COMMENTS

Attempt to Monopolize: Dangerous Probability of Success as an Obstacle to Enforcing Section 2 of the Sherman Act

Over the last seventy-five years judicial decisions and scholarly debate have failed to provide a uniform definition of "attempt to monopolize" under section 2 of the Sherman Act. The Supreme Court has not dealt substantively with the attempt clause since 1951 and has consistently denied certiorari in some very pressing cases. Thus, the federal courts of appeal have become courts of last resort for cases involving an attempt to monopolize, presenting significant problems for business planners who labor to conform their behavior to the laws of the various circuits.

1. Section 2 of the Sherman Act provides that:
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, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.


4. The circuit courts of appeals are not in agreement as to what constitutes an "attempt to monopolize" violation. Compare United States v. Empire Gas Corp., 537 F.2d 296, 306-07 (8th Cir. 1976) (finding no "dangerous probability of success" because defendant had not yet succeeded in monopolizing the market), cert. denied, 429 U.S. 1122 (1977) with Janich Bros. v. American Distilling Co., 570 F.2d 848, 853 (9th Cir. 1977) (stating that "the trier-of-fact may infer dangerous probability of success from proof of specific intent to control prices or destroy competition . . . ."), cert. denied, 439 U.S. 829 and Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579, 598 (7th
The debate over the elements forming an "attempt to monopolize" action reflects two contrary approaches. The majority of courts have held that an "attempt to monopolize" violation requires proof that the defendant was engaged in some anticompetitive conduct, had the specific intent to monopolize the relevant market, and had a market share large enough to create a dangerous probability of successfully monopolizing that market. A minority of courts, most notably, the Ninth Circuit Court of Appeals, has held that independent proof of "dangerous probability of success" is not always necessary for an attempt to monopolize action. The Ninth Circuit, however, has not completely eliminated the "dangerous probability of success" element from the attempt analysis. The courts should take the final step toward clearing up this confused area of the law.

5. For a discussion of "dangerous probability of success" as it relates to market share, see infra note 22 and accompanying text.


The law in the Ninth Circuit is somewhat confused. Some panels have required a "dangerous probability of success." See Cornell Quality Tools Co. v. C.T.S. Co., 446 F.2d 825 (9th Cir.), cert. denied, 404 U.S. 1049 (1971), where the court stated that C.T.S. had to prove "specific intent to monopolize and . . . sufficient market power to come dangerously close to success." 446 F.2d at 832 (emphasis added). Generally, however, the Ninth Circuit has not required independent proof of "dangerous probability of success."

Recently, in West v. Whitney-Fidalgo Seafoods, Inc., 628 P.2d 10 (Alaska, 1981), the Alaska Supreme Court adopted the Ninth Circuit position in interpreting Alaska's attempt to monopolize statute, ALASKA STAT. § 45.50.564 (1980), which is identical to the federal statute. The court stated that "proof of relevant market and dangerous probability that such market will be monopolized are not indispensable elements of the attempt offense." 628 P.2d at 15.

8. See infra notes 25-39 and accompanying text.
law and provide a uniform interpretation of "attempt to monopolize" by eliminating "dangerous probability of success" as an element of the offense.

This Comment analyzes the conflicting definitions of attempt to monopolize. First, the Comment outlines the majority position requiring proof of "dangerous probability of success" in an "attempt to monopolize" case under section 2 of the Sherman Act. Next, the Comment examines the minority position and finds that it raises countervailing concerns that warrant eliminating the "dangerous probability of success" requirement. Finally, this Comment concludes that the "dangerous probability of success" element adds nothing but confusion to the "attempt to monopolize" analysis and should therefore be eliminated.

I. THE MAJORITY POSITION: PROOF OF DANGEROUS PROBABILITY OF SUCCESS A REQUIREMENT

The majority position requiring proof of specific intent, anticompetitive conduct, and dangerous probability of success for an attempt to monopolize rests on three grounds. First, the majority relies on several Supreme Court cases beginning with Justice Holmes' elucidation of the attempt offense in Swift & Co. v. United States.9 Second, the majority argues that the elimination of dangerous probability of success would promote a flood of nuisance cases. Finally, and most important, the majority raises economic policy considerations to demonstrate the need for the dangerous probability of success requirement.

The Supreme Court first defined attempt to monopolize in Swift & Co. v. United States.10 The Court stated that where acts are not sufficient in themselves to produce a prohibited result, an intent to achieve that result is necessary to produce a dangerous probability that it will happen.

But when that intent and the consequent dangerous probability exist, this statute [section 2], like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result . . . .

. . . . . . .

. . . Not every act that may be done with intent to pro-

10. Id.
duce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. The same distinction is recognized in cases like the present.11

Courts adhering to the majority view regard this language from Swift as establishing dangerous probability of success as a separate and essential element in an attempt to monopolize cause of action. While minority courts do not require dangerous probability of success, all courts generally agree that Swift was the first case to define the elements required for an attempt to monopolize cause of action.12

The Supreme Court has addressed attempt to monopolize in relatively few cases since its 1905 decision in Swift.13 Courts adopting the majority position typically cite three cases as authority for requiring dangerous probability of success. In the first case, American Tobacco Co. v. United States,14 the Court quoted from a jury instruction which stated "[t]he phrase 'attempt to monopolize' means the employment of means and procedures which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it . . . ."15 In the second case, Lorain Journal Co. v. United States,16 the Court

11. Id. at 396, 402 (citations omitted).
13. Attempt to monopolize and monopolization violations, both section 2 offenses, are usually pleaded together. Courts tend to concentrate on monopolization claims more than on attempt claims, and thus rarely deal with the essential elements of an attempt cause of action. See, e.g., American Tobacco v. United States, 328 U.S. 781 (1945).
15. Id. at 785. In American Tobacco, the defendants were convicted of violating sections 1 and 2 of the Sherman Act, including the offenses of monopolization and attempt to monopolize. On appeal, the Supreme Court stated that its grant of certiorari was "limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under section 2 of the Sherman Act." Id. at 784. Even though the Supreme Court quoted from the attempt to monopolize jury instruction, the Court proceeded to discuss only the monopolization claim and not the attempt claim. Doubt, therefore, exists as to whether American Tobacco is controlling authority or merely dictum.
upheld an attempt to monopolize conviction, citing the dangerous probability language of Swift. In Walker Process Equipment, Inc. v. Food Machine & Chemical Corp., the third case, the Court stated that monopolization and attempt to monopolize causes of action require assessing the defendant's ability to lessen or destroy competition in the relevant market. Most lower courts adopting the majority view rely on these cases as authority for requiring independent proof of dangerous probability of success.

In addition to referring to these Supreme Court cases, courts adopting the majority view argue that maintaining the dangerous probability of success requirement is necessary to prevent a flood of nuisance cases. The antitrust laws authorize treble damages for plaintiffs who successfully prove injury resulting from an attempt to monopolize. The majority courts fear that plaintiffs seeking treble damages will bring actions for alleged violations involving only a de minimus effect on commerce and competition. The benefits received by preventing the alleged illegal behavior would not offset the considerable judicial resources devoted to litigating the claims. The majority argues that the dangerous probability of success element, by requiring proof of a sufficiently high market share, filters out the frivolous cases that would otherwise unnecessarily burden the already congested courts. This stricter standard of proof, then, reduces

17. Id. at 153. The defendant in Lorain Journal was a local newspaper that refused to accept advertisements from local merchants who had advertised on a new radio station, in an effort to regain its monopoly as the sole news source and advertising medium for the area. The Court, however, limited its holding regarding attempt to monopolize to preventing a monopolist from using his power to protect or regain his monopoly. The Lorain Journal had a substantial monopoly between 1933 and 1948 and tried to use its position to eliminate the new entrant to the market, the radio station. Id. at 152. The Court held that "a single newspaper, already enjoying a substantial monopoly in its area, violates the 'attempt to monopolize' clause of section 2 when it uses its monopoly to destroy threatened competition." Id. at 154. When a substantial monopoly already exists, finding a dangerous probability of success merely states the conclusion.

18. 382 U.S. 172 (1965). In Walker Process, plaintiff moved to dismiss its own patent infringement claim, and defendant Walker counterclaimed alleging that plaintiff had fraudulently procured its patent, constituting a section 2 monopolization violation. Because the case involved only a monopolization claim, the language concerning attempt to monopolize is dictum, leaving some doubt as to its authoritativeness. See L. Sullivan, supra note 12, at 140.


20. 15 U.S.C. § 15 (1976). The section provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained . . . ."
the amount of unnecessary complex antitrust litigation. 

Finally, courts adopting the majority position assert that eliminating the dangerous probability of success element would chill the aggressive competitive conduct Congress intended the Sherman Act to promote. 21 A plaintiff in an attempt to monopolize case proves a dangerous probability of success by showing that the defendant possesses a sufficiently high share of the relevant geographic and product market. 22 The majority argues that requiring such proof shelters firms with no real potential for monopolizing the market from antitrust liability. Small firms can thus vigorously compete with larger firms without the threat of antitrust liability.

Related to the alleged deleterious effect on smaller firms is the majority’s concern that elimination of dangerous probability of success would also chill aggressive pricing by the dominant firms in a market. For example, eliminating dangerous probability of success might encourage lower federal courts to crack down on aggressive business conduct. 23 Thus, larger firms

21. See infra text accompanying notes 30-33 for a discussion of the purposes underlying section 2 and the Sherman Act in general.

22. See 3 P. Areeda & D. Turner, supra note 12, ¶ 831, at 336. Most courts define dangerous probability of success as the possession of “market power” in the relevant geographic and product markets. See, e.g., Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068, 1079 (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). Proof of defendant’s share of the relevant geographic and product market proves market power. 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). Other elements may also be involved in demonstrating market power, including product differentiation, exclusive patents or superior access to vital resources. E.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 64 (1977) (White, J., concurring). For the most part, though, plaintiffs typically prove market power and dangerous probability of success by analyzing defendant’s share of the relevant geographic and product market.

Some courts argue against equating dangerous probability of success with market share. E.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 652 F.2d 917, 933 (1981). For all practical purposes, however, they are equal. The most compelling reason for equating the two is the conceptual difficulty of finding a firm with a low market share dangerously close to monopolizing the market. Courts rarely find a defendant dangerously close to obtaining monopoly power when it has less than a 50% share of the market. This Comment uses dangerous probability of success and market share analysis synonymously with the qualification that in occasional cases elements other than market share may also prove dangerous probability of success.

23. During a panel discussion of suggested changes in the law, one commentator observed: “Judges will know one thing: They are supposed to crack down hard.” 48 Anti-
will shy away from aggressive pricing to avoid risking antitrust liability. Dominant producers will hold back production,\textsuperscript{24} raise prices, and create a "price umbrella" under which smaller firms may produce inefficiently yet still exist. This results in a non-competitive market, and higher consumer prices.

To summarize, the majority first argues that Supreme Court cases beginning with \textit{Swift} support the requirement of dangerous probability of success as an essential element of a prima facie attempt to monopolize case. Second, the majority fears that elimination of this element will increase de minimus nuisance cases. Last, majority courts reason that eliminating the dangerous probability of success element would create a chilling effect on competition. Very simply, courts adopting this approach view the courts and society as better off with the present state of the law.

\section*{II. The Minority Position: Independent Proof of Dangerous Probability of Success Not Necessarily Required}

The minority position, as developed in the Ninth Circuit has in various cases deemphasized or eliminated the dangerous probability of success element. The leading Ninth Circuit case, \textit{Lessig v. Tidewater Oil Co.},\textsuperscript{25} involved a service station owner who sued his supplier, alleging antitrust violations including an attempt to monopolize the market. The \textit{Lessig} court expressly rejected dangerous probability of success as an essential element of an attempt action, and focused instead on intent. The court held that in an attempt to monopolize case, dangerous probability of success may be inferred from specific intent.\textsuperscript{26}

The most recent Ninth Circuit cases have retreated somewhat from the broad sweep of \textit{Lessig} and have generally given the dangerous probability of success element an inferential role.

\textsuperscript{24} The monopolist is one who charges higher prices than the market would normally bear. The monopolist usually cuts production, thereby reducing supply and increasing price. When demand is inelastic, meaning consumers will buy regardless of the price, the monopolist need not reduce production in order to raise prices.

\textsuperscript{25} 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964).

\textsuperscript{26} \textit{Id.} at 474. The court held that "specific intent itself is the only evidence of dangerous probability the statute requires . . . ." One author, however, has argued that "even in the Ninth Circuit, dangerous probability of success . . . [is] essential to a claim of attempted monopolization." Kaye, \textit{Attempt to Monopolize in the Ninth Circuit: The Legacy of Lessig}, 12 WILLAMETTE L.J. 331, 333 (1976).
In *A.H. Cox & Co. v. Star Machinery Co.*, the court stated that "[i]n most cases dangerous probability of success will be inferred from predatory conduct and specific intent to control prices or exclude competition." In *California Steel & Tube v. Kaiser Steel Corp.*, the court stated that when conduct and intent are not clearly predatory or anticompetitive, the plaintiff must present independent proof of dangerous probability of success by showing the defendant already controls a significant market share. The Ninth Circuit thus still requires dangerous probability of success, either as an independent, essential element of the attempt action, or as an inference from other necessary elements.

Courts adopting the minority position raise several fundamental arguments disputing the necessity of the dangerous probability of success requirement. First, the purposes underlying the Sherman Act and the Act's language prohibiting attempts to monopolize support the view that the Sherman Act prohibits anticompetitive conduct and not a condition, or state of being, which the dangerous probability of success element and market share analysis are directed toward proving. Congress intended the Sherman Act to be a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade," and to "sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved." While section 1 of the Sherman Act prohibits unreasonable restraints of trade, section 2 proscribes "all attempts to reach the end prohibited by the first section, that is restraints of trade, by an attempt to monopolize . . . ."

The literal language of section 2 also supports the position that the attempt to monopolize offense proscribes conduct and not a state of being. Section 2 makes it unlawful for any person to "attempt to monopolize . . . any part of trade or com-

27. 653 F.2d 1302 (9th Cir. 1981).
28. Id. at 1308.
29. 650 F.2d 1001 (9th Cir. 1981).
30. Id. at 1004.
31. 15 U.S.C. § 2 (1976) provides "every person who shall . . . attempt to monopolize . . . any part of the trade or commerce . . . shall be deemed guilty of a felony . . . ."
34. Standard Oil Co. v. United States, 221 U.S. 1, 61 (1911).
merce.”36 “Attempt,” as it is commonly understood, connotes conduct and not a state of being. Justice Holmes in *Swift* analogized an attempt to monopolize action to the criminal law of attempt.36 For proof of an attempt, the criminal law requires some conduct sufficient to allow an inference of unlawful intent.37 The law does not require completion of the crime; it requires conduct. Moreover, “monopolize” is a verb, necessarily requiring some action and not just a condition, or state of being. In addition, the Supreme Court has stated that section 2 does not prohibit existing monopolies. “Thin market” monopolies38 and monopolies resulting from historic accident, superior products, or business acumen do not violate section 2.39 The attempt language in the Sherman Act is clearly directed at anticompetitive conduct, and simply does not reach a state of being.

The legislative history of section 2, though sparse, also supports the view that section 2 in general and the attempt clause in particular prohibit conduct and not a state of being. Legislative history reveals that the 51st Congress was concerned with the social costs that monopolies impose40 and proscribed the conduct that enabled firms to attain a monopoly position. Congressional sponsors of the Act defined monopolization as conduct directed toward the goal of monopolization.41 An attempt to monopolize is simply conduct that falls short of achieving its intended goal of a completed monopoly. The evidence clearly

36. “The distinction between mere preparation and attempt is well known in the criminal law. The same distinction is recognized in cases like the present.” Swift & Co. v. United States, 196 U.S. 375, 402 (1905).
37. The common law of attempt “does not insist that the criminal actor be within range of success, but only that he have externalized his unlawful animus in a deliberate effort to bring it to actuality.” L. Sullivan, supra note 12, § 51, at 137-38.
38. A “thin market” monopoly occurs when the market demand is too low to support more than one producer. United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).
40. 1 E. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 9-12 (1978). The author notes some of the policies underlying passage of the Sherman Act, including society’s aversion to ruthless business practices, higher prices, discriminatory rebates, market divisions, graft and general political corruption. Id.
41. Senator Hoar, a proponent of the Act, quoted from “Webster’s Dictionary the definition of the verb ‘to monopolize’: To purchase or obtain possession of the whole . . . . To engross or obtain by *any means* the exclusive right of . . . trading to any place . . . .” 21 Cong. Rec. 3145, 3152-53 (1890) (emphasis added).
demonstrates that Congress intended the Sherman Act to prohibit active conduct and not a passive state of being.

Attempt to monopolize is a conduct offense. Monopolization, though, is partially a structural offense, and the difference between the two necessitates eliminating dangerous probability of success as an element in an attempt case. The Supreme Court defined monopolization as "the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power," and monopoly power as the "power to control prices or exclude competition." Courts have clearly indicated that proof of monopolization requires that the defendant possess a seventy percent or greater share of the market. Market share analysis, the typical proof of dangerous probability of success, is thus used to prove monopolization. Market share, however, does not relate to conduct, and should be irrelevant for a conduct offense such as attempt to monopolize. Requiring dangerous probability of success for an attempt to monopolize action merges that action with the monopolization prohibition, an unreasonable result in light of the independent nature of the two offenses.

In summary, requiring evidence relating to a state of being such as dangerous probability of success and market share in an attempt to monopolize action conflicts with the Sherman Act's purpose, language and legislative history. Section 2, through

42. See L. Sullivan, supra note 12, § 52, at 139; Baker, Section 2 Enforcement—The View from the Trench, 41 ANTITRUST L.J. 613, 620 (1972) (discussions of the structural aspect of the monopolization offense). For evidence that the attempt to monopolize and monopolization offenses are separate and distinct violations, see the Senate debate, 21 CONG. REC. 3145, 3153 (1890), where Congress rejected an amendment that would have eliminated the attempt offense. The rejection of that amendment reveals that Congress intended attempt to monopolize to be a separate offense.


45. A 70% market share was the lowest ever found sufficient for a violation. See United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). In United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945), the court stated that whereas a 90% share is "enough to constitute a monopoly... it is doubtful whether sixty or sixty-four percent would be enough." Even though the Court in United States v. Yellow Cab Co., 332 U.S. 218, 225 (1947), stated that market share is not crucial in finding a monopolization violation, see infra text accompanying notes 51-52, the Court established a market share floor below which a monopolization violation will not be found.

46. Some commentators argue that eliminating the dangerous probability of success requirement would essentially make section 2 a business tort statute prohibiting unfair competition. See, e.g., Cooper, Attempts to Monopolize: A Mildly Expansionary Approach to the Prophylactic Riddle of Section 2, 72 Mich. L. Rev. 373, 455 (1974). These critics argue that adequate remedies for unfair competition already exist under
the attempt clause, prohibits conduct intended to create a monopoly. The dangerous probability of success requirement, shown by market share, is evidence of a state of being, not conduct. The Sherman Act and the attempt clause of section 2, therefore, cannot reasonably be interpreted to require a plaintiff to prove a dangerous probability of success in an attempt to monopolize action.

The minority position also casts doubt upon the majority's three primary arguments in support of the dangerous probability of success requirement. First, the four Supreme Court cases the majority cites as requiring dangerous probability of success do not withstand close scrutiny. A careful reading of the language in *Swift* indicates that the Court considered dangerous probability of success to be a result of intent,47 not a separate element. Later Ninth Circuit cases and commentators also interpret *Swift* as simply requiring intent and not dangerous probability of success.48 *American Tobacco* involved a monopolization claim; the Court did not rule on the attempt to monopolize claim.49 *Lorain Journal* concerned the use of existing monopoly power to exclude a new competitor.50 Finding a dangerous probability of success merely stated the result. *Walker Process* was a monopolization case; the language concerning attempt, therefore, is dicta.51 The four Supreme Court cases that courts adhering to the majority view cite as authority are therefore unpersuasive.

Other Supreme Court cases support the minority position that dangerous probability of success is not a mandatory element in an attempt action. For example, in *United States v.*
Yellow Cab Co., the defendant conspired to monopolize the sale of taxicabs in four midwestern and eastern cities. The Court held that proof of defendant's market share was not necessary in a conspiracy to monopolize case, relying on section 2 language that makes it unlawful to "monopolize any part of the trade or commerce . . . ." Although Yellow Cab involved a conspiracy to monopolize, the Supreme Court's conclusion that market share is not necessary in a conspiracy to monopolize action is persuasive authority. The literal language of section 2, and Yellow Cab, compel the conclusion that an attempt to monopolize "any part" of a market violates that section irrespective of market share or the probability that the monopolist will succeed.

The majority's second argument, that eliminating dangerous probability of success will result in more nuisance cases, disregards the potential threat to competition posed by firms with relatively small market shares. Claims involving defendants with relatively small market shares, which courts adopting the majority view dismiss for failure to prove dangerous probability of success, do not necessarily involve de minimus amounts of interstate commerce. For example, a firm controlling twenty percent of an economically large market may command considerable resources. Certainly administrative problems could result from nuisance cases, particularly considering the length of antitrust trials and the complexity of the issues involved. However, courts can use other methods to reduce the burden of attempt to monopolize cases that are more efficient and fairer than barring legitimate claims by requiring a dangerous probability of success. Requiring this additional element effectively allows

52. 332 U.S. 218 (1947).
53. Id. at 225 (emphasis added). The Court held that because section 2 prohibits monopolization of "any part" of interstate trade or commerce, defendant's "relative position in the field of cab production has no necessary relation to the ability of [defendant's] to conspire to monopolize or restrain, in violation of the Act, an appreciable segment of interstate cab sales." Id. at 226. Despite this broad proscription, the Supreme Court has never found a monopolization violation where the defendant's market share was below 70%.
54. E.g., United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977). The record indicated that Empire Gas had several hundred plants and operations in over twenty states. 537 F.2d at 298.
55. See generally REPORT TO THE PRESIDENT AND ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES (1979), reprinted in [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 897 (Special Supp., Jan. 18, 1979) [hereinafter cited as REPORT]. The Commission suggested other methods by which courts might speed up the litigation process: imposing mandatory time limits for making motions, narrowing and controlling the scope of discovery and imposing sanc-
defendants with small market shares to destroy competitors and competition with impunity.

The majority asserts as its third argument that the dangerous probability of success requirement promotes competition by shielding smaller firms from antitrust liability for attempt to monopolize. The effect of the majority view, however, is precisely the opposite. United States v. Empire Gas Corp. demonstrates that requiring proof of a dangerous probability of success and a high market share impedes rather than promotes competition. The defendant in Empire Gas was a large wholesaler and retailer of liquified petroleum charged with an attempt to monopolize the market for these fuels. Defendant had engaged in a host of anticompetitive activities, including requesting competitors to raise their prices to meet its own and threatening to price competitors out of business if they refused to do so. Defendant also retaliated against recalcitrant competitors by drastically reducing its prices in the competitor’s market and, on several occasions, by purchasing a competitor’s fuel supply and then charging him prices so high that the competitor was unable to effectively compete. The record indicates that defendant successfully forced at least one competitor to capitulate and sell at a uniform higher price. The court found a specific intent to monopolize and a probable market share of approximately fifty percent. The court did not, however, find an attempt to monopolize because it found no dangerous probability of success. Conduct like that involved in Empire Gas seems to stifle rather than foster competition by reducing the amount of competition between the firm and its uncooperative competitors and new entrants in the market. Empire Gas demonstrates that permitting anticompetitive exclusionary conduct simply because the aggressor firm was not dangerously

57. Id. at 298.
58. Id. at 299-300.
59. Id.
60. Id. at 300.
61. Id. at 299, 306-07.
62. New entry into a market usually indicates that the market is healthy and competitive, and for this reason is one of the best indicators of a competitive market. When a market is fiercely competitive and profits are low, however, new entry tends to taper off as investors will seek higher profit markets. Hence, the presence of new entrants into a market is not a prerequisite for a competitive market. 2 P. AREEDA & D. TURNER, supra note 12, ¶ 409, at 298-99.
close to monopolizing the market prevents the competition the antitrust laws seek to promote.\textsuperscript{63}

Further, eliminating the dangerous probability of success element will not chill aggressive competitive conduct by smaller firms, as the majority suggests, because proof of high market share is relevant when intent and conduct are ambiguous. The majority and minority agree that ambiguous conduct will not by itself trigger attempt to monopolize liability.\textsuperscript{64} When conduct is ambiguous the courts require greater proof of predatory intent; a high market share can prove that intent.\textsuperscript{65} On the other hand, when conduct and intent are clearly anticompetitive, dangerous probability of success and market share should be irrelevant. Courts must exercise caution, however, in defining anticompetitive conduct in order to avoid chilling legitimate aggressive market behavior, as the majority courts suggest. Clearly anticompetitive conduct would include acts such as the systematic threats and cutthroat pricing Empire Gas used to deter price-cutting and force competitors to sell at uniform higher prices. The fraudulent patent procurement involved in \textit{Walker Process}\textsuperscript{66} also has no legitimate competitive purpose. The requirement of dangerous probability of success and high market share immunizes small firms engaged in such objectionable conduct from antitrust liability contrary to the purposes of both the Sherman

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63. The Ninth Circuit Court of Appeals discussed this problem in Greyhound Computer v. International Business Machs., 559 F.2d 488 (9th Cir. 1977), \textit{cert. denied}, 434 U.S. 1040 (1978). The court stated:

If proof of an economic market, technically defined, and proof of a dangerous probability of monopolization of such a market were made essential elements of an attempt to monopolize, as a practical matter the attempt offense would cease to have independent significance. A single firm that did not control something close to 50% of the entire market would be free to indulge in any activity, however unreasonable, predatory, destructive of competition and without legitimate business justification. Any concern not dangerously close to monopoly power could deliberately destroy its competitors with impunity . . . . A construction of the Sherman Act that would immunize such practices would be contrary to the purposes of the Act . . . .

559 F.2d at 504 (citations omitted).

64. For the majority cases, see \textit{supra} note 5. For the minority view, see California Steel & Tube v. Kaiser Steel Corp., 650 F.2d 1001 (9th Cir. 1981); Janich Bros. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), \textit{cert. denied}, 439 U.S. 829 (1978).

65. A firm with a large market share engaged in ambiguously anticompetitive conduct is more likely to be attempting to monopolize than a small firm engaging in the same conduct. Majority and minority courts agree that market share analysis is a way to gauge the intent behind ambiguous conduct.

66. 382 U.S. 172 (1965). In \textit{Walker Process} the Court held that fraudulent patent procurement may give rise to antitrust liability. \textit{Id.} at 176-77.
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Act and the attempt to monopolize clause.

The final concern of the majority courts, that eliminating the dangerous probability of success element will reduce price competition and cause umbrella pricing, 67 addresses the most fundamental theoretical debate in antitrust law. Were the antitrust laws designed to promote efficiency, allowing the elimination of the inefficient competitor, or were they designed to guarantee a market with a large number of competitors? 68 Adherents to the majority view argue that a dominant producer will raise prices to avoid even the appearance of predatory pricing 69 and potential antitrust liability, allowing other less efficient firms to

67. See supra notes 23-24 and accompanying text.

68. Critics of the antitrust laws argue that the law is "being directed towards a 'protectionist' policy of preserving competitors from their more energetic and efficient rivals" at the expense of businessmen's freedom to serve both their own and the public's best interest . . . ." Blake & Jones, In Defense of Antitrust, 65 COLUM. L. REV. 377, 381 (1965). On the other hand, proponents of the antitrust laws argue that "antitrust operates to forestall concentration of economic power which, if allowed to develop unhindered, would call for . . . intrusive government supervision of the economy." Id. at 383.

69. Predatory pricing, simply stated, is pricing below marginal cost, or the cost of producing the next unit. Commentators view predatory pricing as a monopolist's tool for forcing a competitor out of business. By pricing at a loss, the aggressor hopes that its competitor, who has fewer resources, will be unable to meet its low prices for any reasonable length of time and thus will be destroyed in the competitive struggle. The aggressor may then recoup its losses by charging monopoly prices after the competitor is gone.

Considerable difference of opinion exists over the scope of predatory pricing and its usefulness as a tool for antitrust analysis. 3 P. Areeda & D. Turner, supra note 12, ¶ 711, at 150-54. Predatory pricing is irrational absent significant barriers to entry. Once the old competitor is eliminated, a new one could take its place, forcing the aggressor to begin the process again. No aggressor can operate at a loss forever. The ability to eliminate a competitor, however, acts as a significant barrier to entry in itself. When a dominant producer in a market has destroyed a competitor, new entrants will not rush to enter the market to become the next victim. Once a competitor has been effectively destroyed, subsequent threats may be sufficient to deter potential entrants.

Predatory pricing, however, should not be per se illegal but rather should merely create a rebuttable presumption of illegality. Legitimate reasons exist for selling below marginal cost, such as meeting a competitor's price or selling at bargain prices. An inflexible rule would simply not effectively serve the purposes behind the antitrust laws.

Some analysts, including the National Commission for the Review of Antitrust Laws and Procedures, note a tendency in the lower federal courts to find that pricing above marginal cost is per se legal. See 48 ANTITRUST L.J., supra note 3, at 1433, 1436 (remarks of John Shenefield). This result is inappropriate when an established firm prices at or near marginal cost, intending to run a new competitor out of the market and then raise prices. If the dominant producer has not allowed a new entrant sufficient time to become efficient and to compete effectively, society loses the benefits of the competition that would have resulted. This Comment, therefore, adopts the position that above marginal cost pricing should not be per se legal and below marginal cost pricing should not be per se illegal. Courts should examine a firm's pricing policy in light of all of the relevant evidence.
operate under this price umbrella to the consumer's detriment. Implicit in the majority's argument is the belief that antitrust laws seek to protect the consumer from high prices and inefficient production, not from a market with too few sellers.

Economic efficiency may be an important goal\(^70\) of antitrust law, but it is not the only one. Congress in enacting the Sherman Act\(^71\) and the courts in interpreting it also evidenced concern for dispersing economic and political power.\(^72\) This social goal of antitrust law heavily favors increasing the number of competitors in the market.\(^73\) The divestiture remedy\(^74\) in monopolization cases clearly demonstrates society's interest in preventing economic concentration. Furthermore, although the monopolist may be the most efficient producer in terms of economy of scale, antitrust law condemns monopolies. Moreover, it is axiomatic that a

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70. Critics of the antitrust laws find the social and political concerns to be "questionable as a description of congressional intent, dubious as social policy, and impossible as antitrust doctrine." Bork & Bowman, The Crisis in Antitrust, 65 COLUM. L. REV. 363, 369 (1965). The true purpose underlying the antitrust laws, they contend, is "allocating resources to . . . [maximize] consumer satisfactions [and] encouraging efficiency and progressiveness . . . ." Blake & Jones, supra note 68, at 381.

71. Commentators have noted the public's and Congress' concern with dispersing economic power.

By the late 1880's, the accumulation and use of vast economic power by these [trusts and monopolies] had caused great public hostility, evidenced by a popular, generalized hatred of trusts and commercial monopolies . . . . The Sherman Act debates contain numerous references to this public resentment, which was one of the prime causal factors behind the legislation . . . .

1 E. KINTNER, supra note 40, at 11. For example, Senator Vest noted "there will be no controversy . . . as to the enormity of the abuses that have grown up under the system of trusts and combinations which now prevail in every portion of the Union." 21 CONG. REC. 2462 (1890).

72. See United States v. Vons Grocery Co., 384 U.S. 270 (1966), where the Court stated "from this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly—that is, the concentration of economic power in the hands of a few." Id. at 274.

73. In United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), the court stated: "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of the possible cost, an organization of industry in small units which can effectively compete with each other." Id. at 429. In Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962), the Court stated:

We cannot fail to recognize Congress' desire to promote competition through the protection of viable, small locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

74. 15 U.S.C. §§ 25, 26 (1976). The divestiture remedy, whereby courts may order corporations to "split up" or divest themselves of part of the corporation, arises out of the courts' broad equitable powers.
competitive market cannot exist with only one competitor. Even if economic efficiency were the sole aim of antitrust law, courts would defeat this purpose by allowing large, efficient producers to exclude by anticompetitive means the very competitors that force them to strive for efficient production and low prices.

The majority's argument that the dangerous probability of success requirement keeps prices at a competitive level because producers will not be threatened with antitrust liability for aggressive pricing is flawed for another reason. The argument fails to recognize that other elements must be proven before antitrust liability will be imposed. Mere aggressive pricing does not constitute an antitrust violation without an intent to control prices or exclude competition.\textsuperscript{75} Furthermore, under either the minority or majority view, where intent and conduct are ambiguous the court will examine market share.\textsuperscript{76} Rather than chilling legitimate, competitive market behavior, eliminating the dangerous probability of success requirement will deny the defense of insufficient market share to firms engaging in clearly anticompetitive conduct.

The minority has decided correctly not to require independent proof of dangerous probability of success and market share in all attempt cases. The courts should, however, eliminate this element altogether instead of inferring dangerous probability of success from intent or conduct.\textsuperscript{77} In an attempt to monopolize


\textsuperscript{76} For the majority position, see Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981). For the minority position, see A.H. Cox Co. v. Star Mach. Co., 653 F.2d 1302 (9th Cir. 1981).

\textsuperscript{77} The National Commission for the Review of Antitrust Laws and Procedures in its 1979 report to the President essentially committed the same error as has the Ninth Circuit. \textit{Report}, supra note 55. Rather than eliminating the dangerous probability of success requirement altogether, thereby eliminating confusion in the attempt to monopolize analysis, the Commission recommended that proof of dangerous probability of success be dependent upon whether the defendant has significantly threatened competition. \textit{Id.} at 40. Clearly anticompetitive conduct, for example, fraudulent patent procurement in \textit{Walker Process}, or the systematic requests to raise prices, threats to predatoryly cut prices and subsequent price cuts in \textit{Empire Gas}, would demonstrate that threat to competition. See \textit{supra} notes 18-19 & 56-63 and accompanying text. \textit{Report}, supra note 55, at 43. If the conduct and intent are not clearly anticompetitive, then an examination of market share may help guarantee that the defendant really is close to attaining monop-
case where conduct and intent are plainly anticompetitive, the defendant's size, as shown by dangerous probability of success and market share, is simply irrelevant. Attaching importance to the size of the defendant and his probability of succeeding in such a situation adds nothing but confusion to the attempt to monopolize analysis. Eliminating this unnecessary element would streamline the analysis, eliminate the confusion, and better effect the purposes underlying the Sherman Act. Market share analysis could still play a role by illuminating the intent behind ambiguous conduct, but would no longer provide a defense for smaller firms whose intent and conduct are plainly anticompetitive.

III. CONCLUSION

The purpose, language and legislative history of the attempt to monopolize clause support eliminating the dangerous probability of success element from the attempt to monopolize analysis. Rather than promoting competition as the majority view asserts, requiring dangerous probability of success actually chills competition by smaller firms, contrary to the policies of the Sherman Act. Entirely eliminating the dangerous probability of success requirement would simplify the law of attempt to monopolize, eliminate the confusion and better promote the statutory policy of free competition.

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