CHAPTER I

INTRODUCTION

Section 2 of the Sherman Act and associated monopolization law play an important role in promoting competitive markets by policing anticompetitive unilateral conduct by dominant firms. More specifically, Section 2 makes it an offense to "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. . . ."[1] When interpreting this statutory language, it has become axiomatic under modern U.S. law that mere possession of a monopoly or dominant position is not unlawful. In 1966, the Supreme Court laid out the modern framework for applying Section 2 in *United States v. Grinnell Corp.*[2]:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[3]

Accordingly, to violate Section 2 a dominant firm needs to employ anticompetitive conduct that either led to the monopoly position or somehow keeps or extends it in an unlawful way, rather than securing its dominance by winning (or continuing to win) on the merits by supplying a preferred product or service offering.[4] In particular, the Supreme Court recognizes that the application of Section 2 should not "dampen the

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1. 15 U.S.C. § 2.
2. 384 U.S. 563 (1966).
3. *Id.* at 570.
4. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam); Pacific Bell Tel. Co. v. linkLine Commc'ns, 129 S. Ct. 1109, 1118 (2009); Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998-1000 (9th Cir. 2010).

competitive zeal of a single aggressive entrepreneur"[5] and that the ability to possess monopoly power "is an important element of the free-market system" because "[t]he opportunity to charge monopoly prices—at least for a short period . . . induces risk taking that produces innovation and economic growth."[6]

Economists recognize,[7] and U.S. case law has long accepted, that monopoly power, no matter how acquired, leads to undesirable effects: including higher prices, lower quality, and the associated wealth transfer from consumers to producers and allocative inefficiency (output limitation).[8] Because monopolists face little competitive pressure, monopoly power can lead to inefficiency in production and reduced innovative effort.[9] Moreover, dominant firms may expend valuable resources acquiring or defending their market position that provide little, or no, social benefit.[10]

While antitrust law does not address monopoly power that is obtained from legitimately out-competing rivals, it does try to promote competition by requiring firms to compete without leveraging existing market power so that markets can be self-correcting. In particular, it is recognized that monopolistic profits can attract innovative, new competitors. These new competitors may not only lead to immediate improvements in market outcomes, such as lower prices, but may alter market structure so that the

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5. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 (1984).
6. Verizon Commc'ns v. Law Offices of Curtis v Trinko, 540 U.S. 398, 407 (2004).
7. *See* Chapter II.
8. *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 52 (1911) ("The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public; (2) The power which it engendered of enabling a limitation on production; and (3) The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale.").
9. *See* Chapter II.
10. *See e.g.*, Richard A. Posner, *The Social Costs of Regulation*, 83 J. POL. ECON. 807 (1975); ABA SECTION OF ANTITRUST LAW, MARKET POWER HANDBOOK: COMPETITION LAW AND ECONOMIC FOUNDATIONS 5 (2d ed. 2012).

former "dominant firm" no longer has significant market power. In both cases, consumers can benefit.

While Section 2 requires the identification of anticompetitive conduct, the statute does not provide specific examples of unlawful conduct or a detailed definition of the term. On one hand, this could be viewed as a negative because this lack of particularity creates ambiguity. On the other hand, it can also be a positive, because this same lack of particularity allows Section 2 to evolve through court decisions and thus to endure.

For over a century, courts have developed the bounds of unlawful conduct from their experiences with a variety of industries and business models. While the historical toolbox of the Section 2 experience continues to be instructive, enforcers and other plaintiffs continue to develop it through the application of Section 2 in new factual contexts, including those arising from new technologies, such as digital platforms and networks. However, this evolution has been gradual as courts follow the Supreme Courts' admonition in *Trinko* that : "Mistaken inferences and the resulting false condemnations 'are especially costly because they chill the very competition the antitrust laws are designed to protect.'"[11] Accordingly, courts have proceeded cautiously when considering expanded Section 2 liability.

This Handbook provides an outline of the current state of U.S. monopolization law, as well as its economic underpinnings. The aim is to give the reader a sense of the economic roots and historical development of the law, so the reader can better understand its application, not just to identical circumstances in the future, but also to analogous ones that arise in the future as businesses continue to evolve. The Handbook is organized as follows.

A. The Economics of Monopolization

Chapter II provides an overview of the economic principles underlying monopolization law. It begins with an explanation of the economic concept of market power and the impact that monopolies can have on consumer welfare and total welfare. The chapter goes on to describe several standard economic models that describe market outcomes in different market structures. These models have been used by economists

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11. *Trinko*, 540 U.S. at 414 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

to understand how differences in market structures can impact market performance.

B. Monopoly Power

Building on the economic foundation set forth in Chapter II, Chapter III summarizes how Section 2 case law approaches the definition and presence of monopoly power—the first element in the offense of monopolization. It discusses relevant market definition and how courts have approached the establishment of monopoly power with both direct and indirect evidence, such as market shares and barriers to entry. The chapter also discusses how courts have approached monopoly power, the legal requirement, as compared to market power in the economic sense. Lastly, the chapter discusses how monopoly power is assessed in input or buyer markets, i.e., monopsony power.

C. Monopolizing Conduct

Section 2 applies to firms that either possess monopoly power or have a dangerous probability of acquiring it. Chapters IV and V discuss situations where it is alleged that a defendant already possesses monopoly power and the issue is whether it is abusing that power. As a result, these chapters focus on conduct that courts have addressed in determining when competitive strategies by monopolists cross the line into unlawful monopolization. Chapter IV discusses, at a general level, the meaning of Section 2's conduct element and the policies and tests that courts and commentators have considered in identifying unlawful monopolizing conduct. Chapter V reviews how the courts have addressed discrete types of conduct such as unilateral refusals to deal, exclusive dealing, bundled discounts, and others.

D. Attempt and Conspiracy to Monopolize

Chapter VI focuses on situations where the challenged conduct is alleged to be an attempt to secure monopoly power. In these cases, the focus is often on determining whether a defendant is positioned to have a "dangerous probability" of gaining monopoly power and whether that defendant employed unlawful monopolizing tactics toward that end. The chapter discusses the challenges associated with both parts of the attempt analysis. It also summarizes the case law and commentary on the offense of conspiracy to monopolize.

E. Enforcement and Remedies

The problem of crafting adequate remedies to address monopolizing practices—such as how to eliminate anticompetitive discounting strategies while preserving desirable price competition by monopolists—has influenced the development of liability rules under Section 2. Chapter VII addresses the evolution of the law on monopolization remedies, discussing the role of structural and behavioral remedies, as well as treble damages, in the Section 2 context. Chapter VII also covers the enforcement roles and powers of the two principal federal antitrust enforcers, the U.S. Department of Justice and the Federal Trade Commission, as well as the role of state antitrust enforcers and private plaintiffs in monopolization cases. Finally, Chapter VII discusses remedies that have been used to ameliorate different types of unlawful conduct and compares how some jurisdictions outside the United States approach monopolization remedies.