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Antitrust--The Thrust-Upon Defense: An Affirmative Defense or Judicial Balm

David Brent Frost
West Virginia University College of Law

STUDENT NOTES

ANTI-TRUST THE THRUST-UPON DEFENSE: AN AFFIRMATIVE DEFENSE OR JUDICIAL BALM?*

Convinced that public and private injury would result from the vast accumulation of wealth in the hands of corporations and individuals, Congress declared 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 any foreign nation, shall be deemed guilty of a misdemeanor. . . ."[1]

Noteworthy, however, is the absence of a prohibition against monopoly in the concrete, as distinguished from monopolization.[2] At least on a theoretical level, this omission can be attributed to the faith in the working of market forces which may be expected to prevent or cure monopoly if economic freedom is not restrained by monopolization.[3] But as is so often the case, theory yields to reality and a monopoly may prevail against the countervailing forces supposedly destined to overcome it. The net result is the

*It is the intention off this paper to deal only with non-statutory monopolies, *i.e.*, those not created by patents or licenses lasting beyond their term.

[1] Sherman Anti-trust Act, 15 U.S.C. § 2 (1964).

[2] A general distinction would be as follows: A monopoly exists where all or nearly all of an article of trade or commerce within a community is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein. F. Cooke Cooke on Combinations, Monopolies, and Labor Unions § 116 (2d ed. 1909).

On the other hand, monopolization means:

> to conspire, to acquire, or maintain the power to exclude competitors from any part of the trade, or commerce among the several states or with foreign nations, accompanied with such power that the parties are able as a group to exclude actual or potential competition from the field, and accompanied with the intent and purpose to exercise that power.

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

[3] In Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911), the Court held,

> [T]he omission of any direct prohibition against monopoly in the concrete indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised is the most effective means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to contract freely was the means by which monopoly would inevitably be prevented if no extrane-

exposure of the public to the same evils of monopoly. A monopoly exists, yet it exists by virtue of effective competition, which competition the Act was designed to foster. In attempting to reconcile this paradox courts have had a most difficult task.

Although referred to as "the highly exceptional case, a *rara avis,* more often found in academic groves than in the thickets of business", jurists and legislators alike have recognized the possibility that a monopoly may indeed be "thrust-upon" a company. During the original congressional debates on section two, Senator Hoar pointed out that monopoly involved something more than extraordinary commercial success.[5] Likewise, the United States Supreme Court has reaffirmed the position that monopoly power must be "distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[6] The courts have "kept in reserve the possibility that the origin of a monopoly may be critical in determining its legality."[7] What engendered these compunctions is reasonably plain; persons

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ous or soverign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted.

More simply stated, a monopoly climate tends to induce new entrants into that market whose entry, if competition is unfettered, lowers prices. Subsequently, the weaker competitors fail and the market moves toward monopoly again, followed by an increased number of new entrants, and so on in a continuing cycle. Theoretically, within a monopoly are the seeds of its own destruction.

[4] United States v. Grinnell Corp., 236 F. Supp. 244 248 (D. R.I. 1964).

[5] Senator George Frisbie Hoar (R. Mass. 1877-1907). The following dialogue appears in 21 CONG. REC. 3151-52 (1890):

Mr. Kenna. Suppose a citizen of Kentucky is dealing in short horn-cattle and by virtue of his superior skill in that particular product it turns out that he is the only one in the United States to whom an order comes from Mexico for cattle of that stock for a considerable period, so that he is conceeded to have a monopoly of that trade with Mexico; is it intended by the committee that the bill shall make that man a culprit?

Mr. Edmunds. It is not intended by it and the bill does not do it. Anybody who knows the word "monopolize" as the courts apply it would not apply it to such a person at all; and I'm sure my friend must understand that.

Mr. Hoar. I put in the committee, if I may be permitted to say so, the precise question which has been put by the Senator from West Virginia, and I had the precise difficulty in the first place with this bill, but I was answered. . . .

. . . I suppose, therefore, that the courts of the United States would say in the case put by the Senator from West Virginia that a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisian of any kind, got the whole business because nobody could do it as well as he could was not a monopolist. . . .

[6] United States v. Grinnell Corp., 384 U.S. 563, 571 (1965).

[7] United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945); *In re* Greene, 52 F. 104 (S.D. Ohio 1892).

may find themselves unwittingly in possession of a monopoly without having intended to put an end to existing competition or to prevent competition from arising where none had existed. Yet, notwithstanding these pronouncements, the realistic availability of the "thrust-upon" defense has rightfully been questioned. This questioning arises out of several cases which suggest that to say one is the passive recipient of a monopoly is to declare a principle unsound both in an economic and legal sense. To quote Judge Wyzanski:

> [Seven] decades of Sherman Act enforcement leave the informed observer with the abiding conviction that durable non-statutory monopolies . . . are, to a moral certainty, due to acquisitions of competitors or restraints of trade prohibited by Sec. 1. They are the achievement of the quiet life after the enemy's capitulation or his defeat in inglorious battle.[8]

Speaking in *Grinnell,* Judge Wyzanski predicted that the day will come when the Supreme Court will hold that when a company achieves market dominance, a rebuttable presumption will arise that such power was criminally acquired and was a monopolization punishable under section two.[9] In *Grinnell,* the lower court openly invited the Supreme Court to rule on the question, but as

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[8] United States v. Grinnell Corp., 236 F. Supp. 244, 248 (D. R. I. 1964).

[9] *Id.* Apparently, Judge Wyzansky's interpretation of the effect of this presumption would be that:

> the Government need not prove, and in a well conducted trial ought not to be allowed to consume time needlessly proving defendant's predatory practices while in this dominant role. If defendant wishes to go forward, it is free to do so and to maintain the burden of showing that its eminence is traceable to superior skill, superior products, natural advantages, technological and economic efficiency, scientific research, or low cost margins of profit maintained permanently and without discrimination.

Although Judge Wyzanski's presumption has not been accepted, *Alcoa* and the cases decided prior to it, indicate a move in that direction. Initially, in addition to monopoly position, an element of predation was required. This predation may be characterized as *cut-throat* policies directed toward one's competitors. Thus, unabashed pursuit of profits was lawful. Subsequently, however, this element of predation was expanded into a concept of *deliberateness,* which not only included cut-throat policies, but also the *intent* to monopolize *per se* as distinguished from the intent to extend one's share of the market. Thus, the nice distinction must be drawn between the intent to gain a monopoly and the intent to expand one's market. Though it appears only to have meaning in the abstract, it does leave the courts much freer in deciding each case, as it provides some degree of latitude in invoking judicial sanctions against those corporations which the courts feel do not have the required section two *scienter.* For a further discussion, see United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1933).

Grinnell was ultimately found guilty of section one violations, the necessity of reaching the section two question was obviated. A decade earlier though, the Court explained that the Act was not aimed at size, nor at the lawful exertion of power, provided that such power and size were the product of natural growth.[10] Even though its resources, capital, and strength may give the company a dominating place in the business or industry with which it is concerned, it is entitled to maintain its size and power that legitimately go with it.[11] The significance of this, however, may have been glossed over by the Court in *United States v. Swift & Co.*,[12] when the Court announced that "size is not offensive . . . unless . . . it amounts to a monopoly . . . but size carries with its an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."[13]

The classic definition of the limits of the "thrust-upon" defense is that the section two defendant must be the passive beneficiary of a monopoly, following upon the involuntary elimination of competitors by automatically operative economic forces. Thus, a company has not violated section two where monopoly has been thrust upon it. Yet the court in *Alcoa* admonished that the company may yet be held to have monopolized if its acquistion or retention of the monopoly power is in part caused by other business practices having an exclusionary effect.[14] These acts may be legal in themselves, yet in context evidence a "purpose" sufficient to transform monopoly into monopolization. The one element that tranforms lawful monopoly into unlawful monopolization, "deliberateness," might very well be the key to the availability of the "thrust-upon" defense.[15] At least some related dependency does seem to exist. This, however, raises a question which strikes at the

[10] United States v. United States Steel Corp., 251 U.S. 417, 460 (1920).
[11] *Id.*
[12] 286 U.S. 106 (1932).
[13] *Id.* at 116.
[14] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). This case has frequently been criticized for penalizing enterprise. But the cases decided under it seem to refute that criticism and instead declare only illegal those monopolies maintained by policies intended to discourage, impede or even prevent the rise of new competition.
[15] This apparently would not hold true when a company, existing in a natural monopoly climate (one wherein there is only enough demand to support one supplier), is faced with new competition. Here, a monopoly and survival are synonymous and a company would not be prohibited from actively and deliberately seeking to retain a monopoly.

very heart of the defense. If some dependency does exist, then the defense is not really an affirmative defense, but rather a failure on the part of the plaintiff to make out his case, *i.e.,* a failure to prove deliberateness. Yet the concept is always thought of as an affirmative defense, and is allowed as such. Clearly, this is the law, but due to its elemental vagueness its application, both from a standpoint of prosecution and defense, often becomes difficult.

Certainly, this purpose is characterized by elements of *exclusion* and *predation.* In *United States v. United Shoe Machinery Corp.,*[16] the court spoke in terms of "unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market." The court intimated that if business policies failed to encourage competition or tended to perpetuate their creator's dominance, they may be treated as exclusionary.[17] A similar idea was expressed in *United States v. Pullman Co.,*[18] where the court held that Pullman's method of negotiating sleeping car contracts with the railroads, though legal in itself, evidenced Pullman's purpose to retain its monopoly position both in providing sleeping car service and in building sleeping cars for use in its sleeping car service. The court concluded that business policies legal in themselves cannot be used to maintain a monopoly. Again in *Alcoa,* the Court became more specific when it held "we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with its capacity already geared into great organization, having the advantage of experience, trade connections, and the elite of personnel."[19]

Apparently in an effort to prevent emasculation of the Act, the courts have not limited exclusion to matters not honestly industrial, but rather have broadened it to include maneuvers activated solely by a desire to curb competition.[20] The courts seemingly

[16] 110 F. Supp. 295, 345 (D. Mass. 1933).

[17] *Id.* In view of the court's language, an interesting question arises as to whether a company is under an obligation to conduct itself in such a manner as thereby *promotes* competition or merely to conduct itself so as to *permit* competition. The latter interpretation seems more in line with the case law, although at times one senses that a company is under some duty to promote competition in so far as it is not unreasonably inconsistent with its own interests.

[18] 50 F. Supp. 123 (E.D. Pa. 1943), *aff'd per curiam,* 330 U.S. 806 (1947).

[19] United States v. Aluminum Co. of America, 148 F.2d 416, 431 (2d Cir. 1945).

[20] *Id.*

are attempting to protect competition without penalizing enterprize by injecting a sense of fair play into section two. In the words of one lower court, "competing fairly and aggressively regardless of consequences to one's rivals is not condemned."[21]

It should be realized that although singularly important when called upon, the "thrust-upon" defense is, indeed, a *rara avis*. The very name itself imports overtones of passivity or even regression. But as the cases clearly show, the defendant companies were far from being passive. Though perhaps not bent on cornering a particular market, they actively pursued increased business and profits. Yet, when found possessed of a monopoly, the courts often found no anti-trust violation. The thrust is that the monopolies sanctioned are not merely those that are economically inevitable and achieved against the recipient's will, but also those that come about through nonpredatory, nonexclusionary, and essentially fair competitive practices. Just as the "thrust-upon" defense was allowed as a protection for passive recipients of monopoly, the same protection has been extended to those who were "innocently active."

Though it is an apparent contradiction to assert that one in pursuit of business success can have a monopoly *thrust* upon him, the courts have had little difficulty in allowing the defense. Although no specific language was discovered, the court holdings indicate that the defense can be advanced in two situations. The first is where the monopoly devolves upon the defendant due to economic forces generally outside the defendant's control.[22] This is the traditional passive recipient. An example would be where the defendant is the owner and publisher of the only newspaper in a small town. The town is of such size that it can only support one newspaper. As a result of the dominant market position the defendant enjoys, he is the possesser of a monopoly. Aside from the

[21] Bailey's Bakery Co. v. Continental Baking Co., 235 F. Supp. 705, 718 (D. Hawaii 1964).

[22] *E.g.*, Union Leader Corp. v. Newspapers of New England Inc., 284 F.2d 582 (1st Cir. 1960). *See also* United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2nd Cir. 1945), where the court held that "a market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to meet the whole demand."

[23] Bailey's Bakery Co. Continental Baking Co., 235 F. Supp. 705, 718 (D. Bawaii 1964). *But see* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) where business policies similarly aggressive were held unlawful. The reader is invited to consider whether "bigness" is an element of consideration.

defendant's selection of that city as a place to publish his newspaper, he has done nothing to create or maintain the monopoly. It was simply the product of external forces over which he had no control. It cannot be said that the defendant was guilty of any predation.

The second is where the monopoly devolves upon the defendant, at least to a great extent, due to internal forces over which the defendant does have control. This is the innocently active recipient. An example would be where the defendant owned and operated a large bakery. Fearing encroachment into his area by outside bakeries, the defendant made a large investment in new production and distribution techniques, and in advertising. He also undertook to intensify his promotional and sales program. Plaintiff, also a baker, claims that the defendant is quilty of unlawfully attempting to impede the entry of new competition. Although business methods designed for and having the effect of impeding any new entry into a market are a recognized exclusionary device, each and every businessman has the right to aggressively resist encroachment upon the market for his products. Resultantly, the defendant would probably prevail.

In the former case, the application of the defense is obvious. In the latter, it is used in the sense that, while not seeking a monopoly, one was thrust upon him because of his own superior enterprize. As a matter of simple pragmatism, the latter is of far more significance than the former if for no other reason than frequency of occurrence. But the facility in categorizing these situations is not intended to imply that the resolution of the problems inherent in them is simple. As always, when legality is dependent upon the facts, the dividing line between what is illicit and what is licit is at best a shadowy one.

In the cases of both an active and passive recipient, the particular company must, if it desires to avoid legal sanctions, discover and conform to a judicial code of business morality. The difficulties intrinsic in this approach are obvious. Certainly, a rigid code unresponsive to the changes in business or to the needs of society would not be desirable. Though it must be flexible in its demands, it must also be sufficiently definite to afford reasonable notice.

The crux of the problem is that this code cannot be expressed in "black-letter" terms. It must be concerned with business facts—

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with individual company activities and relations among activities, and their effect upon the market freedom of others and the consuming public. Hence, when considering the legality of any particular business practice, one must ultimately determine how that practice effects competition. Available to both the courts and industry are several types of information that may be used in determining from an economic standpoint whether effective competition exists. In varying degrees all of these factors are elements of market situations which bear directly on the presence or absence of effective competition. This analysis is of importance for several reasons. The factor with which this article is most concerned is that the less monopoly that exists the more predation will be allowed by those charged with enforcing the anti-trust laws.

A court's first consideration would be the number and relative strength of the firms in the particular industry. For example, unless numbers are already large in a given market, a reduction of numbers may involve some reduction of competition. Likewise, where genuine economies of large scale operations, or other considerations, permit only a small number of sellers, added vigilance is indicated as to other requisites of effective competition. Where sellers are few, each producing a significant share of the total market supply, the courts are aware that any substantial change in price or production by any of the sellers will have an appreciable effect upon total market supply and price, and will tend to elicit responsive changes in the prices and outputs of the other sellers. In fact, when sellers are few, even in the absense of anti-competitive practices, the market itself may not show many of the characteristics of effective competition. However, where the number of sellers is large, with each one facing an impersonal market, and each one able to do little to effect total supply or to raise the market price, each individual seller has a greater lattitude in pricing.

In addition to total number, the courts will also consider the relative size and strength of the competitors. This does not mean that close equality of size is required, but only that the competition should not depend entirely upon competitors who are so weak or ineffective as to exist by sufferance. If the latter exists, the vigor with which one faces his competitors becomes an important issue.

Of special significance is the opportunity for entry. The relative freedom for entry of new rivals is a fundamental requisite for effective competition in the long run, and will not be overlooked by the courts. Recognition is given to the fact that as a practical matter, the size of minimum adequate investment capital and other factors may make the entry of new firms into even a competitive industry a relatively slow or hazardous process. Aggressiveness in embracing new opportunities can be interpreted as an attempt to exclude new rivals.

A business should not engage in predatory preclusive tactics, such that their natural effect would be to enable the user to eliminate rivals without regard to efficiency, or at least to place them under serious handicaps irrelevant to their efficiency. But always an indepth analysis is required to determine whether the alleged laws seem to be at odds with the traditional concepts of "American enterprise." At least from one point of view, urging one to compete and then castigating him when he succeeds, seems somewhat inconsistent. But this seeming inconsistency does help to explain the "thrust-upon" defense. The courts are torn between the pulls of their conscience on one side and the demands of the law on the other. When the proper case arises, one in which a monopoly was obtained by honest industry and ingenuity, the "thrust-upon" defense becomes available. Whether thought of as an affirmative defense or a failure in plaintiff's case, it is, in any event, a judicial balm. It allows the court to protect the integrity of section two without applying its severe penalities to the innocent monopolizers.

Aside from the above, few guidelines can be formulated with any degree of accuracy. The most that can be said is that the resolution of specific problems remains the task of that fallible, indispensable servant "litigating elucidation."

David Brent Frost