PRIVATE LITIGATION GUIDE

Editors
Nicholas Heaton and Benjamin Holt

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PART I
KEY ISSUES AND OVERVIEWS

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US Monopolisation Cases

Barbara Sicalides and Lindsay D Breedlove[1]

Introduction

The principal US statute governing monopolisation is Section 2 of the Sherman Act (Section 2).[2] Section 2 provides that '[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .'[3] Courts have interpreted Section 2 to require proof of three factors: (1) that the defendant possesses monopoly power in the relevant market: (2) that the defendant has acquired, enhanced or maintained that power by the use of exclusionary conduct: and (3) that the conduct caused antitrust injury.[4]

Although the statutory text references a felony criminal charge, the vast majority of applicable case law and enforcement agency actions relate to monopolisation matters in the civil context. Private plaintiffs can bring civil suits to enforce Section 2. Specifically, Section 4 of the Clayton Act[5] makes Section 2 enforceable by private plaintiffs seeking damages if they can establish an injury causally tied to the exclusionary conduct and of the type the antitrust laws

1 Barbara Sicalides and Lindsay D Breedlove are partners at Pepper Hamilton LLP.

2 The US Federal Trade Commission may also challenge exclusionary conduct under Section 5 of the FTC Act, 15 U.S. Code § 45. Only the FTC, however, has the ability to pursue a Section 5 claim.

3 15 U.S.C. § 2.

4 *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (explaining that first two elements derive from statutory text); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ('Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.').

5 Codified at 15 U.S.C. § 15(a).

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are intended to prevent.[6] Section 16 of the Clayton Act[7] provides a private plaintiff with the right to seek injunctive relief to terminate conduct that violates Section 2, and to prevent the recurrence of the exclusionary conduct.[8]

This chapter explores the contours of Section 2 jurisprudence, with a focus on private plaintiffs' pursuit of civil liability and damages under Section 2. It first tackles how courts determine whether a firm has monopoly power, by examining relevant product and geographic market definitions, and the evidence necessary to establish market power. It next explores the general principles courts use to evaluate purported exclusionary conduct, how they apply those principles to the most often challenged conduct, and how regulatory and intellectual property protection intersects with monopolisation. The chapter concludes by reviewing the law addressing attempted monopolisation and conspiracy to monopolise claims, the jurisdictional hurdles private plaintiffs must clear and the remedies available when they successfully establish Section 2 violations.

Monopoly power

The US Supreme Court long ago defined monopoly power as 'the power to control prices or exclude competition'.[9] Importantly, at this phase of the analysis, a plaintiff need not establish that 'prices are raised and that competition is actually excluded', but only that the defendant has the power to do so.[10] In nearly all cases,[11] determining whether a defendant has monopoly power starts with evaluating the scope of the 'relevant market' – which necessarily encompasses both the relevant product market and relevant geographic market.[12]

Relevant product market

The early cases to articulate a standard for defining the relevant product market remain the leading cases courts rely on in the relevant market analysis. In *United States v. E.I. du Pont de Nemours & Co.*, the Supreme Court explained a relevant market as including 'products that have reasonable interchangeability for the purposes for which they are produced – price, use and

6 *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 537–45 (1983) (setting out five factors for determining whether an alleged injury is too remote to give rise to standing); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (defining antitrust injury as 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful' (quoting *Brunswick*, 429 U.S. at 489)).

7 Codified at 15 U.S.C. § 26.

8 See, e.g., *California v. Am Stores Co.*, 495 U.S. 271, 281 (1990).

9 *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

10 *Am. Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).

11 Many courts have held that a plaintiff in a Section 2 case cannot prevail without proving which products and geographic regions comprise the relevant market; e.g., *Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993); *United Sates v. Grinell Corp.*, 384 U.S. 563, 570-71 (1966).

12 *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962) ('The "area of effective competition" must be determined by reference to a product market (the "line of commerce") and a geographic market (the "section of the country")').

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qualities considered'.[13] Courts uniformly hold that both functional interchangeability and the extent to which a price change in one product impacts demand for a second product should be part of the relevant product market analysis.[14]

Although it has been developed by the US Department of Justice, Antitrust Division and the US Federal Trade Commission (FTC) for the purpose of merger reviews and is non-binding authority, the Horizontal Merger Guidelines' 'hypothetical monopolist test' is generally accepted by courts as an appropriate analytical framework for evaluating cross-price elasticity of demand and defining markets.[15] The test asks whether a hypothetical monopolist in a proposed market could impose a 'small but significant non-transitory increase in price' (SSNIP) – at least 5 per cent – over all of the products or services in that market without losing sufficient sales so as to render the SSNIP unprofitable. If customer demand shifts to substitute products in response to a SSNIP in the market the hypothetical monopolist controls, the proposed market is too small, and the products or services to which customers turn in response to a SSNIP are added to it. The test is an iterative process. When the court identifies the set of products over which a hypothetical monopolist could profitably increase prices, that product set should be deemed the relevant product market under the SSNIP test.

No matter the specific test applied, courts yield to the commercial realities of the industry.[16] In *United States v. Grinnell*, the Supreme Court determined the relevant product market for property protection services, grouping burglary and fire alarm services together in a 'central station services' market. The Court explained that, while the services differed, 'it would be unre-

13 *E. I. du Pont de Nemours & Co*., 351 U.S. at 404. This is known as 'functional interchangeability'. *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 25 (D.D.C. 2015) ('"Functional interchangeability" refers to whether buyers view similar products as substitutes.'); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997) ('Whether there are other products available to consumers which are similar in character or use to the products in question may be termed "functional interchangeability"'). Thus, the relevant market includes: '(1) identical products, (2) products with such negligible physical or brand differences that buyers regard them as the same product, and (3) other products that buyers regard as such close substitutes that a slight relative price change in one will induce intolerable shifts of demand away from the other.' Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* Paragraph 562a (4th ed. 2014).

14 *E. I. du Pont de Nemours & Co.*, 351 U.S. at 381, 393, 400; see also *Brown Shoe*, 370 U.S. at 325. Some courts regard functional interchangeability and cross-elasticity of demand as two factors to consider in determining whether products are 'reasonable substitutes'. See *Sysco Corp.*, 113 F. Supp. 3d at 25 ('Whether goods are "reasonable substitutes" depends on two factors: functional interchangeability and cross-elasticity of demand.'). Cross-elasticity does not only consider price. Courts have also evaluated 'the "ease and speed with which customers can substitute [the product] and the desirability of doing so"'. id. at 25-26 (alteration in original) (quoting *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1037 (D.C. Cir. 2008)); see also id. at 26 ('[S]ubstitution based on a reduction in price will not correlate to a high cross-elasticity of demand unless the switch can be accomplished without the consumer incurring undue expense or inconvenience.'); *Whole Foods* 548 F.3d at 1037 ('Whether one product is reasonably interchangeable for another depends not only on the ease and speed with which customers can substitute it and the desirability of doing so, . . . but also the cost of substitution, which depends most sensitively on the price of the products.').

15 US Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010).

16 *United States v. Grinnell Corp.*, 384 U.S. 563, 572, 592 (1966); *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) ('[C]ourts should "combin[e]" different products or services into "a single market" when "that combination reflects commercial realities."'); *Brown Shoe*, 370 U.S. at 336–337 (noting that the definition of the relevant market must 'correspond to the commercial realities of the industry'); see also *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 361 F. Supp. 3d 324, 338 (E.D.N.Y. 2019) (finding that the

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alistic . . . to break down the market into the various kinds of central station protective services that are available.'[17] Recently, in *Ohio v. American Express Co.*, the Supreme Court, noting the realities of the credit card industry, included both the merchant and cardholder sides of the network platform in a single product market because the transactions necessarily required both sides to accept the network platform's service.[18] In some cases, courts have found 'submarkets' within a broader relevant product market.[19]

Relevant geographic market

The relevant geographic market encompasses the area in which a seller competes with other seller.[20] As with the relevant product market, the relevant geographic market definition depends on cross elasticity of demand, and in some cases, supply. The Supreme Court explained in *United States v. Philadelphia National Bank*, the geographic market includes the area where the seller operates and to which customers can practicably turn for supplies.[21] Just as the SSNIP test can be used to define a relevant product market, it also can be used to determine the market's geographic scope.

Establishing the requisite market power

Monopoly power within a given market can be established several ways. The most straightforward approach involves presenting direct evidence that a defendant actually controls price, excludes competition or both. For example, in *Re/Max International v. Realty One*, the court found that the plaintiff provided sufficient evidence that the defendants' practices, which

'plaintiffs' allegations are dependent on the economic realities of the credit-card market and the unique features of how Amex operates').

17 *Grinnell*, 384 U.S. at 572 ('Central station companies recognize that to compete effectively, they must offer all or nearly all types of service.').

18 *Am. Express Co.*, 138 S. Ct. at 2285-86; see also *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43 (2d Cir. 2019) (travel technology platform is two-sided market because defendant offers different services to different groups of customers – to airlines, access to travel agents; to travel agents, flight and pricing information – and they connect travel agents to airlines in simultaneous transactions).

19 The Supreme Court in *Brown Shoe* also recognised submarkets as a relevant market for antitrust purposes. Submarkets are distinct from the broader markets based on certain 'practical indicia', including 'industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers distinct prices, sensitivity to price changes, and specialized vendors.' *Brown Shoe*, 370 U.S. at 325. Courts continue to apply the *Brown Shoe* factors to define the relevant submarket market. See, e.g., *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1121 (9th Cir. 2018) (applying the *Brown Shoe* submarket 'practical indicia' in rejecting the plaintiffs' proposed submarket for certain type of advertising because it was not distinct); *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 198 (D.D.C. 2018) (applying the *Brown Shoe* 'practical indicia' in finding that Chloride TiO2 is a submarket distinct from a broader market that includes both chloride and sulfate TiO2, in part, because consumers and producers view it as such); *Ojmar US, LLC v. Sec. People, Inc.*, No. 16-cv-04948-HSG, 2018 U.S. Dist. LEXIS 58544, at *6–11 (N.D. Cal. 5 Apr 2018) (discussing the *Brown Shoe* factors in finding that plaintiff's alleged submarket of electronic non-keypad lock products was economically distinct from other types of locks).

20 *United States v. Phila Nat'l Bank*, 374 U.S. 321, 359 (1963).

21 id.; see also *Tampa Elec Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) ('[T]he area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.').

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would have been economically irrational for a firm without monopoly power, actually drove competitors from the business.[22] With such direct evidence, plaintiff may not need to precisely define the market, although courts may require a showing of its 'rough contours'.[23]

Direct evidence of market power is rare, so courts often look to indirect evidence. Under this method, after defining the relevant market, a court typically considers the defendant's market share and the presence or absence of barriers to entry.[24] Generally, courts have noted that over 90 per cent market share is sufficient to constitute a monopoly, but 'it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not.'[25] According to the FTC,[26] courts generally do not find monopoly power where an actor has less than 50 per cent market share, but percentages below 90 per cent often pass muster.[27] Barriers to entry

22 173 F.3d 995, 1018-20 (6th Cir. 1999); see also *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (observing 'the existence of monopoly power is clear' when evidence shows a firm has profitably raised prices substantially above the competitive level); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995), cert. denied, 516 U.S. 987 (1995) ('If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power.').

23 See *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 n.3 (3d Cir. 2007) ('[D]irect proof of monopoly power does not require a definition of the relevant market.'); *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004) ('[I]f a plaintiff can show the rough contours of a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power—in lieu of the usual showing of a precisely defined relevant market and a monopoly market share.'); *Re/Max Int'l*, 173 F.3d at 1016 ('[A]lthough the plaintiffs failed to define the relevant market with precision and therefore failed to establish the defendants' monopoly power through circumstantial evidence, there does exist a genuine issue of material fact as to whether the plaintiffs' evidence shows direct evidence of a monopoly . . . .'); But see *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1198-99 (10th Cir. 2009) (observing the Tenth Circuit has 'discussed the possibility that proof of anticompetitive effects rendered definition of a relevant market unnecessary in a § 2 case,' but has not resolved the issue).

24 See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) ('The existence of such [monopoly] power ordinarily may be inferred from the predominant share of the market.'); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997) ('[A] plaintiff must: "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run."' (quoting *Rebel Oil*, 51 F.3d at 1434); *Broadcom Corp.*, 501 F.3d at 307 ('To support an inference of monopoly power, a plaintiff typically must plead and prove that a firm has a dominant market share, and that significant "entry barriers" protect that market.'); see also *Broadcom Corp.*, 501 F.3d at 307 ('Barriers to entry are factors . . . that prevent new competition from entering a market in response to a monopolist's supracompetitive prices.'); *Microsoft Corp.*, 253 F.3d at 51 ('"Entry barriers" are factors . . . that prevent new rivals from timely responding to an increase in price above the competitive level.').

25 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945).

26 Monopolization Defined, Federal Trade Commission, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined (last visited 31 Aug. 2019).

27 For instance, the Supreme Court has found monopoly power where actors controlled 87 per cent of the market, *Grinnell*, 384 U.S. at 571, and over two-thirds of the market, *Am. Tobacco Co v. United States*, 328 U.S. 781, 797 (1946). Circuit courts have generally required more than 50 per cent market share, but numbers vary. See, e.g., *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) ('Absent other pertinent factors, a share significantly larger than 55% has been required to established [sic] prima facie market power.'); *Image Tech. Servs., Inc.*, 125 F.3d at 1206 ('Courts generally require a 65% market share to establish a prima facie case of market power.'); *Blue Cross & Blue Shield United v. Marshfield Clinic*,

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can include regulatory requirements, high capital costs, technological obstacles, patents and licences, control over essential resources and entrenched buyer preferences.[28] The Supreme Court has observed, '[W]ithout barriers to entry it would presumably be impossible to maintain supra-competitive prices for an extended time'.[29]

Most courts reject the notion that sellers of equipment in a competitive market that thereafter limit competition in the markets for replacement parts or service necessary for continued use of the seller's product have monopoly power in the parts or services 'aftermarket'. The most notable exception to this general rule is *Eastman Kodak Co. v. Image Technical Services, Inc.*, in which the Supreme Court rejected defendant's argument that 'lack of market power in the primary equipment market [for duplicating and imaging equipment] precludes – as a matter of law – the possibility of market power in derivative aftermarkets' for replacement parts and services.[30] Kodak implemented a policy of selling replacement parts only to customers who either used Kodak repair services or repaired their own machines, but refused to sell replacement parts for use by third-party independent service organisations (ISOs) thus driving some ISOs out of business.[31] The Court found that the ISOs presented direct evidence that Kodak raised prices and drove out competition in after-markets, and it was reasonable to infer that Kodak both possessed and wielded market power in the markets for replacement parts and services.[32]

Following *Eastman Kodak*, defendants generally have prevailed in after-market cases, with courts holding that without a change in policy after locking in customers, there can be no after-market claim.[33] The Ninth Circuit described 'three relevant principles' from *Eastman Kodak* and its progeny: first, a claimant can restrict the market to a single brand; second, a claimant cannot 'rest . . . on market power that arises solely from contractual rights that consumers knowingly and voluntarily gave to the defendant';[34] and third, in determining whether a defendant's market power is 'contractually-created' or falls in 'the *Eastman Kodak* category

65 F.3d 1406, 1411 (7th Cir. 1995) (observing '50 percent is below any accepted benchmark for inferring monopoly power from market share' and collecting cases); *Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) ('[L]ower courts generally require a minimum market share of between 70% and 80%.'); *Exxon Corp. v. Berwick Bay Real Estate Partners*, 748 F.2d 937, 940 (5th Cir. 1984) (*per curiam*) ('[M]onopolization is rarely found when the defendant's share of the relevant market is below 70%.').

28 *Broadcom Corp.*, 501 F.3d at 307; *Microsoft Corp.*, 253 F.3d at 51; *Image Tech. Servs., Inc.*, 125 F.3d at 1208.

29 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986).

30 504 U.S. 451, 455 (1992).

31 id., at 458.

32 id., at 477–78.

33 Jonathan Gleklen, *The ISO Litigation Legacy of Eastman Kodak Co. v. Image Technical Services: Twenty Years and Not Much to Show for It*, 27 Antitrust 56, 58 (2012), available at https://pdfs.semanticscholar.org/23e3/75357b31355b1fe71d87b907c0ca3ba28fdd.pdf; see, e.g., *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997); *Dig. Equip. Corp. v. Uniq Dig. Techs., Inc.*, 73 F.3d 756 (7th Cir. 1996).

34 *Newcal Indus., Inc. v. IKON Office Sols.*, 513 F.3d 1038, 1048 (9th Cir. 2008) (emphasis omitted). The Ninth Circuit cited *Queen City and Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997) for this proposition. In *Queen City*, the Third Circuit found franchise tying restrictions did not support a monopoly claim, and agreed that defendant's 'ability to block franchisees from purchasing ingredients from other sources stemmed from its exercise of contractual power, not market power'. 124 F.3d at 444. In *Forsyth*, consumers alleged their insurance carrier, Humana, colluded with certain hospitals to give the hospitals a monopoly over the market of Humana-insured consumers. The Ninth Circuit rejected plaintiffs' market definition; plaintiffs used certain hospitals 'because of contractual provisions in their

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of economic market power,' courts can examine whether a consumer's selection of a brand 'is the functional equivalent of a contractual commitment' and whether consumers knowingly entered such contracts.[35]

Exclusionary conduct

The possession of monopoly power and charging of monopoly prices does not necessarily violate Section 2. Indeed, as the Supreme Court has recognised, monopoly power resulting from 'growth or development as a consequence of a superior product, business acumen, or historic accident' does not run afoul of the antitrust laws.[36] Rather '[t]he opportunity to charge monopoly prices – at least for a short period – is what attracts "business acumen" in the first place.'[37] Private plaintiffs that accuse those with monopoly power of harming them in some way are frequently met with the refrain that '[t]he antitrust laws were enacted for "the protection of competition, not competitors"'.[38]

To ensure that the antitrust laws target problematic competitors, as opposed to merely successful ones, Section 2 requires some sort of 'exclusionary conduct' or 'wilfulness' in the maintenance or achievement of monopoly power. Early cases held that a defendant's conduct could be deemed wilful if a monopoly was the probable result of the defendant's actions, rather than forced upon the defendant by circumstance. In *United States v. Paramount Pictures*, for example, the Court held that 'the requisite "purpose or intent" is present if monopoly results as a necessary consequence of what was done.'[39] More recently, however, the Court has acknowledged that the question should be, instead, 'whether [the defendant] has impaired competition in an unnecessarily restrictive way'.[40] Thus, courts generally agree that not all aggressive business conduct violates Section 2, even though that conduct, too, can force rivals out of the market.[41]

The remainder of this section reviews the most common types of conduct that courts have examined as potentially exclusionary. From cases examining such conduct, a few general principles can be extracted, which bear noting from the outset. First, although 'wilfulness' was not a particularly helpful guidepost in early monopolisation cases, courts often examine the intent of the defendant when considering whether conduct may violate Section 2. More specifically,

insurance policies. This tie-in defeats the plaintiffs' argument for a submarket consisting only of those hospitals Humana insureds actually used.' 114 F.3d at 1475–76.

35 *Newcal*, 513 F.3d at 1048-49.

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

37 *Verizon Commc's v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

38 *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

39 334 U.S. 131, 173 (1948).

40 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 605 (1985).

41 *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999) ('Exclusionary conduct under section 2 is the creation or maintenance of monopoly by means other than the competition on the merits embodied in the *Grinnell* standard'.); *Data Gen. Corp. v. Grumman Sys. Support Corp.,* 36 F.3d 1147, 1182 (1st Cir. 1994) ('[E]xclusionary conduct does not include behavior which poses no unreasonable threat to consumer welfare but is merely a manifestation of healthy competition, an absence of competition, or a natural monopoly'.).

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if the defendant intended 'to exclude rivals on some basis other than efficiency',[42] courts may find the intent alone problematic or find the intent 'relevant only to the extent it helps [the fact-finder] understand the likely effect of the monopolists' conduct'.[43]

Second, 'even if a company exerts monopoly power, it may defend its practices by establishing a business justification', namely that its conduct 'promotes a sufficiently procompetitive objective'.[44] Relying on Supreme Court precedent, the First Circuit explained in *Data General Corp. v. Grumman Systems Support Co.* that 'a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare,' such as 'pursuit of efficiency and quality control', rather than 'the desire to maintain a monopoly market share or thwart the entry of competitors'.[45]

Finally, courts evaluate whether the conduct has caused (or is likely to cause) a defendant to acquire, enhance or maintain its monopoly power.[46] When a defendant has engaged in more than one activity that may impact competition, courts are likely to assess the anticompetitive effects of the activities on an aggregate basis.[47] In addition, the conduct need not have had its full effect. Rather, courts are willing to infer causation from conduct that 'reasonably appears capable of making a significant contribution to . . . maintaining monopoly power'.[48]

Exclusive dealing

Firms with market power may violate Sherman Act Section 2 by requiring buyers to purchase their products or services exclusively or predominantly for a period of time.[49] However, most exclusive dealing arrangements do not rise to the level of a Section 2 violation; rather, mirroring

42 *Aspen Skiing*, 472 U.S. at 605.

43 *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001). Modern courts tend to reject the notion that a general intent to defeat competitors and obtain monopoly status does not satisfy the exclusionary conduct requirement. e.g., *Endsley v. City of Chi.*, 230 F.3d 276, 283 (7th Cir. 2000) ('By intent, we do not mean intent to obtain a monopoly or to capture an ongoing increase in market share. This of course is the aim of every business endeavor. Under § 2, intent to obtain a monopoly is unlawful only where an entity seeks to maintain or achieve monopoly power by anti-competitive means.').

44 *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 196 (3d Cir. 2005).

45 *Data Gen. Corp.* 36 F.3d at 1183 (citing *Eastman Kodak*, 504 U.S. at 483 ; *Aspen Skiing*, 472 U.S. at 608–11).

46 *New York v. Actavis PLC*, 787 F.3d 638, 654 (2d Cir. 2015) (taking issue with defendant's conduct because it forced patients to switch to a branded product for which a generic equivalent was not available, impeding 'generic competition by precluding generic substitution through state drug substitution laws').

47 *Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980) ('The [defendant] would have us consider each separate aspect of its conduct separately and in a vacuum. If we did, we might agree with the [defendant] that no one aspect standing alone is illegal. It is the mix of the various ingredients of [the defendant's] behavior in a monopoly broth that produces the unsavory flavor.').

48 *Microsoft*, 253 F.3d at 79 (quoting Areeda and Hovenkamp, *supra* note 13, Paragraph 651c) .

49 Although evaluating similar factors, courts have ruled that a firm's exclusive contracts may violate Section 2 even though the same level of foreclosure would not be illegal under Section 1. See *Microsoft Corp.*, 253 F.3d at 70 (explaining that although '[t]he basic prudential concerns relevant to §§ 1 and 2 are admittedly the same[,]' . . . that 'a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation'); see also *LePage's Inc. v. 3M*, 324 F.3d 141, 157 n.10 (3d Cir. 2003) ('The jury's finding against [plaintiff] on its exclusive dealing claim under § 1 of the Sherman Act and § 3 of the Clayton Act does not preclude the application of evidence of [defendant's]

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the general concepts noted just above, an exclusive dealing arrangement only violates Section 2 where it has a significant adverse impact on competition and lacks a sufficient business rationale.[50] Courts typically first consider the amount of competition foreclosed to rivals by the agreement, but also consider other factors, such as the strength of the parties' market positions, the length of the exclusivity arrangements, the use of coercion by the supplier,[51] and whether there was competition among suppliers for the exclusive contracts.[52] Importantly, the exclusivity requirements imposed by a firm need not be express; rather, retroactive rebates, market penetration or other volume targets can be 'as effective as mandatory purchase requirements' where, for example, customers fear losing a supplier if they fail to meet the targets.[53] In 2015, in *McWane, Inc. v. Federal Trade Commission*, the Eleventh Circuit affirmed an FTC ruling that defendant McWane's full support programme, in which dealers that bought from McWane's rivals might lose their McWane rebates or be prohibited from purchasing McWane products, resulted in substantial foreclosure and harm to competition.[54] The court found evidence showing that the programme 'contributed to key dealers freezing out' a new entrant, which 'stunted' the new entrant's growth.[55]

exclusive dealing to support [plaintiff's] § 2 claim.'). But see *Imaging Ctr., Inc. v. W. Md. Health Sys., Inc.*, 158 Fed. Appx. 413, 421 (4th Cir. 2005) (holding that district court did not err by refusing to consider whether conduct found not to be in violation of § 1 was a violation of § 2).

50 See, e.g., *Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, 859 F.3d 408 (7th Cir. 2017) (upholding summary judgment for 'dominant hospital' that entered exclusive contracts with commercial health insurance providers); *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74, 81 (2d Cir. 1999) (affirming summary judgment where plaintiff failed to show exclusive contracts' adverse impact on competition); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 237 (1st Cir. 1983) (upholding contract as legal where the defendant offered legitimate business rationales such as lower costs and stable source of supply).

51 The relevance of 'coercion' to the analysis is in doubt, but as noted, some courts will factor it into their assessment.

52 See, e.g., *Methodist Health Servs.*, 859 F.3d at 411–12 (affirming summary judgment for defendant where most exclusive contracts expired after a few years and there was 'competition-for-the-contract' when rebid); *Sterling Merch., Inc. v. Nestlé, S.A.*, 656 F.3d 112, 124 (1st Cir. 2011) (explaining that '[f]oreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent, and while high numbers do not guarantee success for an antitrust claim, "low numbers make dismissal easy"' ' (quoting *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 68 (1st Cir. 2004))) ; *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 78 (3d Cir. 2010) (affirming summary judgment for defendant supplier where purchasers 'freely entered into exclusive contracts' with supplier); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 185 (3d Cir. 2005) (reversing grant of summary judgment for defendant supplier where supplier imposed 'all-or-nothing choice' that dealers could only sell supplier's products); *CDC Techs., Inc.*, 186 F.3d at 80–81 (summary judgment upheld for defendant where competitor could reach customers through alternative distribution channels and exclusive arrangements were terminable on short notice).

53 *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 282 (3d Cir. 2012).

54 783 F.3d 814 (11th Cir. 2015). Although the FTC filed the complaint under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, both the FTC and Eleventh Circuit relied on Sherman Act Section 2 case law for their analyses. See id., at 827 n.10.

55 id. at 838. The court found sufficient evidence that the new entrant was frozen out by key dealers, despite this new entrant gaining 10 per cent of the domestic pipe-fitting market in two years. Moreover, the court found other evidence of harm to competition, including McWane's prices not falling in the face of a new entrant, the new entrant not investing in a new foundry, alternative channels not being

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Predatory pricing

Predatory pricing may also be examined under Section 2. Predatory pricing is 'pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run'.[56] Given that low prices are 'generally procompetitive', courts do not want to 'punish firms for being the most efficient producers'.[57] Accordingly, the Supreme Court, in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, outlined a two-part test for predatory pricing claims: plaintiffs must establish (1) prices 'below an appropriate measure of [the defendant's] costs' and (2) 'a dangerous probability' of the defendant 'recouping its investment in below-cost prices'.[58] As to part one, *Brooke Group* did not define what measure of costs should be used[59] and court rulings since *Brooke Group* have varied on the appropriate application.[60] For example, in 2015, the Fifth Circuit explained that average variable cost was a 'suitable surrogate' for marginal costs in the *Brooke Group* analysis and that rebates should be taken into account when evaluating the price component of the test.[61] The second part's application has been more straightforward. '[F]or recoupment to occur, the below-cost pricing must be capable' of driving rivals from the market and the alleged predator must be capable of sustaining supra-competitive prices after its rivals' exit.[62]

Loyalty discounts

Loyalty discounts, or incentives provided by a supplier to induce the purchase of its products or services, may violate Section 2. Firms with market power generally may offer competitive pricing and discounts to customers to incentivise large purchases or reward customer loyalty.[63]

available to the new entrant, and the fact that McWane's intent in creating the programme was to prevent the new entrant from becoming an effective competitor. id., at 838-40.

56 *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 (1986).

57 *Superior Prod. P'ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 326 (6th Cir. 2015).

58 509 U.S. 209, 222-24 (1993).

59 id., at 222 n.1.

60 Compare *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1080 (1st Cir. 1993) ('[P]ricing below variable cost [is] the normal test of predation . . . '), and *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 532 (5th Cir. 1999) ('In the wake of *Brooke Group*'s clarification of the standard, a plaintiff must show pricing below the standard this Court has long embraced as an appropriate measure of cost – average variable cost.'), with *Superior Products P'ship*, 784 F.3d at 325 ('While the appropriate measure of cost has some flexibility (as, say, between average variable and average total cost), this flexibility extends only to costs directly incurred, not all conceivable opportunity costs') (citations omitted) and *United States v. AMR Corp.*, 335 F.3d 1109, 1116 (10th Cir. 2003) ('Because there may be times when courts need the flexibility to examine both [average variable costs] as well as other proxies for marginal cost in order to evaluate an alleged predatory pricing scheme, we again decline to dictate a definitive cost measure for all cases.').

61 *Felder's Collision Parts, Inc. v. All Star Adver. Agency, Inc.*, 777 F.3d 756, 761-63 (5th Cir. 2015) ('The price versus cost comparison focuses on whether the money flowing in for a particular transaction exceeds the money flowing out').

62 id., at 225–26; see also *Stearns Airport Equip.*, 170 F.3d at 518, 529 (affirming summary judgment for the defendant where the plaintiff 'has introduced no evidence that its survival is threatened by the sales lost to the rare, sporadic predation that it alleges, and does not claim that the continuation of below-cost bids at this level – two percent at most – will drive it out of business').

63 See, e.g., *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 265-73 (2d Cir. 2001) (defendant incentive agreements upheld as legal); *W. Parcel Express v. United Parcel Serv. of Am., Inc.*, 190 F.3d 974, 976 (9th Cir. 1999) (defendant volume discount contracts affirmed as legal); *Advo, Inc. v. Phila.*

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However, courts have ruled that certain discount practices violate Section 2 where (1) the prices resulting from the discounts meet the standards of predatory pricing or (2) the discounts function as 'de facto' anticompetitive exclusive dealing arrangements.[64] This year, the Northern District of California held that Qualcomm's use of 'de facto' exclusive dealing contracts violated Section 2.[65] In so doing, the court focused on Qualcomm's agreement with Apple, which provided large monetary incentives to Apple for purchasing a substantial portion of its needs from Qualcomm and penalised Apple for purchasing from Qualcomm's rivals. The Court also examined Apple's importance to suppliers and sales volume, the duration of the arrangement (five years), Qualcomm's intent to foreclose rivals, and evidence showing Qualcomm's rivals were blocked from gaining a 'foothold' in the market through sales to Apple.[66]

Tying

Although more commonly pursued under Section 1, tying arrangements can also be challenged under Section 2.[67] Tying occurs when a supplier sells one product ('tying product') on the condition that a purchaser buys a second product ('tied product'). To succeed under Section 2, courts require actual or probable monopolisation of the tied or typing product market – namely, the defendant supplier used the tie to maintain a monopoly in the tying product market or to attempt to monopolise the tied market.[68] In *United States v. Microsoft Corporation*, the Justice Department challenged Microsoft's practice of tying its Windows operating system to the Internet Explorer (IE) web browser, including through 'excluding IE from the Add/Remove Programs utility' and 'commingling' Windows and IE code.[69] The DC Circuit determined that Microsoft's actions were anticompetitive because they deterred computer manufacturers from using rival browsers and deterred developers from choosing rival program interfaces, resulting in the maintenance of Microsoft's operating system monopoly.[70]

Newspapers, 51 F.3d 1191, 1203 (3d Cir. 1995) (defendant discount 'based on the total amount of dollars spent by a customer' was not antitrust violation); *Fedway Assocs. v. U.S. Treasury*, 976 F.2d 1416, 1418 (D.C. Cir. 1992) (explaining that a volume-based promotion would be legal under Sherman Act).

64 Compare *Virgin Atl.*, 257 F.3d at 266–72 (using predatory pricing framework in determining incentive program did not violate Section 2), with *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 281–89 (3d Cir. 2012) (analysing long-term incentive agreements as 'de facto exclusive dealing arrangements' and holding sufficient evidence existed for jury to find agreements anticompetitive). Notably, plaintiffs can allege these discount programme violate both Section 1 and 2 of the Sherman Act. See, e.g., id., at 267; *Virgin Atl.*, 257 F.3d at 262.

65 *Fed. Trade Comm'n v. Qualcomm Inc.*, No. 17-CV-00220, 2019 U.S. Dist. LEXIS 86219, at *261-87 (21 May 2019).

66 id., at *271-83. The Court also noted that Qualcomm entered 'de facto' exclusive deals with other cell phone manufacturers, which compounded the anticompetitive effects of the arrangement with Apple. id., at *283-87.

67 Under Sherman Act Section 1, a per se tying claim requires: '(1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.' *United States v. Microsoft Corp.*, 253 F.3d 34, 85 (D.C. Cir. 2001).

68 id., at 64–67; see also *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc.*, 63 F.3d 1540, 1550-53 (10th Cir. 1995).

69 253 F.3d at 64.

70 id., at 64–67.

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Bundled pricing

Bundled pricing, where the supplier offers discounts to buyers that purchase across multiple product or service lines, can also be challenged under Section 2. Offering low prices and discounts to customers has procompetitive benefits.[71] Therefore, courts have developed specific approaches to assess whether a bundled discount is illegal under Section 2, including analysing the foreclosure effects of the discounts or evaluating whether the discounts resulted in prices below cost.[72] In 2018, the District of Minnesota followed the Ninth Circuit and adopted a form of the price-below-cost analysis called the 'discount attribution test'.[73] That test applies the full discount offered on the bundle of products to the products in the competitive market. 'If the resulting price of the competitive product or products is below the defendant's incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of § 2.'[74] Despite accepting the 'discount attribution test' generally, the court rejected the plaintiff's experts' method for employing the test, in which the expert applied the discount to only 20 per cent of the competitive products in the bundle based on the theory that a new entrant could only contest for 20 per cent of the market.[75]

MFN clauses

Most-favoured-nation (MFN) clauses are agreements where a supplier guarantees that a buyer will receive its product or service at a price no higher (or a specific percentage lower) than the price it offers to any other buyer. As a vertical agreement, MFNs are generally analysed under the 'rule of reason' standard and can be explained by procompetitive justifications such as allowing buyers to take advantage of cost savings without having to renegotiate each purchase.[76] MFNs, however, have come under increasing scrutiny recently by courts and regulators, particularly in industries where one firm has market power or where similar MFNs are used by a group of competitors with market power. In two recent cases, *United States v. Blue Cross and Blue Shield*,[77] and *United States v. Apple, Inc.*,[78] the Department of Justice brought claims under Section 1 of the Sherman Act where defendants had MFNs with a substantial number of the suppliers in

71 See *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894-96 (9th Cir. 2008) (explaining that bundled discounts are 'pervasive' and 'generally benefit buyers').

72 Compare *LePage's Inc. v. 3M*, 324 F.3d 141, 154-57 (3d Cir. 2003) (using foreclosure analysis in affirming district court determination that bundle pricing was anticompetitive), with *PeaceHealth*, 515 F.3d at 903 (refusing to follow LePage, holding that 'the exclusionary conduct element of a claim arising under § 2 of the Sherman Act cannot be satisfied by reference to bundled discounts unless the discounts result in prices that are below an appropriate measure of the defendant's costs,' and adopting 'discount attribution standard').

73 *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC*, 351 F. Supp. 3d 1187, 1210–12 (D. Minn. 2018). '[T]he discount attribution test is performed by allocating the full amount of the discounts given by the defendant on the bundle . . . to the competitive product or products.' id. at 1210 (quoting *PeaceHealth*, 515 F.3d at 906).

74 id.,at 1207 (quoting *PeaceHealth* 515 F.3d at 906).

75 This application is referred to as the 'contestable share' approach. id.

76 See, e.g., *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) ('"Most favored nations" clauses are standard devices by which buyers try to bargain for low prices . . . .').

77 809 F. Supp. 2d 665 (E.D. Mich. 2011).

78 791 F.3d 290 (2d Cir. 2015).

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a particular industry (in these cases, MFNs with hospitals and book publishers). These same theories can be applied in Section 2 cases targeting a monopolist who obtains or maintains a monopoly through MFN clauses.

Refusal to deal with disloyal customers or suppliers

Generally, a business may refuse to deal with a 'disloyal' customer or supplier.[79] Courts have applied Section 2 liability, however, in certain circumstances, such as where the parties had a 'prior course of dealing' or where the business refusing to deal is forsaking profits.[80] The Department of Justice has also successfully pursued refusal to deal cases where the supplier at issue had market power and refused to deal with disloyal customers to maintain a monopoly.[81] The recent trend is that most courts have rejected refusal to deal with disloyal customer claims, so long as the decision is reached independently and is not part of a scheme to maintain monopoly power.[82]

Refusal to deal with competitor

A business only has a duty to deal with rivals in very narrow circumstances.[83] The seminal case permitting an antitrust claim based upon a refusal to deal with a competitor is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, in which the Supreme Court affirmed a jury verdict finding that defendant violated Section 2 of the Sherman Act.[84] The Supreme Court held that the defendant's withdrawal from its voluntary, profitable and prior course of dealing with its competitor 'was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival'.[85] The Supreme Court has since noted that '*Aspen Skiing* is at or near the outer boundary of § 2 Liability,' rejecting a refusal to deal theory where the defendant had not previously 'voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion' and where the products at issue 'are not otherwise marketed or available to the public'.[86]

79 *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009) ('As a general rule, businesses are free to choose the parties with whom they will deal . . . .').

80 See, e.g., *SOLIDFX v. Jeppeson Sanderson, Inc.*, 841 F.3d 827 (10th Cir. 2016).

81 See *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

82 See, e.g., *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 797 F.3d 1248 (11th Cir. 2015); *Insulate SB, Inc. v. Advanced Finishing Sys.*, 797 F.3d 538, 545 (8th Cir. 2015).

83 Requiring a business to cooperate with a competitor 'is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, rival, or both' to innovate. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–08 (2004). In addition, forced cooperation and negotiation between competitors may facilitate collusion, which the antitrust laws condemn, and, from a practical perspective, courts are not equipped 'to act as central planners, identifying the proper price, quantity, and other terms of dealing'. id. at 408.

84 472 U.S. 585 (1985).

85 id., at 610.

86 *Trinko* 540 U.S. 398 (2004); see also *Pac. Bell Tel. Co. v. linkLine Commc'n., Inc.*, 555 U.S. 438, 450 (2009) (holding that where a monopolist sells in both wholesale and retail markets, a competitor who complains that it is 'squeezed' by the monopolist's high prices in the wholesale market and its low prices in the retail market has no antitrust claim, absent proof that the monopolist has an antitrust duty to deal at wholesale or is engaging in predatory pricing in retail).

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Refusal to provide access – essential facilities doctrine

The essential facilities doctrine provides another narrow exception to the general rule that a firm has no duty to deal with its competitors. Developed in the Section 1 group boycott context, the doctrine may apply when Firm A cannot effectively compete in a market for goods or services without access to a facility owned by Firm B. In *MCI Communications v. AT&T*, for example, MCI argued that being able to connect to AT&T's nationwide local telephone network was necessary to MCI's ability to compete with AT&T for long-distance business.[87] The court explained that a refusal to allow access 'may be unlawful because a monopolist's control of an essential facility (sometimes called a "bottleneck") can extend monopoly power from one stage of production to another, and from one market into another'.[88] Most courts apply the four-part test developed by the Seventh Circuit in *MCI Communications*, requiring plaintiffs to demonstrate: '(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility'.[89] If a plaintiff establishes these elements, and the defendant does not respond with a legitimate business justification for denying access, the defendant must make the facility available on non-discriminatory terms to avoid violating Section 2.[90]

Refusal to license intellectual property

Ina typical intellectual property case, a firm that lawfully acquires intellectual property rights can license those rights as it chooses with one exception. The federal circuit courts are at odds over the exception's scope. The Federal Circuit, for example, has held that 'to refuse to sell or license in markets within the scope of the statutory patent' cannot violate Section 2 under any circumstance.[91] The Ninth Circuit has taken a more nuanced approach. In *Image Technical Services v. Eastman Kodak Co.*, the Ninth Circuit adopted 'a modified version of the rebuttable presumption created by the First Circuit in *Data General*', holding that 'while exclusionary

87 708 F.2d 1081 (7th Cir. 1983).

88 id., at 1132.

89 id., at 1132–3; see also *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991) ('A facility that is controlled by a single firm will be considered "essential" only if control of the facility carries with it the power to eliminate competition in the downstream market.'); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 540 (7th Cir. 1986) (holding that a facility that 'was not duplicable without an expenditure that would have been unreasonable in light of the size of the transaction such duplication would have facilitated' met the second element of the *MCI* test); *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990) ('[A] plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible.'); *Ideal Dairy Farms v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996) (holding that charging prices in excess of contractual amount to access facility did not amount to denial where rates did not prevent plaintiff from operating business); *MCI*, 708 F.2d at 1133 (holding as to the fourth element that 'MCI produced sufficient evidence at trial for the jury to conclude that it was technically and economically feasible for AT&T to have provided the requested interconnections').

90 *MCI*, 708 F.2d at 1132; *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1366-68 (9th Cir. 1992) (legitimate justifications for denying access properly led district court to grant defendant summary judgment on certain claims).

91 *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000).

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conduct can include a monopolist's unilateral refusal to license a [patent or] copyright', or to sell its patented or copyrighted work, a monopolist's 'desire to exclude others from its [protected] work is a presumptively valid business justification for any immediate harm to consumers'.[92]

None of these rules apply to instances in which the intellectual property at issue is a patent adopted by a standard setting organisation (SSO) as part of a technological standard. SSOs typically require that the holder of such a patent, referred to as a standard essential patent (SEP), license the SEP to all other members of the SSO on fair, reasonable, and non-discriminatory terms (FRAND). The FTC has repeatedly taken the position that failure to license according to FRAND standards constitutes 'unfair methods of competition' under Section 5 of the FTC Act.[93] The US District Court for the Northern District of California recently partially endorsed that view in *FTC v. Qualcomm Inc*, evaluating the defendant's refusal to license its SEPs according to FRAND terms under a slightly relaxed version of the *Aspen Skiing* framework and concluding that because Qualcomm had a duty to license to its rivals at FRAND rates and did not advance a reasonable procompetitive justification for refusing to do so, Qualcomm's conduct violated Section 2.[94] Courts have also held that deceiving an SSO into adopting a particular standard by promising to license an SEP on FRAND terms and then failing to do so may qualify as unlawful monopolisation.[95]

Product design

In some circumstances, a firm's modification of a product to make it incompatible with a competitor's component can trigger antitrust liability under Section 2. Generally, courts hesitate to evaluate whether a modified product represents an improvement over the previous version, leaving that determination to consumers and refusing to find liability when a plaintiff's only charge is that the modified product is not superior to the prior product.[96] When, however, the evidence suggests that a product modification stemmed from anticompetitive animus, raising substantial doubts about whether the modified product represents an improvement, courts are more willing to conclude that the conduct is predatory.[97] In the pharmaceutical context, courts take issue with product redesigns when a branded pharmaceutical company modifies a product

92 125 F.3d 1195, 1218 (9th Cir. 1997) (quoting *Data Gen. Corp. v. Grumman Syst. Support*, 36 F.3d 1147, 1187 (1st Cir. 1994)).

93 *Motorola Mobility LLC*, 2013 WL 3944149 (Fed. Trade Comm'n 23 July 2013).

94 No. 17-CV-00220-LHK, 2019 U.S. Dist. LEXIS 86219, at *249-61 (N.D. Cal. May 21, 2019).

95 *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) ('We hold that (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an SDO's reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct.').

96 *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 1005 (N.D. Cal. 1979), aff'd sub nom. *Transamerica Comput. Co. v. IBM*, 698 F.2d 1277 (9th Cir. 1983).

97 *C.R. Bard, Inc. v. M3 Sys.*, 157 F.3d 1340 (Fed. Cir. 1998); see also *United States v. Microsoft Corp.*, 253 F.3d 34, 75 (D.C. Cir. 2001) (holding that defendant's development of a runtime engine that was incompatible with its rivals' products but that allowed Microsoft's Windows application to run more smoothly was not problematic).

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in an alleged attempt to avoid generic competition to the prior product and stops selling the prior version, forcing patients to switch from one branded product to another before the generic version of the first product is available.[98]

Misuse of government process and intellectual property protections

In limited circumstances, filing litigation or triggering a regulatory or administrative review process may violate Section 2. Litigation filed with the aim not of prevailing but of impeding a competitor's ability to compete is not protected from antitrust scrutiny by the *Noerr-Pennington* doctrine, which otherwise protects one's ability to petition the government under the First Amendment.[99] Thus, for example, an objectively baseless suit for patent infringement that would prevent generic pharmaceutical competition may trigger a Section 2 violation if anti-competitive effects actually follow.[100] Similarly acquiring intellectual property rights via fraud qualifies as an ill-gotten monopoly that may violate Section 2,[101] as does delaying the FDA drug approval process for a generic drug by filing a citizen petition.[102]

98 Compare *New York v. Actavis PLC*, 787 F.3d 683, 653-55, 659 (2nd Cir. 2015) (finding Section 2 violation when patients were coerced to switch from one branded product to another that would not face generic competition for an extended period); with *Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 427, 431 (3rd Cir. 2016) (concluding that district court had properly dismissed Section 2 claim when the generic version of original product existed before modified branded product was introduced, meaning that patients were not coerced into switching from one branded product to another).

99 *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (holding that '[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.'); *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 51, 56–57 (1993) (noting that the *Noerr-Pennington* doctrine holds that '[t]hose who petition [the] government for redress are generally immune from antitrust liability,' with the exception that 'activity "ostensibly directed toward influencing governmental action" does not qualify for [First Amendment] immunity if it "is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor."' id. at 51 (alteration in original) (quoting *Noerr*, 365 U.S. at 144)).

100 *FTC v. AbbVie Inc.*, No. 14-5151, 2017 U.S. Dist. LEXIS 149824, at *32 (E.D. Pa. Sep. 15, 2017) (granting partial summary judgment to the FTC on the sham claim because 'AbbVie and Besins could not realistically have expected success on the merits of this issue or have had a reasonable belief that they had a chance to prevail,' leaving the FTC to establish anticompetitive intent and monopoly power).

101 *Walker Process Equip. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 176, 179 (1965).

102 e.g., *In re EpiPen Mktg., Sales Practices & Antitrust Litig.,* 336 F. Supp. 3d 1256, 1307 (D. Kan. 2018).

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Monopoly leveraging

Before the Supreme Court decided *Verizon Communications v. Law Offices of Curtis F. Trinko*, lower courts had not reached agreement on whether a firm that leverages its monopoly in one market to obtain an economic advantage in the second subjects itself to Section 2 liability.[103] In *Trinko*, the Court clarified that leveraging does not per se violate Section 2; rather, a plaintiff must establish that the leveraging at a minimum threatens monopolisation in the second market.[104]

Attempted monopolisation

A claim for attempted monopolisation requires a plaintiff to show that (1) defendants engaged in predatory or anticompetitive conduct; (2) defendants possessed the specific intent to monopolise; and (3) there was a dangerous probability of achieving monopoly power.[105] Courts analyse the first two prongs in the same manner as a standard monopolisation case.[106] Whether an attempted monopolist has a 'dangerous probability of achieving monopoly power' is a 'fact intensive' inquiry.[107] Courts consider factors such as 'significant market share coupled with anticompetitive practices, barriers to entry, the strength of competition, the probable development of the industry, and the elasticity of consumer demand.'[108] Although no factor is dispositive, 'courts focus principally on the defendant's share of the relevant market.'[109] This makes properly defining a relevant geographic and product market essential to alleging and proving an attempted monopolisation claim.[110]

Conspiracy to monopolise

To establish that defendants conspired to monopolise, a plaintiff must present evidence suggesting that the alleged co-conspirators consciously committed themselves to a common scheme designed to achieve an unlawful objective.[111] The performance of an overt act – although not necessarily an unlawful one – is a necessary element of conspiracy to monopolise, as is specific intent to achieve monopoly power.[112] Following the Supreme Court's decision in *Spectrum*

103 Compare *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979) (attempt to monopolise second market not necessary), with *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991) ('Unless the monopolist uses its power in the first market to acquire and maintain a monopoly in the second market, or to attempt to do so, there is no Section 2 violation.').

104 540 U.S. at 415 n.4.

105 *Ind. Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413 (7th Cir. 1989); see also *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993).

106 See, e.g., *Phila. Taxi Ass'n v. Uber Techs.*, 886 F.3d 332, 339–41 (3d Cir. 2018).

107 id., at 341–42.

108 id. at 342, (quoting *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 318-19 (3d Cir. 2007)).

109 See *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 940 F. Supp. 2d 367, 385 (E.D. La. 2013) (citing *Pastore v. Bell Tel. Co.*, 24 F.3d 508, 513 (3d Cir. 1994)).

110 See, e.g., *Spectrum*, 506 U.S. at 459; see also *United States v. Microsoft Corp.*, 253 F.3d 34, 81-82 (D.C. Cir. 2001).

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

112 *Am. Tobacco Co. v United States*, 328 U.S. 781, at 809 (1946).

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Sports v. McQuillan,[113] courts disagree about whether a plaintiff must show a dangerous probability that the conspiracy would have resulted in a monopoly, or merely that the conspiracy, if successful, would amount to illegal monopolisation.[114]

Private plaintiff considerations

To establish an entitlement to pursue damages for an alleged Section 2 violation, a private plaintiff must generally prove three things. First, the plaintiff must establish to a 'reasonable degree of certainty' that it has been injured in fact – namely harmed in a material or substantial way – by the alleged antitrust violation.[115] Second, the plaintiff must show that its injury is 'of the type the antitrust laws were intended to prevent' and that the injury 'flows from that which makes the defendant's acts unlawful'.[116] This requirement stems from *Brunswick Corp. v. Pueblo Bowl-O-Mat., Inc.*, in which the Supreme Court held that lossess suffered by several bowling alley operators were caused not by a restriction in the amount of competition or harm to the market as a whole, but rather by more vigorous competition following from Brunswick's acquisition of competing centres that otherwise would have gone out of business.[117] Finally, the plaintiff must establish that it is the proper plaintiff to pursue the claim, which takes into account the extent to which a plaintiff's injury is removed from the alleged violation.[118] The Supreme Court has identified several factors to consider regarding remoteness, including the 'causal connection between an antitrust violation and harm' to the plaintiff, 'the tenuous and speculative character of the relationship between the alleged antitrust violation and the [plaintiff's] alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy'.[119] The most concrete remoteness rule is that indirect purchasers cannot state claims under the federal antitrust laws, stemming from the fact that a defendant facing an antitrust challenge by a direct purchaser cannot generally allege that the direct purchaser was not injured because it passed on the alleged overcharge to the next purchaser in the chain.[120]

113 506 U.S. 447, 459 (1993)

114 *Compare Hannah's Boutique, Inc. v. Surdej*, 112 F. Supp. 3d 758, 771 (N.D. Ill. 2015) ('Plaintiff does not raise an issue of fact as to whether any claimed conspiracy to monopolize affected a substantial amount of interstate commerce.'), with *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003) ('To prevail, [plaintiffs] must show "specific intent to monopolize and anticompetitive acts designed to effect that intent." "[N]o particular level of market power or dangerous probability of success has to be alleged or proved . . . where the specific intent to monopolize is otherwise apparent from the character of the actions taken."' (alterations in original) (quoting *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980))).

115 *Int'l Travel Arrangers, Inc. v. W. Air Lines, Inc.*, 623 F.2d 1255, 1270 (8th Cir. 1980), cert. denied, 449 U.S. 1063 (1980).

116 *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990).

117 429 U.S. 477, 480-81 (1977).

118 See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986) ('A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons.').

119 *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 547 (1983).

120 *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 735 (1977); *Hanover Shoe, Inc. v. United Machinery Corp.*, 392 U.S. 481, 491–93 (1968).

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In contrast to a damages action brought under Section 4 of the Clayton Act, a private plaintiff is substantially more likely to meet the criteria necessary to pursue injunctive relief under Section 16 of the Clayton Act. That section provides that '[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity'.[121]

Remedies

Under Section 4 of the Clayton Act, a plaintiff can recover 'threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee'.[122] Unless a statutory exception applies, trebling occurs automatically. The most notable statutory exception prevents trebling if a defendant enters the federal leniency programme after self-reporting criminal violations of the Sherman Act to the Department of Justice.[123] Despite the near mandatory nature of trebling, most courts have concluded that instructing juries that treble damages must be awarded is improper, reasoning that juries aware of trebling may adjust damages downward and thereby undercut the deterrent effect intended by the spectre of treble damages in the first place.[124]

Under the Clayton Act, Section 16, ' injunctive relief has three primary purposes: "(1) putting an end to illegal conduct, (2) depriving violators of the benefits of their illegal conduct, and (3) restoring competition in the marketplace."'[125] While a court should not issue an injunction that is untethered from the injury, injunctive remedies may be as broad as necessary to serve Section 16's goals.[126]

121 15 U.S.C. § 26.

122 15 U.S.C. § 15(a).

123 Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), 15 U.S.C. § 1 (mandating that damages recoverable from leniency applicants 'shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods and services affected by the violation').

124 e.g., *HBE Leasing Corp. v. Frank*, 22 F.3d 41, 46 (2d Cir. 1994); *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1242-43 (5th Cir. 1974).

125 *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.,* 729 F.2d 1050, 1059 (6th Cir. 1984) (quoting *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 234 (9th Cir. 1976)).

126 See *California v. Am. Stores Co.*, 495 U.S. 271, 281 (1990) (noting that Section 16 of Clayton Act provides broad authority, including authority to require divestiture); *Omega World Travel v. Trans World Airlines*, 111 F.3d 14, 16 (4th Cir. 1997) (reversing grant of preliminary injunction that did not remedy alleged violation); *John B. Hull, Inc. v. Waterbury Petroleum Prods.*, 588 F.2d 24, 30 (2d Cir. 1978) ('[A] decree cannot enjoin conduct about which there has been no complaint,' or 'enjoin all possible breaches of the law.' (citation omitted)).

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Appendix 1

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Barbara Sicalides is co-chair of the antitrust and competition section of Pepper Hamilton LLP's trial and dispute resolution practice group and practices out of the firm's Washington, DC and Philadelphia offices. Ms Sicalides focuses her practice on antitrust litigation, class actions and distribution or dealer cases. She also routinely advises international and domestic clients on merger, civil conduct and criminal antitrust investigations and other matters before the Antitrust Division of the US Department of Justice, the US Federal Trade Commission, and state attorneys general.

Ms Sicalides's antitrust experience has covered a wide range of industries and antitrust claims under the Sherman Act, Robinson-Patman Act, Clayton Act, and numerous state statutory and common laws. She provides real-time antitrust advice with the aim of deploying practical solutions for achieving the client's business goals with the lowest possible legal risk. Her practice also includes working with companies to design and implement cost-effective, dynamic, custom compliance programmes that leave the business teams with a deeper understanding of what is at stake and how to minimise or avoid antitrust risks.

Ms Sicalides speaks regularly and has authored numerous articles and book chapters on competition-related issues and currently serves on the editorial board of the American Bar Association's *State Antitrust Practice and Statutes* (5th edition). She is immediate past chair of the American Bar Association's business law section antitrust committee.

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A substantial portion of Ms Breedlove's practice focuses on the health care and life sciences industries, where she litigates on behalf of the key players across the innovation and care delivery spectrum – from biotech, pharmaceutical and medical device companies to health care providers. Ms Breedlove also applies her deep industry understanding to advise clients in the health sciences on how to avoid litigation risk and liability when making regulatory filings, entering agreements with suppliers and customers, developing marketing strategies, structuring joint venture and licence arrangements, and settling litigation.

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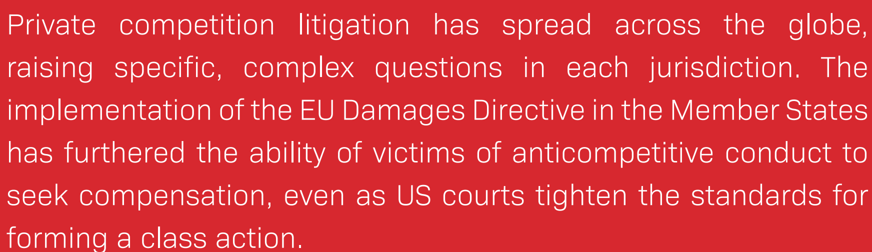

Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

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As the editors of this publication note, 'litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.'

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