly power" should be found only after rigorous application of the fundamental principles of market definition and market power measurement. When courts find substantial market power merely because a firm's customers are "locked in" to its aftermarket parts or service,¹⁰⁰ or where the defendant's franchise contract prevents the buyer from substituting another's goods,¹⁰¹ then they are no longer

¹⁰⁰E.g., *Kodak*, note 64, and ¶1564.

¹⁰¹See 2B Antitrust Law ¶1519.

dealing with the kind of substantial market power that should be the concern of §2.

Conclusion

To summarize:

- Assuming that monopoly power has been established, the unlawful exclusionary conduct that §2 requires consists of acts that (1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits that the acts produce, or (2c) produce harms disproportionate to the resulting benefits.
- The behavioral component is not defined by "purpose," "intent," or similar language. It can be rationally defined only in terms of conduct. However, knowledge of intent may sometimes aid in the interpretation of ambiguous conduct.
- Proof of actual consumer harm is generally unnecessary, but the challenged conduct must be of a type that the anticipated end result is actual consumer harm. Of course, the private plaintiff must prove the requisite actual or threatened harm to itself.
- The given definition of monopolizing conduct is flexible and frees the court of doctrinal rigidity, but it requires an extremely careful determination that the defendant has substantial market power.