Santa Clara Law Review

Volume 21 | Number 1 Article 5

1-1-1981

Expanding the Standard for Attempts to Monopolize: The Recommendations of the National Commission for the Review of Antitrust Laws and Procedures

Timothy J. Buchanan

COMMENTS

EXPANDING THE STANDARD FOR ATTEMPTS TO MONOPOLIZE: THE RECOMMENDATIONS OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES

I. INTRODUCTION

Prolonged debate has not resolved a major controversy in antitrust law concerning the proper definition and scope of the "attempt to monopolize" offense under section 2 of the Sherman Antitrust Act.[1] A majority of federal courts retain the time-honored view that attempt liability will lie if defendant's conduct evidenced a specific intent to monopolize and defendant possessed sufficient market power to generate a "dangerous probability" of actual monopolization.[2] Certain courts and commentators, however, would devitalize market power considerations in attempt cases, focusing instead upon the anticompetitive severity of defendant's conduct.[3] The

---

1. Sherman Act § 2 provides in part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

15 U.S.C. § 2 (1976).

2. *E.g.*, Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068, 1079 & n.14 (3d Cir. 1978); Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186, 1192 (5th Cir. 1978); Kearney & Trecker Corp. v. Cincinnati Milacron, Inc., 562 F.2d 365, 373 (6th Cir. 1977); FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); McDaniel v. General Motors Corp., [1980-81] TRADE CASES (CCH) ¶ 63,043 (E.D.N.Y. 1979); Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 478 F. Supp. 243, 268 (E.D. Pa. 1979); Fiorino v. Turner, 476 F. Supp. 962, 963 (D. Mass. 1979); Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 403 (D. Del. 1978). *See generally* Annot., 27 A.L.R. Fed. 762 (1976); 2 E. KINTNER, FEDERAL ANTITRUST LAW, § 13.1 (1980); 2 J. VAN KALINOWSKI, ANTITRUST LAWS & TRADE REGULATION § 9.01 (1978).

3. The Ninth Circuit's qualified rejection of the market power requirement is discussed in connection with notes 49-65 *infra*.

Commentary critical of the majority approach includes 3 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (1978) [hereinafter cited as AREEDA & TURNER]; L. SULLIVAN, HANDBOOK OF THE LAW

United States Supreme Court has consistently denied *certiorari* in attempt cases[4] and thus has declined to settle the issue.

In late 1977, President Carter created the National Commission for the Review of Antitrust Laws and Procedures[5] (hereinafter Commission). The President directed the Commission to "study and make recommendation," "within the framework of existing antitrust laws," on two general problem areas: 1) reducing the time consumption of complex antitrust cases and fashioning more effective remedies in such cases, and 2) the desirability of maintaining various existing antitrust exemptions and immunities.[6] The appropriate scope of attempted monopolization was one of several specific concerns,[7] and the President asked the Commission to consider "simplification of the standards required to establish" the offense.[8]

OF ANTITRUST 137-40 (1977); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373 (1974); Baker, *Section 2 Enforcement—The View From the Trench*, 41 ANTITRUST L.J. 613 (1972); Blecher, *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market"*, 38 GEO. WASH. L. REV. 215 (1969); Turner, *Antitrust Policy and the Cellephane Cases*, 70 HARV. L. REV. 281 (1956); Note, *The Role of Attempt to Monopolize in Antitrust Regulation: An Economic and Social Justification for a New Approach*, 31 VAND. L. REV. 309 (1978); Comment, *The Attempt to Monopolize Charge: The Sherman Act's Atrophied Arm*, 48 MISS. L.J. 55 (1977); Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 COLUM. L. REV. 1451 (1973) [hereinafter cited as *Market Power as Requisite*]; Note, *Attempt to Monopolize: The Offense Redefined*, 1969 UTAH L. REV. 704 (1969).

4. Recent denials of *certiorari* include Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); Greyhound Computer Corp., Inc. v. IBM, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d. 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977).

The Supreme Court has not completely abdicated the field. In past decades the Court has addressed the attempt offense, but the results have been inconclusive. *See* notes 12-28 and accompanying text *infra*.

5. Exec. Order No. 12,022, 3 C.F.R. 155 (1977), *as amended by* Exec. Order No. 12,052, 3 C.F.R. 173 (1978), *reprinted in* 15 U.S.C. § 1 app., at 857 (Supp. II 1978). The amendment increased the Commission's membership from 15 to 22.

6. *Id.* § 2(a)(1).

7. Other specific problem areas mentioned in the Executive Order were revision of pleading and discovery practices, judicial control of dilatory behavior, amendment of evidentiary practices, structural relief for violations, and nonjudicial alternatives for resolution of complex cases. Monopolization and attempt to monopolize were evidently the only substantive offenses to be considered. *Id.* § 2(a)(1)(i)-(vii).

8. *Id.* § 2(a)(1)(vi). The Commission was given six months from the time its

The Commission issued its report[9] in January 1979. Of fifteen chapters, one was devoted to revision of the prevalent approach to the attempt offense. This comment will analyze and assess the Commission's suggested revisions, focusing particularly on the recommended "balancing" approach whereby defendant's market power and conduct are relevant but not always controlling in determining "dangerous probability" of success. It will be suggested that the Commission's proposal will not simplify attempt litigation in a procedural sense but is perhaps more attuned to the basic objectives of the Sherman Act than the current majority approach.

II. Current Judicial Approaches to the "Dangerous Probability" Requisite

As previously noted, attempt to monopolize has traditionally been viewed as requiring both specific intent to monopolize and dangerous probability of success. The specific intent requirement is unanimously accepted by the courts[10] and is thus not critically discussed. Major debate has focused on the dangerous probability requirement; this element was explicitly the Commission's chief concern.[11]

Debate revolves around two central questions: First, whether the dangerous probability requirement should be discarded altogether, and second, if retained, whether the requirement should be expanded to reach anticompetitive conduct undertaken by a firm with less than substantial market power. The Commission's alternatives thus included retaining the traditional market-power-oriented approach, eliminating dangerous probability as a requisite element in attempt cases, or revising the traditional definition of dangerous probability

---

members were selected to complete its work. *Id.* § 2(b).

9. Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures (1979), *reprinted in* Antitrust & Trade Reg. Rep. (BNA) (Special Supp., Jan. 18, 1979) [hereinafter cited as Commission Report].

10. The Supreme Court has made it clear that a specific intent to monopolize is an essential ingredient of the attempt offense. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953); United States v. Griffith, 334 U.S. 100, 105 (1948); Swift & Co. v. United States, 196 U.S. 375, 396 (1905). *See* 2 E. Kintner, *supra* note 2, § 13.3, at 412; Cooper, *supra* note 3, at 392-400; Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 Cornell L. Rev. 1121, 1135-49 (1973); *Market Power as Requisite, supra* note 3, at 1451.

11. Commission Report, *supra* note 9, at 144-45.

by reducing the overriding importance of market power in the classic approach. As discussed below, the Commission preferred expansion to rejection. Before considering the Commission's proposal, however, it is useful to summarize the competing judicial interpretations of the dangerous probability element.

A. *The Traditional View: Dangerous Probability Measured by Proximity to Actual Monopoly Power*

1. *Origins of dangerous probability: the Supreme Court.* Justice Holmes introduced the elements of attempted monopolization in *Swift & Co. v. United States*[12] with the following language:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. . . . But when the intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against the dangerous probability as well as against the completed result.[13]

Later in the same opinion, Holmes stated:

> Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree.[14]

Though most courts have apprehended *Swift* as setting forth a double-element prima facie case,[15] some courts and commentators have seized upon the ambiguity and context of

---

12. 196 U.S. 375 (1905).

13. *Id.* at 396 (citing Commonwealth v. Peaslee, 177 Mass. 267, 272, 59 N.E. 55, 56 (1901)). Holmes wrote *Peaslee* as Chief Justice of the Massachusetts Supreme Court. The case recognized the criminal law distinction between preparation and attempt:

> [S]ome preparations may amount to an attempt. It is a question of degree. If the preparation comes *very near* to the accomplishment of the act, the intent to complete it renders it *so probable* that the act will be a misdemeanor. . . .

177 Mass. at 272, 59 N.E. at 56 (emphasis added). In *Swift,* Holmes claimed that the same distinction applies to attempt cases under the Sherman Act. 196 U.S. at 402.

14. 196 U.S. at 402.

15. *See* note 2 and accompanying text *supra*.

Holmes' words to argue that dangerous probability should not be a *sine qua non* of the offense.[16] More troubling was the unexplicated meaning of "dangerous probability" and the concomitant evidentiary problem: could the element be inferred from market power, wrongful conduct, or both?[17]

Subsequent Supreme Court opinions in this area have scarcely illuminated *Swift*. The few cases[18] that discuss attempt have fallen into two general categories: 1) cases in which the Court focused on the specific intent element[19] and, finding insufficient evidence to support the element, rejected plaintiff's attempt claim without inquiring into dangerous probability,[20] and 2) cases in which monopoly power[21] in one

---

16. The Ninth Circuit Court of Appeals treatment of dangerous probability is discussed in connection with notes 49-65 *infra*. *See also* L. SULLIVAN, *supra* note 3, at 137-38 (Holmes was stating the common law rationale for the specific intent requirement in attempt cases; dangerous probability flows from the evil intent alone); Hawk, *supra* note 10, at 1126 n.21 (noting the ambiguity); *Market Power as Requisite, supra* note 3, at 1454 (noting the ambiguity).

17. The *Swift* opinion gave no indication of possible criteria for determining specific intent or dangerous probability. Defendants in *Swift* allegedly controlled about 60% of the national trade in fresh meats. 196 U.S. at 391. The appeal, however, concerned the sufficiency of a bill in equity, hence the Court did not consider the evidentiary matters involved. This fact, of course, affects the precedential value of the case in the attempt area. *See* Hawk, *supra* note 10, at 1125-26 & n.21.

18. A major reason for the paucity of Supreme Court cases on the attempt offense is that attempt is usually charged in conjunction with other Sherman Act violations, especially that of actual monopolization under § 2. Though the Act sets forth monopolization and attempt to monopolize as separate offenses, note 1 *supra*, and the Supreme Court has indicated that the offenses are analytically distinct, *see* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 61 (1911), attempt often merges into the monopolization offense at trial and on appeal. *E.g.*, American Tobacco Co. v. United States, 328 U.S. 781, 783 (1946). *See also* E. KINTNER, *supra* note 2, § 13.1, at 404-05.

19. In United States v. Columbia Steel Co., 334 U.S. 495 (1948), the Court stated: "even though the restraint effected may be reasonable under § 1, it may constitute an attempt to monopolize under § 2 if a specific intent to monopolize may be shown." *Id.* at 531-32. The Court made no mention of the *Swift* dangerous probability requirement, though such inquiry was not necessary since the Court found no evidence of specific intent. *Id.* at 520-27. *See also* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626-27 (1953).

20. "Dangerous probability" language has been used in only three Supreme Court cases since *Swift*. In American Tobacco Co. v. United States, 328 U.S. 781 (1946), the Court expressly approved a jury instruction that included dangerous probability as an element of attempted monopolization. *Id.* at 785, 815. Attempt was not, however, an issue before the Court, as *certiorari* was explicitly limited to issues surrounding actual monopolization. *Id.* at 782. The opinion is thus of questionable authority in the attempt area. *See* Cooper, *supra* note 3, at 384 n.34; *Market Power as Requisite, supra* note 3, at 1457.

In United States v. Griffith, 334 U.S. 100 (1948), the Court quoted the *Swift* market has been used as leverage to obtain competitive advantages in another.[22] The latter type primarily involves misuse of *existing* monopoly power[23] rather than the classic situation, apparently addressed in *Swift,* in which a firm with less than monopoly power attempts to gain that power in a single market.

As a result, the Court's opinions regarding dangerous probability have been inconclusive.[24] The cases have been silent beyond an occasional indirect[25] reminder that the element exists and a perfunctory reference to Justice Holmes' comments in *Swift*. The closest the Court has come to explaining the element was in dictum in a 1965 monopolization case:[26] monopolization *and* attempts to monopolize require assessment of defendant's market power in order to determine "ability to lessen or destroy competition."[27] Dangerous probability was not, however, discussed.[28] Largely by default,

"dangerous probability" language, but did so in elaborating the specific intent requirement and not the dangerous probability element. *Griffith* is discussed in connection with notes 22-23 *infra.*

Finally, the Court quoted the *Swift* passage in Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951). However, *Lorain* was a misuse of monopoly power case, *see* notes 22-23 *infra,* thus the Court had no occasion to comment on the meaning of dangerous probability.

21. The prevailing judicial interpretation of "monopoly power" is discussed below. *See* notes 31-41 and accompanying text *infra.*

22. "[T]he use of monopoly power, however lawfully acquired, to gain a competitive advantage, or to destroy a competitor, is unlawful." United States v. Griffith, 334 U.S. 100, 107 (1948). The point was repeated in Lorain Journal Co. v. United States, 342 U.S. 143, 154 (1951), and more recently in Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973).

23. *See* Hawk, *supra* note 10, at 1156-59. Professor Hawk argues that misuse of monopoly power cases, such as United States v. Griffith, 334 U.S. 100 (1948), should be treated as "unique" offenses under § 2 of the Sherman Act. Hawk, *supra* note 10, at 1158-59.

24. *See* E.J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 305 (10th Cir. 1975); *Market Power as Requisite, supra* note 3, at 1458.

25. The reminders have been indirect since the Court has never addressed or explained the dangerous probability element. *See* notes 17-20 and accompanying text *supra.*

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

27. *Id.* at 177. It should be noted that the Court has in dictum reached the contrary conclusion that power inquiry is relevant only when actual monopolization is alleged. United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 395 n.23 (1956); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940). The controversy surrounding the cryptic *duPont* footnote is discussed in note 53 *infra.*

28. Dangerous probability was not mentioned because attempt itself was mentioned only once in the brief opinion. Monopolization was evidently the only § 2 vio-

the Court has left to lower federal courts the responsibility of developing a coherent attempt analysis.

2. *The lower federal court majority.* Lower courts, following the lead of Justice Holmes' criminal law analogue,[29] have closely related the attempt offense to the definition of completed monopolization.[30] The result has been twofold: the attempt offense requires a showing of specific intent to monopolize and dangerous probability of success; dangerous probability exists when a defendant possesses market power proximate to monopoly power.

The latter fold concerning the existence of a dangerous probability is derived from Justice Holmes' proximity concept and from the definition of monopolization. In *United States v. Grinell Corp.*,[31] the Supreme Court stated that monopolization 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 historical accident.[32]

Thus, monopoly is not in itself proscribed, a conclusion that runs consistently through judicial interpretation of the Sherman Act.[33] Of paramount concern in attempt analysis is the monopoly power element, since attempt is formulated in terms of specific intent to monopolize and proximity to monopoly power.

---

lation alleged in the case. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174 (1965).

29. *See* note 13 *supra.*

30. 3 AREEDA & TURNER, *supra* note 3, ¶ 820, at 312; Cooper, *supra* note 3, at 378-80.

31. 384 U.S. 563 (1966).

32. *Id.* at 570-71.

33. *See, e.g.,* American Tobacco Co. v. United States, 328 U.S. 781, 813-14 (1946), *quoting* Judge Hand's influential opinion in the *Alcoa* case, United States v. Aluminum Co. of America, 148 F.2d 416, 427-32 (2d Cir. 1945); United States v. International Harvester Co., 274 U.S. 693, 708 (1927); United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920).

Indication that monopoly power could, without more, be a § 2 violation was given in United States v. Griffith, 334 U.S. 100, 107 (1948). See the well-known analysis of the *Griffith* problem in United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D. Mass. 1953). In *Grinnell,* however, the Court solidified the idea that mere existence of monopoly power, without more, is not monopolization. Beyond power, it is unclear what the Court requires. 3 AREEDA & TURNER, *supra* note 3, ¶ 613, at 34.

Monopoly power is the "power to control prices or exclude competition,"[34] and is inferable from a "predominant share of the market."[35] Determination of "relevant market" and of defendant's share of that market are thus crucial in actual monopolization cases.[36] Assuming the validity of the criminal law analogy, it is logical to approach the dangerous probability element of attempted monopolization in terms of market share "dangerously close" to a predominant share.[37] A complete understanding of attempt thus requires examination of judicial standards for determining what market shares are considered "predominant" and the confusion that inevitably surrounds determination of proximity to such predominance.

Since the influential *United States v. Aluminum Co. of America*[38] opinion, courts have developed a convenient guideline in monopolization cases to measure the predominance of market share: shares in the neighborhood of seventy percent[39] and up are inherently suspect and will likely fulfill the monopoly power requirement of that offense. In Supreme Court cases, the lowest market share resulting in liability was seventy percent, in *United States v. Paramount Pictures, Inc.*[40]

---

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

The Court has similarly stated that "the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so." American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946).

Market power in general is usually defined as "the ability to raise price by restricting output." 2 AREEDA & TURNER, *supra* note 3, ¶ 501, at 322.

35. 384 U.S. at 571.

The question in all monopolization cases surrounds the definition of "predominant." *See* notes 37-41 *infra*.

Though market share is the most popular criterion for determining market power, a comprehensive approach would probably add product differentiation, since "[w]ith physical differences, performance characteristics will vary to some degree, and there is a higher likelihood that a substantial number of buyers will consider the one product distinctly superior to the others." 2 AREEDA & TURNER, *supra* note 3, ¶ 504b, at 326. This criterion was discussed in United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 392-93 (1956), and was more recently utilized in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 64 (1977) (White, J., concurring).

36. *See* United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 392-404 (1956); Hawk, *supra* note 10, at 1151.

37. *See, e.g.*, Hawk, *supra* note 10, at 1154-55.

38. 148 F.2d 416 (2d Cir. 1945).

39. *Market Power as Requisite*, *supra* note 3, at 1460 & n.69. The 70% figure is derived from Judge Hand's comment in *Alcoa* that, whereas a 90% market share is "enough to constitute a monopoly . . . it is doubtful whether sixty or sixty-four percent would be enough." 148 F.2d at 424. *See also* note 40 *infra*.

40. 334 U.S. 131 (1948). *See generally* Cliff Food Stores, Inc. v. Kroger, Inc.,

Thus, though the approach may seem arbitrary, it has led to a fairly consistent theory of liability for completed monopolization.[41]

The same cannot be said of judicial approaches to attempted monopolization. The interpretation of dangerous probability in terms of proximity to monopoly has led the majority of courts to require that an attempt plaintiff plead and prove defendant's market share as an element of the prima facie case.[42] The nebulous "proximity" concept, however, has precluded meaningful standardization of market share analysis in attempt cases. Something less than monopoly power is required in most cases, but how much less is unclear.

Thus, while it can be said generally that most courts hold market shares of greater than thirty percent[43] to generate a dangerous probability of successful monopolization, some courts have found market shares in the fifty to sixty percent range insufficient.[44] An indication of the confusion and inconsistency in the lower courts is the apparent requirement in some courts that a defendant possess *actual* monopoly power for dangerous probability to exist.[45] This latter misconceived

---

417 F.2d 203, 207 n.2 (5th Cir. 1969).

41. *Market Power as Requisite, supra* note 3, at 1453.

42. In addition to the cases cited in note 2 *supra*, *see, e.g.*, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 554 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); Mullis v. Arco Petroleum Corp., 502 F.2d 290, 297 (7th Cir. 1974); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974).

43. Professor Cooper has stated that firms with market shares around 30% and up "should start to worry about attempt liability." 3 AREEDA & TURNER, *supra* note 3, ¶ 835c, at 349 & n.15, *quoting* E. Cooper, Dangerous Probability and Market Share Analysis in Attempts to Monopolize, (paper delivered at Southwestern Legal Foundation, February 12, 1976). Case law in the area generally supports Cooper's conclusion. *See, e.g.*, Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068, 1080 (3d Cir. 1978)(15.5% market share insufficient); Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1368 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977)(20% share insufficient); Mullis v. Arco Petroleum Corp., 502 F.2d 290 (7th Cir. 1974)(3% share insufficient); Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 404 (D. Del. 1978)(35% share sufficient). *But see* Mowery v. Standard Oil Co. of Ohio, 463 F. Supp. 762 (N.D. Ohio 1976)(33.3% share insufficient); Lektro-Vend Corp. v. Vendo Co., 403 F. Supp. 527, 534 (N.D. Ill. 1975)(market share "probably over 20%," sufficient). *See generally* 3 AREEDA & TURNER, *supra* note 3, ¶ 835, at 348-49.

44. United States v. Empire Gas Co., 537 F.2d 296, 305 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977)(shares of 50% and 47% insufficient); General Communications Eng'r, Inc. v. Motorola Communications & Elecs., 421 F. Supp. 274, 291-92 (N.D. Cal. 1976)(64% share insufficient); Diamond Int'l Corp. v. Walterhoefer, 289 F. Supp. 550, 578 (D. Md. 1968)(51% share insufficient).

45. *See* United States v. Empire Gas Corp., 537 F.2d 296, 305 (8th Cir.

approach obviates, of course, inquiry into proximity: defendant must be virtually guilty of monopolization in order for *attempt* liability to arise.

To summarize, the majority of courts require a plaintiff to establish that defendant's market share is substantial enough to create a dangerous probability of successful monopolization.[46] In addition, plaintiff must prove that defendant specifically intended to monopolize—usually evidenced circumstantially by anticompetitive conduct.[47] Practically speaking, courts usually determine attempt claims on the market power analysis:[48] if defendant's market share is regarded as less than dangerous, inquiry into conduct is unnecessary, no matter how anticompetitive such conduct may have been. It is this anomaly that prompted judicial modification of market power analysis in a minority of courts, most forcefully in the Ninth Circuit.

Expansion: The Ninth Circuit Approach

The most explicit rejection of the traditional approach to the attempt to monopolize has come in the Ninth Circuit. In the seminal case, *Lessig v. Tidewater Oil Co.*,[49] the court expressly rejected dangerous probability as a necessary element of attempted monopolization.[50]

In *Lessig*, a service station owner sued his supplier under the Sherman and Clayton Acts alleging unlawful exclusive dealing and tying arrangements, price fixing, and attempt to monopolize. On the attempt issue, defendant argued that because plaintiff's evidence had not established a dangerous probability of success in a relevant market, the attempt claim must fail.[51] The court stated:

1976)(citing Judge Hand's market power guideline for *actual* monopolization, *see* notes 38-39 and accompanying text *supra*, in concluding that market shares of 50 and 47% were insufficient to establish dangerous probability); Dankese Eng'r, Inc. v. Ionics, Inc., 469 F. Supp. 149, 152-53 (D. Mass. 1979)(attempted monopoly requires that plaintiff establish the existence of monopoly power and an intent to monopolize).

46. *See* notes 2 & 42 *supra*.

47. *See* 3 AREEDA & TURNER, *supra* note 3, ¶ 822a, at 315 & n.4; Smith, *Attempt to Monopolize: Its Elements and Their Definition*, 27 GEO. WASH. L. REV. 227, 230 (1958).

48. *See Market Power as Requisite*, *supra* note 3, at 1460.

49. 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

50. *Id.* at 474.

51. *Id.*

> We reject the premise that probability of actual monopolization is an essential element of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires. . . .[52]

The court added that the "relevant market is not in issue" in attempt cases.[53]

The decision did not illuminate the intent issue, and, as subsequent developments within the Ninth Circuit reveal, the extent to which dangerous probability is important has been disputed.[54] Some cases have expressly required a showing of dangerous probability,[55] while others adhere to the *Lessig* principle and see market power and dangerous probability as relevant but not essential.[56] As a result, the *Lessig* treatment has been somewhat restricted within the circuit[57] and has been expressly rejected by many courts outside the circuit.[58]

The most recent cases indicate that the Ninth Circuit requires proof of dangerous probability, but that such proof need not take the form of market power evidence.[59] Thus, an

---

52. *Id.*

53. *Id.* (citing the monopolization case of United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 395 n.23 (1956)). The cryptic "footnote 23" of *duPont* led Professor Turner to argue that market evidence is irrelevant in attempt and conspiracy cases under § 2 of the Sherman Act. Turner, *supra* note 3, at 281, 304-05 (1956). The footnote rejects several cases put forth by the government in favor of its definition of the market in that case, some for the apparent reason that they involved conspiracies or attempts to monopolize, in which case the relevant market is "not in issue." Professor Turner's interpretation of the footnote has been disputed. *See, e.g.*, Smith, *supra* note 47, at 240-44. The Ninth Circuit has been alone in adopting Professor Turner's interpretation of the footnote.

54. *See* Kaye, *Attempt to Monopolize in the Ninth Circuit: The Legacy of Lessig*, 12 WILLAMETTE L.J. 331, 344 (1976)("[T]he legacy of [*Lessig*] has, by and large, been confusion.").

55. *E.g.*, Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); Cornwell Quality Tools Co. v. C.T.S. Co., 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

56. *E.g.*, Moore v. Jas. H. Matthews & Co., 473 F.2d 328, 332 (9th Cir. 1972); Hallmark Indus. v. Reynolds Metals Co., 489 F.2d 8, 12 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974); Knutson v. The Daily Review, Inc., 548 F.2d 795, 814 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

57. *See, e.g.*, 3 AREEDA & TURNER, *supra* note 3, ¶ 832, at 338-39 & nn.13-14.

58. *Id.* at 338 n.12.

59. *E.g.*, Gough v. Rossmoor Corp., 585 F.2d 381, 390 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 853 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); Purewater Resources v. Consolidated Foods Corp., [1980-1] TRADE CASES (CCH) ¶ 63,064 (N.D. Cal. 1979). *See gen-*

attempt plaintiff may prove such probability by "proof of specific intent to control prices or destroy competition in a portion of the market. . . accompanied by predatory conduct toward that end."[60] Apparently, such intent and conduct alone create a dangerous probability of success.[61] Nonetheless, independent proof of dangerous probability is preferable,[62] and if plaintiff does not produce evidence of defendant's market power then "he must demonstrate conduct which is clearly threatening to competition or clearly exclusionary" in order to prevail.[63]

In sum, the Ninth Circuit has not categorically rejected dangerous probability or market power as criteria for determining attempt liability. Sharing a view propounded in varying degrees by certain commentators in the field,[64] the Ninth Circuit sees power and conduct as relevant, but in a case of "clearly" anticompetitive conduct, the power inquiry may be eschewed altogether. Presumably, the premise of this view is that very strong evidence of specific intent and anticompetitive conduct will, without more, create a dangerous probability of success. The President's Commission recommended a similar approach.[65]

III. The Commission Report and the "Sliding Scale" Recommendation

While reducing the complexity of antitrust litigation was the Commission's overall concern,[66] the report makes it clear that in the attempt to monopolize area the primary concern

---

erally Sherman v. British Leyland, Ltd., 601 F.2d 429, 453 n.47 (9th Cir. 1979).

60. Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 853 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

61. *Id.* at 853-54.

62. *Id.* at 854.

63. *Id.* at 854 n.4.

64. *E.g.*, 3 Areeda & Turner, *supra* note 3, ¶ 836, at 350-55 (power evidence relevant in all cases except those involving patently anticompetitive conduct); Baker, *supra* note 3, at 620 (eliminate dangerous probability element); Blecher, *supra* note 3, at 215 (eliminate dangerous probability element); Turner, *supra* note 3, at 281 (eliminate market power inquiry); Note, *supra* note 3, at 704 (eliminate dangerous probability element).

65. *See* notes 88-98 and accompanying text *infra*.

66. Exec. Order No. 12,022, 3 C.F.R. 155, 156 (1977), *as amended by* Exec. Order No. 12,052, 3 C.F.R. 173 (1978), *reprinted in* 15 U.S.C. § 1 app., at 857 (Supp. II 1978). *See* text accompanying notes 6-8 *supra*.

was effective antitrust enforcement.[67] Noting the inconsistent judicial approaches to the attempt offense, the report states that the Commission's main inquiry was into alleged impairment of enforcement due to the "overly restrictive" standard adopted by the majority of courts.[68] Thus, the Commission assessed testimony of persons who asserted that the market power approach leaves certain forms of "plainly predatory" conduct unchecked.[69] Tempering the enforcement inquiry was the fundamental notion that antitrust statutes "must not be so broad as to deter legitimate, vigorous competitive behavior."[70]

A. *The "Lacuna" Problem*

The Commission indicated that the prevailing interpretation of "dangerous probability" is "unnecessarily strict" and "diminishe[s] the ability of Sherman Act Section 2 to reach unilateral anticompetitive conduct."[71] Since a business firm with less than a twenty-five to thirty percent market share apparently cannot be guilty of attempt, regardless of the anticompetitive severity of its conduct,[72] a gap arguably exists in section 2 enforcement. Some commentators call this problem the "lacuna" effect.[73]

The Commission illustrated the problem in *United States v. Empire Gas Co.*,[74] an Eighth Circuit opinion that exemplifies the potential for injustice in the majority view. The defendant in that case possessed possible market shares of forty-seven and fifty percent in two separate product markets.[75] The government established a variety of predatory practices that the firm used to coerce competitors into maintaining prices at a high level.[76] Despite this evidence, the court could find no attempt liability since there was no pros-

67. Commission Report, *supra* note 9, at 144.
68. *Id.* at 144-45.
69. *Id.* at 145 & n.12.
70. *Id.* at 145.
71. *Id.* at 146.
72. *See* notes 43-48 and accompanying text *supra*.
73. *E.g.*, Hawk, *supra* note 10, at 1152.
74. 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).
75. *Id.* at 305.
76. The practices included threats to exclude competitors through "drastic" price cuts, coupled with express statements of predatory intent. *Id.* at 299-302. On these facts, the court had no problem finding specific intent to monopolize. *Id.* at 302.

pect for monopoly control in the market.[77] The Commission found this case "troubling" in its steadfast adherence to the proximity concept.[78] Clearly, the Commission concluded, a broader approach would better serve the Sherman Act policy of safeguarding competition.

The Commission favored the position of the Seventh Circuit in *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*,[79] where the court rejected the view that attempt liability should be based on actual likelihood of successful monopolization.[80] Instead,

> it requires an appraisal of the alleged offender's ability to achieve the forbidden result, his intent, and the nature of his overt actions . . . . The ultimate concern is the firm's actual or threatened impact on competition in the relevant market.[81]

The Commission endorsed the "threatened impact" approach taken in *Kearney & Trecker* as more effective than the market power approach.[82] The proper inquiry then, is whether defendant's conduct "substantially threatens the maintenance of competition," and the existence of such a threat creates the requisite dangerous probability of success.[83] The Commission found the majority approach overly restrictive since blatantly anticompetitive conduct may go unchecked. It found the *Kearney & Trecker* view more consistent with Justice Holmes' approach to attempt and with the modern, "far less demanding" definitions of criminal attempt in general.[84]

---

77. *Id.* at 305, *cited in* Commission Report, *supra* note 9, at 147.
78. Commission Report, *supra* note 9, at 146.
79. 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972).
80. *Id.* at 598.
81. *Id. quoted in* Commission Report, *supra* note 9, at 147.
82. Commission Report, *supra* note 9, at 147.
83. *Id.*
84. *Id.* at 146-47. As evidence of "far less demanding" approaches, the Commission cited proposed Senate Bill 1437 and MODEL PENAL CODE § 5.01(1)(c)(Proposed Official Draft, 1962). Commission Report, *supra* note 9, at 146 n.17. While the proposed criminal code reform expands present definitions of attempts in general, *see* CRIMINAL LAW REP. (BNA) (Special Supp. June 14, 1978), at 19, the Model Penal Code arguably does not. Section 5.01(1)(c) defines attempt in terms of "substantial step" as opposed to "dangerous probability." However, § 5.01(2) requires that conduct be *strongly corroborative* of the actor's criminal purpose in order to qualify as "substantial step." Analytically, this may be very similar to dangerous probability. One court, in fact, has so observed, at least with respect to attempted monopolization. Unibrand Tire & Product Co. v. Armstrong Rubber Co., 429 F. Supp. 470, 477 (W.D. N.Y. 1977).

The Commission's recommended approach—over and above its endorsement of *Kearney & Trecker*—is considered below. Before that recommendation is set forth and assessed, however, it should be noted that condemnation of *Empire Gas* as representative of the "wrong" approach to attempts is misleading. As noted previously,[85] *Empire Gas* was based upon the erroneous premise that *actual* monopoly power is necessary to a finding of dangerous probability of success. Thus, market shares in the forty-seven and fifty percent range were considered insufficient since they do not constitute monopoly power as it has been defined by the Supreme Court and *Alcoa* cases.[86] Most courts, however, would hold that market shares in the *Empire Gas* range are sufficiently high to establish a dangerous probability.[87] The case is thus not truly representative of the current majority view.

B. *The "Sliding Scale" Solution*

Having identified the "lacuna" problem in judicial constructions of the Sherman Act, the Commission briefly summarized what it believed to be the appropriate view. In its ensuing recommendation, the Commission urged courts to adopt the new approach and offered Congress a suggested amendment to section 2 that included the favored standard.[88]

The Commission succintly stated its recommended approach as follows:

> [T]he more unambiguously anticompetitive the conduct and the clearer the presence of the requisite specific intent, the less important is the defendant's present or probable market position.[89]

Thus, clearly anticompetitive conduct could determine dangerous probability of success "without lengthy market analysis."[90] Such conduct, defined as "conduct that cannot serve any competitive purpose and is inherently destructive to competition,"[91] assures a substantial anticompetitive effect when

85. *See* note 45 and accompanying text *supra*.
86. *See* notes 37-40 and accompanying text *supra*.
87. *See* note 43 and accompanying text *supra*.
88. Commission Report, *supra* note 9, at 150-51, 165-66.
89. *Id.* at 148.
90. *Id.*
91. *Id.*

undertaken by any firm.

Conversely, proof of present or potential market dominance necessitates inquiry into a "broader range of factors . . . to evaluate the impact of the defendant's activities on competition . . . ."[92] Though this point was not elaborated, it apparently means that as power increases, conduct need be less clearly anticompetitive for liability to arise.[93]

Although the Commission referred to its approach as "balancing,"[94] the same concept has been called a "sliding scale" by most commentators.[95] The gist of the view is that the significance of market position is inversely related to the invidious nature of the conduct.[96] But regardless of the label, the Commission confidently stated that the approach would reach conduct such as that in the *Empire Gas* case, "even when [such conduct is] undertaken by a firm with less than a dominant position."[97] In addition, the new standard could "serve to expedite litigation concerning such conduct since the volume of evidence relating to market position [would] be reduced."[98]

A few initial observations may be made. First, the Commission did not reject the "dangerous probability" requirement. On the contrary, the report notes that the element is useful in shedding light on the defendant's intent and limiting attempt to "cases in which the potential anticompetitive impact of the defendant's conduct is truly significant."[99] Dangerous probability was, however, expanded beyond the prevalent market power approach to include cases where conduct is "unambiguously anticompetitive" despite defendant's market position.

Next, the report arguably does not suggest a "pure" sliding scale approach: market power and invidiousness of con-

92. *Id.* at 149.

93. This interpretation is based on the traditional or "pure" sliding scale approach, under which conduct and power are inversely related. *See* note 96 and accompanying text *infra*.

94. Commission Report, *supra* note 9, at 148.

95. *See, e.g.*, 2 E. KINTNER, *supra* note 2, at 423 n.121; 3 AREEDA & TURNER, *supra* note 3, ¶ 834b, at 344-45; *Market Power as Requisite*, *supra* note 3, at 1473.

96. *See* 2 E. KINTNER, *supra* note 2, at 423 n.121; 3 AREEDA & TURNER, *supra* note 3, ¶ 834b, at 344.

97. Commission Report, *supra* note 9, at 148-49.

98. *Id.* at 149.

99. *Id.* at 146.

duct are not in every case quantified and somehow related on a magical scale of importance. Market power inquiry is "appropriate" when defendant's conduct is "competitively ambiguous," that is, when the anticompetitive effect is speculative or disputable.[100] The result is that evidence of market power will be crucial in most cases since conduct is usually traceable to at least a few legitimate business practices. Thus, the approach does not purport to "split hairs" over liability in the cases between the extremes: unless plaintiff presents strong evidence of clearly anticompetitive conduct, market analysis must be made.

Finally, the Commission's sliding scale approach appears quite similar to the approach taken by the most recent Ninth Circuit cases. As the *Janich*[101] case revealed, dangerous probability can be shown in two ways: proof of substantial market power, or proof of predatory conduct so strongly supportive of specific intent that dangerous probability is guaranteed despite lack of market power in the traditional sense.[102] If plaintiff relies solely upon defendant's conduct, however, such conduct must be clearly threatening to competition or clearly exclusionary to generate liability.[103] This approach is identical to the Commission's view that market power evidence is appropriate unless defendant's conduct is "unambiguously anticompetitive."

The preceding discussion reveals that the Commission's position could actually be termed "modified," as opposed to "pure," sliding scale.[104] In the vast majority of cases, market analysis will be necessary and dangerous probability will in fact be determined by market share. Nevertheless, in certain cases such inquiry may be eschewed when conduct alone "significantly threatens" competition.

---

100. *Id.* at 148.

101. Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

102. *See* notes 59-63 and accompanying text *supra*.

103. *See* notes 62-63 and accompanying text *supra*.

104. The labels are the author's and are used only for convenient distiction between the two approaches. Professors Areeda and Turner refer to their revised approach, which is similar to "modified" sliding scale, as a "limited per se rule." 3 AREEDA & TURNER, *supra* note 3, ¶ 836, at 350-55.

ASSESSMENT: SERVING THE GOALS OF THE SHERMAN ACT

The Commission's sliding scale approach is not without shortcomings. The two strongest arguments opposing the sliding scale are set forth below, followed by a brief discussion of the basic goals of the Sherman Act and the report's compatibility with those goals.

C. *Assessment of Opposing Arguments*

1. *Expediting litigation.* Though the Commission's central concern in the attempt area was effective antitrust enforcement,[105] it additionally asserted that the sliding scale approach could expedite litigation in some cases because of the abandonment of complex market analysis.[106] This conclusion is erroneous. First, as noted above,[107] market analysis would be required in nearly all cases since firms are usually careful to avoid conduct that is "unambiguously anticompetitive." Second, in those cases where market power analysis can be avoided, plaintiff can get to the jury on the conduct issue, whereas under the current majority view, a plaintiff who dispenses with pleading defendant's market share will suffer adverse summary judgment on the merits.[108] Finally, as Professor Austin has pointed out, the test would likely "inflate rather than expedite litigation"[109] since analysis could not stop, as it does now in the majority of courts, with a determination of insufficient market share. The "anticompetitive potential" of defendant's conduct would require assessment in any case. One observer estimated that, in monopolization cases, litigation of the conduct element constitutes thirty-five to forty-five percent of trial time;[110] clearly, if conduct must

105. Commission Report, *supra* note 9, at 143-44.

106. *Id.* at 149.

107. *See* text accompanying note 103 *supra*.

108. *See* notes 42-46 and accompanying text *supra*. The exception, of course, is the Ninth Circuit, where an attempt plaintiff may prove dangerous probability by strong evidence of specific intent to monopolize. *See* notes 59-63 and accompanying text *supra*.

109. Austin, *The National Commission for the Review of Antitrust Laws and Procedures: Reports on Symptoms but Ignores Causes,* 54 NOTRE DAME LAW. 873, 875 (1979).

110. Dougherty, *Elimination of the "Conduct" Requirement in Government Monopolization Cases: A Proposed Revision of the Sherman Act,* 10 ANTITRUST LAW & ECONOMICS REV., No. 3, 37, 40 (1978). The article consists of the author's testimony before the President's Commission.

be assessed, trials will be longer and more complex than before. Nevertheless, as the Commission itself noted, reduction of complexity often must be subordinated to effective antitrust enforcement.[111]

2. *Sliding Scale would "Chill" Aggressive Competition.* The most pervasive criticism of the sliding scale approach is that the focus on conduct instead of market power could "chill" legitimate, aggressive business conduct.[112] Since defendant's power would not be an essential element of the attempt claim, aggressive price cutting or other stiffly competitive behavior could result in unwarranted criminal or treble damage liability. As a result, firms would be discouraged from competing effectively and the antitrust policy favoring competition would be undermined.[113]

This objection is forceful if "pure" sliding scale is the test. It is entirely unrealistic to assume that courts and juries could effectively arrive at the proper balance of power and conduct in any of the infinite combinations of factual situations presented to them. The potential for incursion into vigorous and legitimate competition is far too great in the many cases involving "ambiguous" firm behavior.

A "modified" approach, arguably endorsed by the Commission,[114] mitigates this effect if properly applied. Market analysis should be dispensed with *only* if a firm's conduct is truly unambiguously anticompetitive. An example frequently cited is fraudulent procurement of a patent:[115] such conduct

---

111. Commission Report, *supra* note 9, at 143. The Commission noted that the Supreme Court has at times taken the view that enforcement is more desirable than simplification. For example, in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Court abandoned a *per se* rule laid down in a prior antitrust case. Abandoning such a rule was "correct," but ensured extensive complication of litigation. Commission Report, *supra* note 9, at 143 n.4 (citing Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 2-3, 37-38 (1978)).

112. *See, e.g.*, 3 AREEDA & TURNER, *supra* note 3, ¶ 834c at 345; Austin, *supra* note 109, at 876: Hawk, *supra* note 10, at 1155; Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. ANTITRUST L.J. 165, 168-77 (1967); *Market Power as Requisite, supra* note 3, at 1473.

113. The Supreme Court has indicated that firms should not suffer antitrust liability for conduct "predominantly motivated by legitimate business aims." Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 627 (1953). The Commission expressly endorsed this policy. *See* text accompanying note 120 *infra*.

114. *See* notes 100-05 and accompanying text *supra*.

115. *E.g.*, 3 AREEDA & TURNER, *supra* note 3, ¶ 836, at 350; Cooper, *supra* note 3, at 447. In Walker Process Equipment, Inc. v. Food Machinery & Chem. Corp., 382

cannot be interpreted in any favorable antitrust light and has a high potential for excluding competition and inflating or achieving substantial market power.[116] In cases where conduct is ambiguous, the problem of market power is more troublesome.

The report should be interpreted as requiring market analysis and substantial market share in cases of ambiguous firm conduct. The Commission noted that in such cases market structure, defendant's power, and "similar indicia of *ability to monopolize* . . . will greatly affect the conduct's impact on competition."[117] Moreover, the report notes that when the effect of certain conduct on competition is unclear, "dangerous probability of monopolization should prevent Section 2 from being used to curtail legitimate behavior."[118] Finally, the Commission, noting testimony urging adoption of standards that would be "carefully tailored to ensure that the results are not actually anticompetitive,"[119] declared that the new standard should protect from liability "aggressive behavior that increases competition in a market and benefits consumers *even at the expense of particular competitors*."[120] These comments, in conjunction with language discussed previously, amply support the position that market analysis should be applied when conduct is ambiguous in order to avoid the "chilling" effect feared by critics.[121]

U.S. 172 (1965), the Supreme Court indicated that fraudulent patent procurement could give rise to antitrust liability.

116. 3 AREEDA & TURNER, *supra* note 3, ¶ 836, at 350.

117. Commission Report, *supra* note 9, at 148 (emphasis added).

118. *Id.*

119. *Id.* at 149 n.28.

120. *Id.* at 149 (emphasis added).

121. Critics of "sliding scale" sometimes argue that elimination or minimization of market power analysis will result in Sherman Act liability for the "lesser sin" of unfair competition. Cooper, *supra* note 3, at 455. Remedies for unfair competition are provided in the Federal Trade Commission (FTC) Act, 15 U.S.C. § 45 (1976), and state law. It is argued that these remedies adequately protect against anticompetitive practices of relatively powerless firms.

The arguments, however, seem unconvincing. The FTC Act empowers the FTC to issue cease and desist orders, make rules, and seek civil penalties for knowing violations of FTC Rules. 15 U.S.C. § 45(b), (l), (m) (1976). The FTC Act, however, does not afford a private right of action and the courts have as yet been unwilling to imply one. *See* FTC v. Klesner, 280 U.S. 19, 25-26 (1929); Holloway v. Bristol-Meyers Corp., 485 F.2d 986, 988-92 (D.C. Cir. 1973). Thus, the FTC must initiate proceedings against alleged violators; it clearly has insufficient resources to prosecute all claims. The Act is thus less effective to reach anticompetitive conduct than the Sherman Act. Private enforcement under the latter is guaranteed by the Clayton Act § 3, 15 U.S.C.

The "chilling" effect argument is thus exaggerated when applied to properly interpreted "modified" sliding scale. If courts apply this standard with the prudence recommended by the Commission, legitimate business behavior should not be deterred.

D. *Compatibility with Antitrust Policy*

Examination of the federal antitrust policy supports a "modified" sliding scale approach to attempted monopolization. Chief Justice Hughes once characterized the Sherman Act as a "charter of freedom" whose adaptability over time is comparable to that of the Constitution.[122] The Act embodies principles of economic egalitarianism[123] that the Supreme Court has recognized as "the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle [a business] can muster."[124] The almost sacrosanct goal of the legislation is the preservation of competition through proscription of anticompetitive economic behavior.[125]

The evils to which the Act is directed are unreasonable restraints of trade and unlawful monopolies. Monopoly is fundamentally anticompetitive in most cases and is an inefficient allocation of society's resources.[126] The high prices and restricted production associated with monopoly present a serious threat to the welfare of the consuming public;[127] the Sher-

---

§ 15 (1976).

Moreover, the fact that the Sherman Act and state laws respecting unfair trade practices may to an extent overlap is irrelevant to the question of whether the federal remedy applies. If the federal antitrust policy embraces proscription of certain anticompetitive conduct, *see* notes 122-40 and accompanying text *infra*, then a federal cause of action should lie.

122. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933). *See also* United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972)(Sherman Act is the "Magna Carta of free enterprise"); Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958)(Act is a "charter of economic liberty"); H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORGANIZATION OF AN AMERICAN TRADITION 608 & n.32 (1954).

123. H. THORELLI, *supra* note 122, at 565-68, 608.

124. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

125. *See* Gordon v. New York Stock Exchange, 422 U.S. 659, 689 (1975); Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958); American Column & Lumber Co. v. United States, 257 U.S. 377, 400 (1921).

126. *See* C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 33, 194 (1959).

127. See Justice Stone's review of the public welfare foundation in the Sherman Act's legislative history, in Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 & n.15 (1940).

man Act is directed to alleviation of such potential dangers. Thus, economic theory has virtually established a presumption that not only monopolies but all impairments to competition are harmful.[128] Monopolies are seen as merely the most intractable form of anticompetitive behavior, synonomous with unjustified power.[129]

Prevailing judicial interpretations of the Sherman Act have established two guiding propositions: First, the Act protects competition, not competitors.[130] The fact that a competitor has succumbed to the forces of the marketplace is by itself irrelevant to antitrust policy. The fact that competitors have been excluded by improper conduct is, however, relevant.[131] Second, size is not, in and of itself, violative of section 2 in the absence of unlawful conduct.[132] A firm with monopoly power, however, must conduct itself more prudently than a firm with a lesser market share due to anticompetitive potential.[133]

The modified sliding scale approach is in accord with historic antitrust principles and policies. An expansion of the current interpretation of section 2 would reach blatantly anticompetitive conduct that the statute was designed to prevent,[134] while the retention of dangerous probability and redefinition of that element in terms of significant threat posed by unjustifiable business conduct is workable if applied carefully.[135]

---

128. A. Neale, The Antitrust Laws of the United States of America: A Study of Competition Enforced by Law 17 (2d Ed. 1970).

129. W. Letwin, Law and Economic Policy in America 59 (1965).

130. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). The point, now virtually a truism, was repeated more recently in Tower Tire & Auto Center, Inc. v. Atlantic Richfield Co., 392 F. Supp. 1098, 1106 (S.D. Tex. 1975) and Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 541 & n.149 (E.D. Mich. 1974). The latter case noted that "inquiry to the individual entrepreneur's competitive position is of concern only as it is indicative of a concomitant public injury." *Id.* at 541 n.149.

131. *See, e.g.*, United States v. United States Gypsum Co., 333 U.S. 364, 401, *rehearing denied*, 333 U.S. 869 (1948)(concerted action to fix prices unlawfully deters competition).

Consistent with a "modified" sliding scale, the anticompetitive effect of such exclusion must be more than *de minimis*. That is, in most cases, exclusion of competitors by firms with insignificant market shares will have no significant anticompetitive effect. *See* notes 100-05, 114-21 and accompanying text *supra;* 3 Areeda & Turner, *supra* note 3, ¶ 829a, at 329. Likewise, exclusion absent evidence of specific intent to monopolize would not be actionable.

132. *See* note 31 *supra*.

133. *See* 3 Areeda & Turner, *supra* note 3, ¶ 829, at 329-33.

134. *See* note 125 and accompanying text *supra*.

135. Careful application necessitates "modified" and not "pure" sliding scale.

The core problem in any case will be to determine what conduct unambiguously and significantly threatens competition. Elimination of competitors is not necessarily anticompetitive, but such elimination, coupled with strong independent evidence of specific intent to monopolize, may amount to an attempt. Price cutting is not in itself anticompetitive,[136] but in certain cases it could be deemed "predatory" and hence inherently injurious to competition.[137] Use of predatory pricing, refusals to deal, or other unilateral anticompetitive conduct to increase market share from, for example, five to twenty-five percent, would probably generate liability for attempt under the new guidelines, whereas under the present majority approach it would not.[138]

To summarize, determination of attempt liability under the proposed approach will depend upon the nature of defendant's conduct and its overall effect on competition. In assessing anticompetitive effect on a case-by-case basis, courts that follow the precepts of Sherman Act policy will be able to avoid such untoward results as punishing firms for vigorous competition or operating efficiency.

IV. Conclusion

The basic principle of antitrust law is the enforcement of competition by deterring anticompetitive business behavior. Ultimately, the consumer reaps the benefit of this policy in the form of lower prices and efficient resource allocation.[139] The Sherman Act is inherently vague[140] and the courts have

See notes 100-05, 114-21 and accompanying text *supra*.

136. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 120 (1948).

137. Determination that a practice is "predatory" generally depends on a number of complex factors, but precise definitions are disputed. *See generally* 3 Areeda & Turner, *supra* note 3, ¶¶ 711-22, at 150-94 (1978); R. Bork, The Antitrust Paradox 144 (1978).

138. *See* note 43 and accompanying text *supra*.

139. Professor Bork asserts that the *only* legitimate antitrust goal is maximization of consumer welfare. R. Bork, *supra* note 142, at 51. Bork defines "competition" as "any state of affairs in which consumer welfare cannot be increased by judicial decree." *Id. See also* M. Forkosch, Antitrust and the Consumer (1956).

140. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940); W. Letwin, *supra* note 129, at 14-15, 278. The vagueness of the statute has been attacked on constitutional grounds. The Supreme Court, in Nash v. United States, 229 U.S. 373 (1913), upheld the Sherman Act against a vagueness attack, but the arguments are periodically reasserted. *See, e.g.*, Note, *Is the Sherman Act Unconstitutionally Vague as a Criminal Statute? A Re-evaluation After* Gypsum, 13 Suffolk U. L. Rev.

been delegated the responsibility of developing a workable approach to antitrust law consistent with the goal of preserving competition.[141]

The prevalent judicial approach to section 2 abdicates this responsibility by guaranteeing that severely anticompetitive conduct will not be checked in the absence of a large market share. The Commission's recommendation, if interpreted as "modified" sliding scale, could resuscitate effective antitrust enforcement in the area by reaching such conduct despite defendant's actual inability to achieve full monopoly power. Careful judicial application could thus ensure a proper scope for the Sherman Act.

Timothy J. Buchanan

1284 (1979).

141. Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940); W. LETWIN, *supra* note 129, at 278.